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DON’T MISREPRESENT TO YOUR INSURANCE COMPANY

– Intentional misrepresentations before or after a claim, even if later corrected, are sufficient to void insurance coverage if the policy so provides. The claimant argued the insurer had not detrimentally relied on his misrepresentations and had not established fraud on his part. *The Illinois Supreme Court had no trouble in upholding a jury verdict for the insurance carrier. The court in part relied on the unambiguous wording of the policy that misrepresentation or concealment of any material fact would void the policy. The insurer did not have to prove common law fraud or reliance. End of discussion!*

1.5 MILLION BUSINESSES OWE \$58 BILLION WITHHOLDING TAXES

– The Internal Revenue Service says 1.5 million businesses owe approximately \$58 billion for employees’ income, Medicare and Social Security withholding taxes that the businesses never paid to the IRS. The IRS considers \$30 billion of the amount to be uncollectible because many of the businesses are out of business, in bankruptcy or in court fighting collection efforts. *Don’t delay forwarding withholding taxes. Although some of these businesses got away with it, in our experience the IRS usually lands on employers very quickly if withholding payments are submitted even a day late. Your Treasurer and board members will not look happily on penalties for late transfers to the IRS.*

TEXT-MESSAGING VS. E-MAIL VS. VOICEMAIL

– Staying in touch was never easier, or was it? Do you quickly respond to “message waiting” notices on your office, home, hotel and cell phones promptly? Do you feel compelled to respond to e-mails quickly? Many persons now using text-messaging are correspondingly less inclined to respond quickly if at all to voicemails and e-mails. *“So 20th Century!” Many of those into text-messaging find e-mails and voicemails too slow and time-consuming, too many buttons to push, codes to type in, etc., just to receive a message much less respond to it. And it’s not just the under-25 crowd saying that. Those dealing with the text-messaging crowd find themselves compelled to adapt to the medium if they want a timely response.*

**GOOD READING... See you in September
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NOT-FOR-PROFIT LAW DEVELOPMENTS

COURT RULES INDIVIDUAL BOARD MEMBERS NOT LIABLE FOR TORT – An Illinois appellate court has affirmed a trial court’s dismissal of claims against a nonprofit high school hockey club’s board members for negligence in not controlling a player whose assault and battery seriously injured the club’s coach. The court affirmed dismissal of the board members on the basis they had not participated in, authorized or ratified the tortious actions of the player. The court also upheld a settlement between the coach and player opposed by the board members even though the settlement was only \$5,000 and assignment of insurance claims (for refusal to defend him) by the player against the hockey club’s insurance companies when the coach had alleged \$800,000 for his injuries. The court noted the player was 17 and had no assets except his claims so the settlement could be in good faith. *The decision offers significant pointers. The appellate court found the hockey club was a valid nonprofit even though it had failed to register under Illinois law. Lesson: register under the statute and avoid such a claim. Second, directors are not vicariously liable for the tortious actions of individual club members if they do not participate in, ratify or support the tortious actions. Lesson: directors and others must be careful about what they do in connection with tortious acts of members or agents including how the acts are investigated or reported. Third, settlements even if seemingly unreasonable in purely economic terms are not necessarily in bad faith and subject to challenge. Lesson: settlements occur for many reasons and economics is only one factor to be assessed in determining if the settlement was made in good faith.*

REGULATORY LAW DEVELOPMENTS

USGA DEFEATS ANOTHER ANTITRUST CLAIM – A federal district court in Minnesota dismissed restraint of trade and group boycott claims against the United States Golf Association (“USGA”) for failure to state a claim, meaning the complaint failed to state a cause of action even if the facts asserted in the complaint are taken as true. The plaintiff manufactures a device used to assess wind conditions, and USGA had ruled the device violated USGA’s Rules of Golf. Golf equipment retailers and pro shops by and large declined to sell the device. The plaintiff alleged a conspiracy between USGA and retailers and pro shops to boycott the device, and an arbitrary and unreasonable interpretation by USGA of its own rules, under federal and Minnesota antitrust laws. The court ruled there were no facts stated to establish such a conspiracy, no benefit to USGA or the retailers to boycott the device, and no competitive reason to do so. *USGA seems to spend a fair amount of time defending its rules against antitrust claims. (See, e.g., H&H Report, July 2008.) But courts are reluctant to find antitrust violations based on noncommercial rules and standards of not-for-profit organizations even when such rules are alleged to have adverse commercial consequences for some third parties.*

EMPLOYMENT LAW DEVELOPMENTS

WILL ASSOCIATIONS CUT FULL-TIME EMPLOYEES TO PART-TIME? – One approach some employers are using is to cut full-time work to part-time work for some workers. This may not show up in unemployment statistics but it demonstrates the pressure that a slower economy is having on many employers and their workers. Employers may resort to putting some workers on part-time assignments to avoid laying them off and dealing with unemployment compensation issues, or to avoid having to replace laid-off employees when business picks up. *It’s an unhappy situation for employers and employees. Associations are not immune to the current business cycle and may have to resort to similar actions to avoid deficit budgets.*

D.C. CIRCUIT DECLARES SLEEP A “MAJOR LIFE ACTIVITY” – The federal appellate court in Washington, D.C. has declared that sleep is a major life activity for Americans With Disabilities Act (“ADA”) claims. A man who suffered from post-traumatic stress disorder (“PTSD”) may proceed with his claim of discrimination against the U.S. Attorney General as a result of being told he would not graduate from the FBI Academy. His PTSD prevented him from sleeping more than a few hours. The court said he had presented enough evidence that a jury might reject the FBI’s rationale that he lacked emotional maturity and a cooperative attitude, and find PTSD-based bias on the part of the FBI. *Does this mean an employer must accept “I overslept” or “I was too tired from lack of sleep due to PTSD to come to work” as valid excuses for tardiness or absenteeism? No. An employee must be able to perform the job, and an employer may require the employee show up for work on time as a condition of the job. But get good advice if faced with a potential ADA claim.*

EMPLOYER’S BURDEN TO KEEP ACCURATE TIME RECORDS – A federal appellate court in Chicago reversed an Indiana trial court’s ruling against a former employee and reinstated her claim against her former employer for unpaid overtime. The trial court had ruled she was unable to identify the hours or even the days on which she had worked overtime, therefore her evidence was insufficient. The appellate court said it was the employer’s burden to keep accurate time records, and had failed to do so. (The employee alleged the employer altered employees’ time records to avoid overtime.) If the employer fails to keep accurate records, the employer rather than the employees should bear the consequences. *There appears to be more going on here than meets the eye. The employee claimed the employer was not only failing to pay overtime but also altering, i.e., falsifying, employees’ time records. Not smart! That can lead to sanctions a lot more severe than time and a half hourly pay.*

MEETING & TRAVEL LAW DEVELOPMENTS

ONE MORE ADDITION TO THE JOYS OF AIR TRAVEL THESE DAYS – Add United’s announced intention to charge for meals for those flying coach on most of its overseas flights to the expanding list of fees for items previously taken for granted as free. Now we variously face charges for checking baggage, aisle seats, window seats, seats with more legroom, assigned seats in advance of boarding, meals on flights, soft drinks, coffee and water, pillows or blankets if they are even on board, reservations by e-mail, charges for redeeming miles and higher mileage requirements for “free” flights, fuel surcharges, and steadily rising air fares. Wireless Internet connections are the next service to carry a hefty fee. *Some business model: drive your customers to other airlines not imposing such charges (if your customers have that option), or reduce overall demand as well as supply. What’s next, a fee to use the bathroom? As costs mount for air travel, will meeting attendance decline for conventions, trade shows and committee and other meetings? Estimate conservatively.*

DETROIT CONVENTION AND TRADE SHOW CENTER OFFICIAL GUILTY – A former director (1996-2004) at Cobo Hall, Detroit’s principal convention and trade show facility, has pleaded guilty to accepting \$100,000 in kickbacks from Kado, a contractor which held all or part of catering, electrical, janitorial and retail contracts for years at some of the big shows at Cobo Hall. The director was the latest to be nabbed as part of an ongoing investigation of Detroit city hall contracting. He is expected to cooperate with federal prosecutors as the investigation continues. *Will the contractor be next? If the person taking a kickback is convicted, the person giving the kickback should be on trial as well. Perhaps this may lead to a reduction in high charges for electrical and other costs to exhibitors which have been a source of complaints for years by exhibitors at Cobo Hall. Or exhibitors could “vote with their feet” and go elsewhere. They have options....*

“CATCH 22” DIDN’T DIE – IT MOVED TO TSA – There is a recurring theme for people named on the Transportation Security Administration’s watch list(s). You may or may not be on it, but we won’t tell you if you are or why. Consider the plight of an airline pilot, a Gulf War veteran, who is about to lose his pilot job because he is on the TSA’s confirmed watch list. He does not know why other than he converted to Islam in 1994 and his wife is a Muslim from Pakistan. TSA says its lists come from the FBI and the FBI does not explain “... for both national security and personal privacy reasons” that a person’s name is on one of their watch lists. *Catch 22 – the government says there is a process for challenging being placed on a watch list but the federal agency or agencies responsible for putting a person on the list won’t confirm your name is on it and reject your right to now why. So how is one to challenge being put on it? If Senator Ted Kennedy, as previously reported, is on such a list, most anyone can be put on it. Good luck getting off.*

TAX LAW DEVELOPMENTS

CAMPAIGN SEASON HEATING UP, IRS CRACKING DOWN – As election season approaches, the IRS has announced that it will be out in full force cracking down on §501(c)(3) exempt organizations attempting to directly endorse political candidates or participate in their campaigns. To preempt some of the violations that have occurred in past election seasons, the IRS issued Rev.Rul.2007-41 which provides guidelines for appropriate political activities and examples of prohibited and acceptable activities. Many of the past violations were a result of referrals by citizens and organizations to the IRS alleging improper campaign intervention. Coupled with the guidelines in Rev.Rul.2007-41, the IRS will be enforcing its “fast track” examination procedure called the 2006 Political Activities Compliance Initiative (“PACT”) whereby the IRS collects referrals and assigns them to IRS employees for preliminary screening. Some referrals will get tossed out and others will be examined further based on information that supports a “reasonable belief” that campaign intervention has occurred. The penalty for a violation may be loss of exempt status. *Be careful this election season as the IRS will not only have its eyes open looking for improper campaign activities but will also have its ears open for referrals provided by vigilant citizens and other organizations. No one likes to receive a call or letter from the IRS, and investigations can be time-consuming and expensive.*

IRS PUBLISHES (NEAR) FINAL FORM 990 INSTRUCTIONS – The Internal Revenue Service recently published final instructions for the revised Form 990 for use with 2008 filings, plus three background documents helpful in understanding the changes from the old Form 990, including one that looks ahead to areas that may require additional study and change in the future. *The revised instructions and background documents are available online at www.irs.gov under Charities and Non-Profits. The IRS has announced the instructions are still marked “draft” because they have to be put in standard IRS three-column format so there may be minor wording changes but no more significant changes are anticipated this year.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

WIN AT HOME, LOSE ABROAD – Once again a U.S. company wins an Internet-based trademark lawsuit in a U.S. court but loses abroad in a French court. Tiffany & Co. claimed that eBay was responsible for sales of counterfeit jewelry by sellers using eBay's system. Tiffany had filed a number of claims against eBay, including contributory trademark infringement because eBay allegedly did not aggressively pursue counterfeit sellers. The court found eBay took appropriate action against sellers of counterfeit goods when it received notice of such sales. This result contrasted with a French court's recent decision awarding Hennessey Louis Vuitton SA \$61 million in damages for alleged sales of counterfeit merchandise by sellers on eBay. *Different standards may apply overseas not only with intellectual property law interpretations but defamation, sales of prohibited (e.g., Nazi) merchandise and disclosure of information prohibited by other countries including religious or political information. As always, you have to "know the territory." International accessibility of Internet-based information obviously complicates defending such claims.*

IF YOU CAN'T BEAT 'EM, JOIN 'EM? – *The Economist* recently reported that some companies are trying to utilize information derived from piracy of their intellectual property – think music and software, for starters – to find new markets and expand old markets, spot new talent, and even buy pirate companies or copy what they are doing. Microsoft was cited as one example, with most of the operating system software used in China being pirated Microsoft copies but effectively delivering the market to Microsoft instead of open source software competitors. Nike was another example, buying a pirate copying a Nike shoe, thereby expanding Nike's market share. *Before sending in the lawyers to wage intellectual property war, think of other options that might be beneficial. Is there a way to use that information from pirates creatively for a profitable outcome? If pirated intellectual property is wanted, does that provide market intelligence about a new market or underserved market? Associations should also consider alternative ways to address piracy of their intellectual property such as unauthorized use of their publications, including standards.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

ANOTHER LAW THAT SHOULD NOT BE NECESSARY – BUT IS – A New York City councilman has introduced an ordinance to ban text-messaging while driving. Four states already have such laws. Why necessary? It's obviously dangerous to text-message while driving. But a study by Nationwide Insurance Company indicates more than a third of drivers ages 18-27 text-message while driving and nearly one in five of all drivers do it. *Will the ban prove effective? Not likely, based on the results of laws banning the use of hand-held cell phones while driving. It would be prudent for associations (and members) to include such a ban in their employment policies and procedures. If your message is that important, pull over to receive or send the message. The life you save may be your own.*

SHOULD YOU BLOG OR MAINTAIN A BLOG? – That question was presented by a contributor to the *Business Ledger*, an online and print publication for the business community of DuPage County, IL, just west of Chicago. The writer, a marketing consultant, reported she had done an informal survey of various business groups in which she participated, including company CEOs. She asked if they read blogs, use blogs to obtain information or solve problems, and what they thought about blogs. The great majority did not personally blog or maintain a company blog or use blogs to obtain information, which pretty well answered her third question. But she noted there are niches for blogs so they have their uses. (Comment: This may also indicate that CEOs are not as conversant as younger persons regarding blogs, MySpace, YouTube and other social networks.) *Associations and their members often consider blogs but think through why you would have one. Have a strategy for your blog, and consider both potential contributors and the target audience. Be careful to maintain control over what is posted there if your association sponsors the blog. Avoid responsibility for third party blogs.*

USE OPEN-SOURCE SCIENCE TO SOLVE ASSOCIATION PROBLEMS? – One method currently being touted as a way to solve intractable business and science problems involves the use of open-source science, posing a problem on the Internet and asking others to develop answers addressing the problem posed. InnoCentive, Inc., a privately-owned company in Massachusetts, was created to foster the use of open-source science, also called open innovation, to develop solutions to problems that have defied solutions by those posing the problems, typically for-profit companies, nonprofit entities and researchers. Money prizes are awarded for the best solutions. InnoCentive acts as a go-between to help those seeking solutions and those presenting solutions, and provides a framework for addressing intellectual property concerns, the award of prizes, and similar issues, and earn fees including a percentage of the prizes awarded to the problem-solvers. *Associations might consider a similar approach to problem-solving, addressing problems posed by members or by the association itself. It need not be limited to scientific problems. We already see a variant of this approach in which association executives pose questions on the Internet and seek input on solutions from other executives, or sites such as ASAE's Knowledge Center.*

H & H DEVELOPMENTS

In August:

Jonathan T. Howe received the “Hall of Fame” Award from BizBash Media which is the media voice of the special events industry for B2B and B2C for outstanding service to the special events and hospitality industries. He also discussed “Union Partnerships” at the BizBash.

Mr. Howe spoke at the ASAE annual meeting on “Protecting Your Association’s Brand;” at a meeting planning association’s World Education Conference on “Dealing with Medical Risk Management;” “When Disaster Strikes” at an event planning World Event conference; and “Legal Issues for Medical CME Programs” for Mayo Medical Clinics.

Barbara F. Dunn lectured on contract negotiations and liquor liability at an international conference of meeting professionals. She also presented a program regarding the IRS Form 990 to charitable organization professionals.

Samuel J. Erkonen presented a course on negotiations to the Association Forum of Chicagoland.

C. Michael Deese presented a session on nonprofit corporation director fiduciary duties to a client board and participated on a panel session entitled “Due Diligence before Acquiring a New Client” at the annual ASAE meeting.

Contributors to this issue...

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