



Howe & Hutton, LTD.

The Law Firm for Associations®
The Law Firm for Meeting Professionals®

Chicago
(312) 263-3001

Washington DC
(202) 466-7252



THE HOWE & HUTTON REPORT

Volume 2018, Issue 4

TRENDING NOW

WARRANTY STICKERS ILLEGAL, ACCORDING TO FTC - The Federal Trade Commission has declared that warning stickers that say owners (or other third-party repair persons) will void their warranties if they try to fix their own electronics are meaningless as well as illegal. These types of messages violate the Magnuson-Moss Warranty Act, which prohibits companies from putting repair limits on warranties. Such messages may also contravene rules against false representation. *Consumers rights win the day! Repairing products correctly shouldn't void the warranty. If you break your widget, you should have options outside of the manufacturer for repairing it.*

SHOULD PATIENTS BE ABLE TO SUE DRUGMAKERS OVER EYE DROP SIZE? - Patients claim that a person's eye can only hold a certain amount of liquid. Research shows that at least half of every medication eye drop is wasted because eye drop bottles dispense drops that are too large. Patients maintain that they are entitled to the full use of the medication they purchase. Drugmakers argue that patients should not be able to sue over a packaging design that doesn't exist and a speculation about how it would affect their costs if it did. The federal appeals court in Chicago dismissed a lawsuit over drop size, but the one in Philadelphia let a similar case proceed. That kind of disagreement often lands a case in front of the Supreme Court. *Keep your eyes open. If a drop-size lawsuit can proceed, courts could get clogged with other packaging design suits, like one by "toothpaste users whose tubes of toothpaste did not allow every bit of toothpaste to be used," wrote the attorney for the major pharmaceutical companies that are asking the Supreme Court to hear this case. Stay tuned.*

[VISIT OUR WEBSITE](#)

TRENDING NOW

TRUMP ANNOUNCES TARIFFS, CHINA STRIKES BACK – First, President Trump imposed tariffs of 25% on imported steel and 10% on aluminum produced overseas, though imports from “allies” such as Canada, Mexico, Australia were exempted. Subsequently, the President announced a 25% tariff on specific imported goods from China, including flat-screen televisions, medical devices, and aircraft parts. China then retaliated, announcing plans to impose tariffs on more than 100 types of American goods. Many members of Congress and U.S. governors objected to the President’s actions, but the President has the power to impose such tariffs without Congressional approval. The U.S. tariffs came as a response to rising volumes of imports, which the Commerce Department has determined are a threat to U.S. national security. *Associations will find their members impacted in different ways by the expanding trade war. The moves may benefit members who will be facing reduced competition from overseas. But experts say the trade war could significantly increase the cost of imported items for U.S. consumers and businesses, including U.S. producers of goods that incorporate products from China. Meanwhile, some American businesses faced with less price competition from overseas could find it easier to raise their prices.*

SUPREME COURT DENIES QUICK REVIEW OF DREAMERS CASE – The Supreme Court has refused to grant the Trump Administration’s request for a quick review of its decision to terminate the DACA program, meaning that the legality of that decision may not be finally determined for years. Federal judges in San Francisco and New York have issued injunctions against deporting any of the “Dreamers,” who are immigrants that entered the U.S. illegally as minors and are staying under Obama’s Deferred Action for Childhood Arrivals program. President Trump originally indicated he would be ending the program March 5 of this year, pending Congressional action to extend or terminate the program, since he considered the Obama program to be contrary to federal immigration law as passed by Congress, and therefore unconstitutional. *Legal challenges to that decision will now be considered in the U.S. Courts of Appeal. DACA has protected about 700,000 people from deportation. Because of the injunctions now in place, the U.S. Citizenship and Immigration Services has been accepting and processing DACA renewals, and will likely continue to do so at least until the Supreme Court weighs in on the President’s decision to end the program. It is rare, though, for the Supreme Court to hear any case before final Court of Appeals action.*

TRENDING NOW

COURT VALIDATES RIGHT NOT TO TIP – A federal district court in New York City has ruled that Applebee’s restaurants violated New York State law by including a mandatory minimum “tip” (in actuality, a surcharge) in customer bills that was not disclosed in menu prices. Table-top computer tablets at some Applebee’s restaurants forced patrons to add a tip before they could check out, and they offered no option to tip at less than the restaurants’ self-proclaimed minimum amount (15% or 18%, depending on the restaurant’s location). Consumers brought a class action suit against Apple-Metro, Inc. Then, on the defendant’s motion for judgment on the pleadings, the district court held that the mandatory tipping policy was a violation of the state’s consumer protection statute because the amount of the mandatory minimum tip hadn’t been disclosed to customers in menu prices, making the menu prices deceptive. *Although the court held that the customers properly alleged a claim against the restaurants, it limited the amount the customers could recover in their suit. The class had not alleged that the menu prices were inflated. Consequently, the court found that they could recover only the difference between the amounts they actually tipped and the amounts they would have tipped if they had been left to their own devices, which the class would have to demonstrate (somehow) to the court’s satisfaction.*

COURT OF APPEALS IN NEW YORK RULES FOR GAY WORKERS – *H&H Report Update* - The U.S. Court of Appeals for the Second Circuit in New York City has ruled that Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination on the basis of a worker’s sexual orientation, joining a conflict on that subject between federal Courts of Appeal that may have to be resolved by the U.S. Supreme Court. The Second Circuit court held that discrimination on the basis of sexual orientation is a form of discrimination on the basis of “sex,” which is specifically prohibited by Title VII while “sexual orientation” isn’t mentioned. The federal Court of Appeals in Chicago has ruled similarly, but the U.S. Court of Appeals in Atlanta has ruled the opposite way. *The Supreme Court often resolves conflicts between the Courts of Appeal, but it declined to do so at the urging of a party in the Atlanta case. Maybe a review of the Second Circuit case will be more to the Supreme Court’s liking.*

STUDENT WINS VERDICT FOR BULLYING ON SCHOOL BUS – A jury has awarded \$250,000 to an autistic student bullied on a school bus. The student sued the bus driver and the school district, alleging that the driver acted with intentional disregard and indifference to the safety of the plaintiff student, who was constantly harassed and attacked by two other students when he was being driven to and from a local short-term alternative school. Evidence showed that the driver didn’t report or try to prevent the incidents, made efforts to cover them up, and even encouraged the bullying, smiling when the victim was being hit. Ultimately, the abuse came to a stop when the victim’s parents complained to police about discovering cuts and bruises all over the victim’s body. *Those involved in transporting students in public or private schools must always be alert to protect them.*

EMPLOYMENT

EMPLOYMENT DESCRIPTION GETS PLAINTIFF TOSSED FROM CLASS SUIT – When filing a class action lawsuit, attorneys for the class must name somebody to serve as representative of the class of otherwise initially unnamed people who are filing the suit. That became a problem in one lawsuit recently when a court noted that the individual representing a class in one suit had told the court that he had been simultaneously working in two full-time jobs and one part-time job. Noting that such a work situation is “unique,” the court rejected that individual as possible representative of the class of plaintiffs bringing a suit under the Illinois Minimum Wage Law and federal Fair Labor Standards Act, citing “a serious issue of his veracity” that led the court to believe he could not represent the class in an honest way. *It may not be the consequence most likely to be thought of by someone when deciding to spruce up his resume untruthfully, but being unable to serve as a named plaintiff in a class action lawsuit is a possible result.*

COURT LIMITS WHISTLEBLOWER PROTECTION UNDER DODD-FRANK – The Supreme Court of the United States has ruled that “whistleblower” protection under the federal Dodd-Frank Act does not apply to people who legally report problems to an organization’s management. The case came to the Court when a former employee of a real estate investment trust sued the trust for unlawfully terminating him in violation of Dodd-Frank, which he claimed was in retaliation for his making accusations about his boss to more senior management. In this case, the Supreme Court held that the termination was not unlawful under Dodd-Frank even if it was retaliatory, because that Act only protects workers from being fired, demoted or harassed for reporting legal violations to the U.S. Securities and Exchange Commission, not to management. *There are numerous federal and state laws that protect “whistleblowers,” including the federal Sarbanes-Oxley Act, which, in some cases, does protect workers from retaliation if they report issues to management. But those laws differ in some ways, such as how long a person can wait before bringing suit and how much a worker can recover in a lawsuit. This former employee sued under the wrong statute, since he had never reported his boss’s activities to the SEC.*

INSURER LIABLE FOR BROCHURE'S REPRESENTATIONS ON PREMIUM – A federal appeals court has found that a policy holder could prevail in a suit against an insurer that raised her premiums, even if the insurer's policy contained language such as "premium rates are subject to change." Newman sued Metropolitan Life Insurance Company after it more than doubled her long-term care insurance premiums when she reached age 67. Newman had read a brochure from the insurer saying that she could select a "Reduced Pay at 65" option, under which she would pay higher premiums to age 65 and then see her premiums reduced. She selected that option and did see her premiums go down at age 65 – until she reached 67. Met Life pointed to language in its actual insurance policy that said such things as "premium rates are subject to change," and a federal district court dismissed Newman's suit, finding that the policy language unambiguously overrode the premium language in the brochure Newman relied upon. But the U.S. Court of Appeals for the Seventh Circuit reversed dismissal of the suit, finding that Newman was entitled to relief on a breach of contract claim. The Court of Appeals searched Newman's actual policy and, though it found much language apparently precluding any liability by Met Life for changing premiums, it contained only one reference to the "Reduced Pay at 65" option, and that one showed her premiums going down substantially "on or after Policy Anniversary at Age 65." So, the Court of Appeals essentially found that Newman could read all of Met Life's policy language about its right to change premium amounts as simply not applying when a policy holder selected the "Reduced Pay at 65" option promoted in Met Life's brochure. *Insurance policies are just like any other contract in that they are sometimes broken forcing people to sue in order to enforce them. But, unlike most business contracts, insurance policies are rarely read carefully by the insureds before they sign up for insurance, and even more rarely read by their attorneys. For that reason, insureds sometimes aren't getting the insurance they think they're getting, and they don't find that out until they file a claim, sometimes after many years of paying premiums.*

JUNK FAXES RESULT IN \$2.4 MILLION SETTLEMENT – A federal judge has approved a \$2.4 million settlement entered into by a bank, one of its employees and a class of thousands of people who received unsolicited fax advertisements sent by the bank. The fax ads did not contain a fax number required by law for use by consumers who didn't want additional fax messages, but contained only a telephone number unable to receive faxes. The settlement will result in each fax recipient obtaining around \$1,250 for each fax message sent to them by the bank, considerably more than the \$500 per fax damages amount provided for in the federal Telephone Consumer Protection Act. However, the attorneys for the class of plaintiffs in the case argued that the bank's faxes also violated state law, the Illinois Consumer Fraud and Deceptive Practices Act, justifying a higher settlement amount. *Also big winners are the lawyers for the class of fax recipients. They will collect \$811,000 in attorney's fees.*

REGULATORY

BAKER CAN DENY WEDDING CAKE TO SAME-SEX COUPLE – H&H Report Update - In a case presenting issues similar to those in another case currently pending before the Supreme Court of the United States, a California Superior Court judge has held that a baker (from Bakersfield, CA, actually) could refuse to provide a wedding cake ordered by a same-sex couple if the marriage violated her religious beliefs. According to the decision, the baker is a practicing Christian who believes that same-sex marriages “violate a Biblical command that marriage is only between a man and a woman.” Though the couple did not want any wording on the cake, the judge ruled that any wedding cake, except perhaps one previously baked and then ordered from a display case, was a type of expression on the baker’s part that could not be compelled by the government in violation of the baker’s right to freedom of speech under the First Amendment to the U.S. Constitution. Furthermore, the judge ruled that the wedding itself was a form of expressive conduct by the couple that no government could compel a baker to engage in if the wedding would violate his religious beliefs. *The California judge’s decision may be appealed, and it may essentially be invalidated in the pending U.S. Supreme Court case. In that case, a Colorado baker, with the support of the Trump Administration, has argued that a baker should be exempt from public accommodations laws to the extent those laws would conflict with the First Amendment’s provisions for free speech and free exercise of religion.*

NONPROFIT MUST PAY \$119,040 TO WORKERS WITH DISABILITIES – A jury in a West Virginia federal court has ordered the nonprofit Randolph County Sheltered Workshop Inc. to pay \$119,040 in back wages to 34 employees with disabilities, finding that the employer violated minimum wage provisions of the federal Fair Labor Standards Act by paying them a subminimum wage. In addition, the employer was found to have violated the law by not posting in the workplace information about the rights of disabled workers paid a subminimum wage. *The employer might have avoided violating the minimum wage provisions of the Act by obtaining a certificate from the federal Department of Labor Wage and Hour Division authorizing subminimum wage payments for workers with disabilities that impaired their work productivity. Issuance of such certificates is permitted by the Act. But, having failed to obtain such a certificate, the employer in this case owed its workers the full federal minimum wage.*

REGULATORY

WORKER CITES AND GETS BEST OF DIFFERENT STATUTES IN SUING – Jaworski sued Illinois general contractor Master Hand Contractors, claiming Master Hand (1) didn't pay him for construction services he provided and (2) misclassified him as an independent contractor when he was actually an employee. Jaworski claimed violation of the federal Fair Labor Standards Act, the Illinois Minimum Wage Law, the Illinois Minimum Wage Payment and Collection Act and the federal Employee Classification Act. The Employee Classification Act prohibits misclassifying an employee as an independent contractor in the construction industry, and it presumes a complaining party is an employee unless the defendant proves otherwise. But the other statutes cited by Jaworski in his suit contain no such presumption. Nevertheless, a trial court awarded Jaworski compensation guaranteed employees by the Minimum Wage Law and Wage Payment and Collection Act without his having to prove he was actually an employee, namely, \$200,000 in damages, plus \$150,000 in attorneys' fees. Further, the U.S. Court of Appeals for the Seventh Circuit affirmed that decision, tacking on additional attorneys' fees for a frivolous appeal of the trial court ruling. *From this case, it would appear that a worker wronged by an employer can pick and choose beneficial aspects of numerous statutes when looking for justice, even if those statutes don't specifically provide for such cherry-picking.*

LAW FIRM SANCTIONED FOR DEFENDING TOWNSHIP'S BAN ON FRACKING – In early January, a federal judge ordered a nonprofit law firm to pay \$52,000 to an oil and gas exploration company for defending in court a rural township's ban on "fracking." The court found that the township's ban violated "settled" Pennsylvania state law protecting the use of "fracking," that is, underground injections of water and other substances in oil and gas exploration. Consequently, the judge found that the law firm was presenting "frivolous" arguments in court, justifying imposition of sanctions against the firm. *Local governments are increasingly challenging state regulatory authority in many areas of the law these days, just as some states and local governments are challenging federal primacy over certain legal matters, such as immigration in the sanctuary cities dispute. Those municipalities that won't comply with federal or state laws are facing the loss of funding from the feds or the states. But it's relatively novel for a law firm to be sanctioned for championing legal challenges to "settled" law. Think of all the instances when "settled" law has been overturned because of lawsuits. The decision by the U.S. Supreme Court declaring unconstitutional "separate but equal" schools for black students is just one of many examples that come to mind.*

NON-PROFITS

DO YOU KNOW WHO MAY BE REINSTATING YOUR DISSOLVED ENTITY? – A nonprofit client of ours recently found that a nonprofit affiliate in Colorado, which they had dissolved, had been reinstated under Colorado law by people who then changed its legal name to one not related to our client’s but incorporating an LLC (“limited liability company”) suffix. Do they intend to convert it to, and operate it as, an LLC? Can they? Do they intend to use the dissolved, but now reinstated, entity’s federal employer identification number, and maybe also try to take advantage of the 501(c)(3) tax-exempt status that the Internal Revenue Service previously granted to the affiliate? Who knows? What has happened so far may have been entirely legal, but the client doesn’t like it. *Unfortunately, if you throw something away, somebody else may pick it up and run with it. Know the difference between voluntary and administrative dissolution and keep in mind each state has differing laws regarding dissolution.*

COURT REJECTS CHALLENGE TO NEW YORK DONOR DISCLOSURE LAW – A three-judge panel of the U.S. Court of Appeals for the Second Circuit in New York City has rejected a challenge to New York State’s law requiring that charities disclose their donors to the state Attorney General’s office. Conservative advocacy group Citizens United argued to the court that the requirement created a “climate of fear” unconstitutionally limiting the making of donations that might be seen as controversial. However, the panel was unconvinced that the requirement would have that effect. *More experience with the relatively new law may be needed to provide evidence that it will or will not have such an impact.*

INTELLECTUAL PROPERTY

FOREIGN PROCEEDINGS IN TRADE SECRET CASE CAN RUN INTO SNAGS – The U.S. Court of Appeals for the Seventh Circuit in Chicago showed a company trying to prevent misappropriation of its trade secrets in foreign countries that there are limits to the value of proceedings in the U.S. for achieving that goal. Heraeus, a German company, sued Biomet, an Indiana company, in the U.S. to obtain discovery of documents Heraeus intended to use in bringing a suit against Biomet for trade secret misappropriation in Germany. Heraeus was successful in obtaining discovery and used the documents in getting a German court to enjoin Biomet from manufacturing or distributing products in Germany that were developed using the misappropriated information. Heraeus then became suspicious that Biomet was using the misappropriated technology to sell products in other countries. So, Heraeus, hoping to avoid multiple foreign suits, unsuccessfully sought an order in the U.S. to impose restrictions on Biomet’s internal use of the documents it produced for use in the German proceeding, which would presumably make it difficult for Biomet to use the disputed technology anywhere. But the Seventh Circuit affirmed a lower court decision that it was inappropriate to grant such relief. Rather, Heraeus may have to bring a suit in every foreign country in which Biomet may be using misappropriated Heraeus information. *In the worldwide marketplace we have today, untangling problems posed in getting legal jurisdiction over someone who has misappropriated intellectual property in various countries can be a big problem.*

HOWE & HUTTON NEWS AND EVENTS



Jon Howe presented an in-service training program for a Fortune 100 Company on Negotiations and Contracts in the Hospitality Industry.

Jerry Panaro recently attended a seminar in Columbia Maryland on Employment Law in Maryland: State and Federal Cases and Statutes.



This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or professional service through its distribution. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Past newsletters are available at howehutton.com.

© Copyright 2018. All Rights Reserved. Republication with credit to Howe & Hutton, Ltd. and "The Howe & Hutton Report" is allowed. Please provide us a copy of your use.

Editor - James F. Gossett
Contributing Editor - Christina Pannos, Naomi Angel

www.howehutton.com

