THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

NOT A SURPRISE – According to the results of a recent survey, higher income flyers who travel a lot are not pleased with the service they receive from airlines. They complain of higher fares, fees for checking baggage, paying for food, etc., things that used to be free. When you pay more you expect more, they complain. *They sound like the rest of us. Association executives, most of whom travel a lot on business, can relate.*

CELL PHONE SNATCH-AND-RUN RISK TRAGICALLY ILLUSTRATED – *H&H Report Update* – Last April we reported the risk of cell phone snatch-and-run attacks at subway, el and other public transit stops in big cities. The risk was tragically demonstrated in Chicago March 29 when a man snatched an iPhone from a woman and took off down the steps at an elevated transit station. He knocked an elderly woman down the steps as he ran away. She was killed; he got away. *Just one more incident, you might say, and thank heaven it did not happen to me. But it could. Be aware when you are using your cell phones and other gadgets in public places. You are at risk.*

INFLATION ACCORDING TO THE FED VS. WHAT THE REST OF US SEE – We repeatedly see the Federal Reserve saying inflation is if anything too low, under 1%, and the Fed resists raising its interest rates as counterproductive to an economic recovery. The Fed position was recently illustrated by the President of the Chicago Federal Reserve Bank calling for more inflationary policies by the Fed. The Fed version of inflation excludes food and energy as part of "core inflation." *However, as food, energy, raw materials, transportation and other inflationary indications start to rapidly go up, the rest of us do not have the luxury of saying they should not be included in the inflation in our personal situations. A number of nationally known economists are already warning not just of inflation but of inflation getting out of control. The Fed is usually behind the curve when inflation starts to heat up, so get ready for a bumpy ride.*

GOOD READING … See you in May

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NOT-FOR-PROFIT LAW DEVELOPMENTS

FIESTA BOWL SPENDING DRAWS CRITICISM – Critics of college athletics**,** and of college football's bowl system in particular, acquired some more ammunition recently when a report commissioned by the Fiesta Bowl's board of directors disclosed spending practices that could result in loss of its tax-exempt status. Most college bowls are operated by tax-exempt entities because of their connection with higher education. But after questions were raised in the press and by the Arizona Attorney General regarding activities related to the Fiesta Bowl, its board authorized an investigative report that showed expenditures such as $30,000 on a birthday for the bowl's chief executive and $1,200 for a strip club. Potentially more damaging were revelations that the bowl paid for catering at political fundraisers and hosted travel for politicians and their families, while bowl employees were allegedly being pressured to make political campaign contributions, then reimbursed with sham bonus payments and told to lie about the practice. *The Fiesta Bowl disclosures have resulted in the firing of its chief executive, the resignation of other top officers, and another black eye for the nonprofit community, which has already suffered way too many of them in recent years.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT CONSIDERS JURISDICTION FOR INTERNET INFRINGEMENT SUITS – The Court of Appeals for the State of New York, the state's highest court, has ruled that a New York copyright holder can file a suit based on Internet copyright infringement in that state, even if the alleged infringing uploading of copyrighted material occurred in another state. The New York court considered whether the state's long-arm statute allowed a publisher principally residing in New York to file a suit there against an Oregon nonprofit with its principal place of business in Arizona. The New York court said that "an injury allegedly inflicted by digital piracy is felt throughout the United States." Moreover, the court concluded the alleged injury to the New York publisher in this case could best be considered as occurring in that state, and properly redressed there, rather than in other states where the actual alleged uploading of copyrighted material may have occurred. *Nonprofits are major copyright owners, and, as in this case, they can also be alleged copyright infringers. This decision, rendered by an influential state court and widely commented upon, may help copyright owners bring successful suits against Internet infringers in the state where the owners reside, where suing is usually more convenient and where courts may be more sympathetic to them. But, as the New York court noted, the court's decision "does not open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner." Among other things, the U.S. Constitution has been found to require that nondomiciliary defendants must have "minimum contacts" with the state where a case is to be decided, and the prospect of defending a suit there must comport with "traditional notions of fair play and substantial justice." Even so, it helps copyright owners file suit "at home."*

REGULATORY LAW DEVELOPMENTS

HOSPITAL COST-SHARING WAIVER AND PATIENT ASSISTANCE OKAYED – The U.S. Office of Inspector General has announced that it will not impose sanctions against a network of nonprofit pediatric hospitals that has proposed to (1) waive all cost-sharing amounts when billing third-party payers, and (2) adopt a new financial need-based policy of providing lodging and transportation assistance to patients, including federal healthcare program beneficiaries, and their families. The OIG has previously expressed concerns about waiver of cost-sharing amounts under the federal anti-kickback statute and laws prohibiting inducements to beneficiaries. The same laws regarding beneficiary inducements could also have been applied *[cont'd-page 3]*

to lodging and transportation funding for federal program beneficiaries, but the OIG found that the network's plan would be exempted from such restrictions as "remuneration which promotes access to care and poses a low risk of harm" to patients and the federal programs. *We certainly wouldn't want any federal programs to be "harmed," but we could think of some that should be amended or repealed. It's a good thing, though, that the OIG decided it was acceptable for charity hospitals to provide the indicated assistance for needy patients, because readers may recall our earlier articles about the federal and state tax problems hospitals may encounter when they don't provide enough charity care. Hospitals don't need to be damned if they do and damned if they don't. Hospitals are increasingly confronted by differing interpretations of federal and state laws of what constitutes charitable care and how much is enough.*

IS THE FTC GETTING SERIOUS ABOUT CONSUMER ONLINE PRIVACY? – The Federal Trade Commission recently entered into a consent agreement with Google Inc. over FTC charges that Google used deceptive tactics and violated its own privacy promises to consumers, in violation of the FTC Act, when Google launched its latest social network offering, Google Buzz, in 2010. The proposed settlement bars Google from misrepresenting future privacy policies, requires Google to implement a comprehensive privacy policy now, and calls for independent privacy audits of Google practices for the next 20 years. Google is alleged to have misrepresented that its users could choose to join or not join Buzz when in fact users who did not opt in were still joined in some respects, and instructions to decline or opt out were ineffective or confusing at best. These allegations plus others about Google's use of users' information were contrary to what users were led to understand. Google is also alleged to have misrepresented its compliance with European Union rules about use of personal information. *At long last the FTC may be getting serious about social network use of consumer information. Is Google, you might well ask. Google has a great thing going for it but it appears to treat consumers' personal information as whatever Google wants, not what the consumers want. If you make your information available to Google or other social networks, understand the risks you are taking. Most of us do not, not really, and the social networks would seem to prefer that we do not.*

TAX LAW DEVELOPMENTS

EXEMPTION GUIDANCE PUBLISHED FOR HEALTH INSURANCE ISSUERS – The Internal Revenue Service has published a notice regarding qualification for tax-exempt status under Internal Revenue Code Section 501(c)(29) for nonprofit health insurance issuers receiving funding under the Consumer Operated and Oriented Plan (CO-OP) Program created by President Obama's Patient Protection and Affordable Care Act. In its notice, the IRS says these organizations must be member corporations, and substantially all of their activities must be the issuance of qualified health plans in the individual and small group markets, with no inurement of earnings to private individuals and no involvement in lobbying or political campaigning. But the IRS also advises that it will wait until it issues a revenue procedure before accepting applications for exempt status, not indicating when that will be. In the meantime, the IRS says that organizations intending to apply should begin filing Form 990 annual returns, stating on the returns that they have not yet received a determination letter. *Here's another one of those frequent cases where Congress has started to dance and the IRS has had to struggle to keep up. By the time the IRS issues its revenue procedure, Congress (or the courts more likely, given the President's veto power), may have repealed parts of the President's healthcare program. The IRS may yet have to dance to a different tune written by a court. Stay tuned. (Pun intended)*

ILLINOIS MAKES PUSH FOR USE TAX COLLECTION – The vast majority of nonprofits that are not exempt from use tax collection should be aware that Illinois is making a push to collect use tax on purchases of tangible personal property from outside the state. Pursuant to new legislation, the tax applies to Internet shopping as well as other out-of-state purchases by Illinois residents, if out-of-state Internet sellers have Illinois affiliates. Credit is given for sales taxes buyers have paid under the laws of other states, so that Illinois will only expect to collect use tax if the buyer has paid sales tax to an out-of- state seller at a rate lower than the Illinois 6.25 percent, or has paid no such sales tax at all. The Illinois Department of Revenue says that buyers who have not kept receipts of purchases can report and pay use tax in suggested amounts published by the Department, which are based on purchaser income in 2010: $15 for those who made $20,000; $27 for those who made $50,000, and $52 for buyers who made $100,000. But these suggested amounts do not apply to large purchases like automobiles. *Searching for revenue wherever it may be found, officials of our cash-strapped state have admitted that they largely depend on taxpayers to report and pay use tax voluntarily as responsible citizens, but they will also be making every effort to obtain reporting of sales by large Internet sellers such as Amazon.com.*

IRS DIRECTOR ANNOUNCES PLANS TO REVOKE EXEMPTIONS – The Director of the Exempt Organizations Office for the Internal Revenue Service has announced the IRS will soon be revoking tax exemptions for a "sizable number" of small nonprofits that failed to file annual returns with the IRS for three years. In addition, she says that the IRS will consider whether to revoke exemptions for some larger organizations that tried to file the electronic Form 990-N, rather than a regular Form 990 or Form 990-EZ return, when it appeared they may not have been eligible for electronic filing. *Many larger nonprofits must have been tempted to file the simple Form 990-N electronic "postcard" instead of the more complex 990 and 990-EZ annual return forms. But electronic filing was meant for smaller nonprofits, not just impatient filers. For those organizations whose exemptions are revoked, one option will be reapplying with the IRS to receive recognition of exempt status, and we could certainly assist with that procedure.*

CONGRESSMEN SEEK IRS AARP INVESTIGATION … AGAIN – Three Republican members of Congress have asked the Internal Revenue Service to investigate the tax-exempt status of AARP because they say the nonprofit lobbied Congress about President Obama's health care reform legislation when it stood to benefit from the law's provisions relating to a type of insurance plan endorsed by AARP. AARP's President says the Congressmen's questions have been "asked and answered by previous Congresses." *Indeed they have, including the Congress that enacted Section 501(c)(4) of the Internal Revenue Code, granting a tax exemption to social welfare organizations such as AARP, which are specifically permitted to engage in lobbying, even to the extent of making it their sole activity. Are membership organizations like AARP supposed to lobby only for laws that will not benefit them and their members? Come on, Congressmen! If you don't like your own legislation, you have the power to change it. The IRS doesn't. So, quit playing politics about AARP's exemption and go after the health bill on its merits.*

EMPLOYMENT LAW DEVELOPMENTS

CAN EMPOYERS ENFORCE NO-SMOKING RULES? – Can employers enforce no-smoking bans on employees, off the job as well as at work? In a nutshell, it all depends. Twenty-nine states currently prohibit employers from discriminating against employees who smoke, including not hiring, firing or imposing higher medical insurance or add-on fees on smokers. Employers argue employees who smoke account for higher medical costs and miss work more often. Employee advocates argue such antismoking bans are discriminatory. Employers, and many workplace property owners, can and do enforce nonsmoking policies on the job. *The issue is higher health costs vs. controlling legal personal behavior off the job. About 20% of U.S. adults smoke. Before imposing a nonsmoking ban across the board, check out the laws of your state.*

NO RIGHT TO TELL OTHERS ON THE JOB THEY ARE GOING TO HELL – A federal appellate court in Chicago affirmed summary judgment on behalf of Wal-Mart in denying an employee's claim her termination constituted religious discrimination. The employee told others including lesbian fellow employees that gay people were sinners and going to hell. The employee was discharged for engaging in conduct that could be regarded as harassment based on an individual's status, including sexual orientation. The trial and appellate courts rejected the employee's claim that Wal-Mart should have accommodated her religious beliefs by allowing her to berate others for their sexual orientation. Accommodating her religious beliefs would have exposed Wal-Mart to potential claims of harassment on the job, an undue burden on Wal-Mart's content-neutral policy of not allowing workplace harassment. *This isn't the common "Oh, go to hell" retort often heard at work. Have a policy disallowing harassment, make it known to employees, and enforce it.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

INDEPENDENT STUDY SAYS TARMAC-RULE CANCELLATIONS HIGHER – An independent study by two aviation consultants contradicts U.S. Department of Transportation reports that the number of cancelled flights due to the DOT's three-hour tarmac rule only slightly increased overall cancellations since the rule was imposed a year ago. The DOT said tarmac-rule cancellations were only up 44 flights over the May to January period a year earlier. The consultants reported the DOT study was flawed and did not take into account the number of flight cancellations well before the three-hour limitation was reached in order to avoid potential breaches of the rule which could lead to million-dollar fines for most flights based on draconian penalties of up to $27,500 per passenger. They concluded cancellations were up 26% over a year ago. *Which report is accurate? Perhaps both are, the DOT reporting the number of flights that actually bumped up against the three-hour rule, and the consultant's analysis that airlines took preemptive action much earlier in the three-hour rule window if there was any uncertainty about getting off the ground in time. What is clear is that northern winter storms caused a lot of flight cancellations which led to other cancellations due to planes not arriving at destination cities.*

IF YOU ARE ONE OF THOSE, IT'S ALL YOUR FAULT – Homeland Security Secretary Janet Napolitano says passengers who are carrying their bags on flights instead of checking them are costing all taxpayers more to pay for more TSA employees to inspect bags, more shifts at airports, and causing longer security lines, flight delays, etc. Therefore she proposes an addition to the current $5 federal fee per one-way ticket to bring in $260 million. *Seldom does a bureaucrat complain about a growing empire.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

MAYBE QUINN IS RIGHT, BUT IF HE'S WRONG… – Illinois governor Pat Quinn publicly blew off concerns recently expressed by Caterpillar's CEO about the declining business climate in Illinois as illustrated by the substantial income tax increases pushed through at the very end of the last legislative session and its impact on Caterpillar, the largest manufacturer in Illinois. Where would Caterpillar go, and how would it get along without all the skilled workers here, said Quinn. *So typical of political attitudes in Springfield, IL. That might be why Caterpillar is expanding overseas and in other states rather than Illinois. As for skilled workers, Toyota, Mercedes, Honda, BMW and a host of other manufacturers seem to have found solutions to that problem in states far away from Illinois, Governor Quinn.*

JUDGE INVALIDATES PARTS OF STATE McCORMICK PLACE LAW – *H&H Report Update* – A federal judge in Chicago has struck down portions of last year's state legislation intended to revamp work rules for labor at McCormick Place to reduce exhibitor costs for the work of unionized workers on the show floor, limiting labor overtime and crew sizes while allowing exhibitors to do more of the work on their booths. In a lawsuit brought by local Teamsters and Carpenters unions to challenge the state law, the judge ruled the National Labor Relations Act preempted states from enacting legislation that would interfere with the ability of private-sector employees to collectively negotiate the terms of their employment through trade unions. Most of the workers that set up and tear down shows at McCormick Place work for private contractors and belong to trade unions. Officials at the state-city agency in charge of McCormick Place have indicated they plan to appeal the judge's ruling. *The latest decision is a setback for state political leaders who, with last year's legislation, were trying to stem the tide of trade shows leaving McCormick for other states' show facilities with more relaxed labor rules and lower exhibitor costs. Their efforts had been somewhat successful until this ruling, as some trade show organizers had recommitted to McCormick for their events following passage of the state law last year. In the short run, watch to see what happens at the next big show at McCormick Place. If exhibitors complain about onerous work rules and expenses, anticipate that other big shows are likely to reconsider coming to Chicago. A pyrrhic victory for the unions?*

H & H DEVELOPMENTS

In April ...

John Peterson provided an update on legal trends and developments of interest to the spring meeting of a North American trade association.

Barbara Dunn ran in her first half marathon on Sunday, April 10th in St. Louis and finished in 2:59.

Jonathan Howe presented "Legal Advice for International Meetings" in a webinar on April 13, 2011, sponsored by a large meeting professional publisher. He also presented "Hotel Contracts In Today's Environment" in Laguna Niguel on April 12, 2011 to a group of meeting professionals.

Contributors to this issue…

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