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ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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A LOGICAL EXTREME? – A Seattle woman claimed to have wed a corporation recently, as a protest effort to incite support for a Seattle ordinance that would deny “personhood” to corporations. But her “marriage” was voided by King County, WA authorities on the basis that the corporate person was too young, only a month and a half old, to give consent. *Aw shucks. If corporations can be persons, according to some recent U.S. Supreme Court decisions, why shouldn't they be allowed to marry? They might even find free speech at home to be difficult on occasion.*

ARE YOU A “HENRY”? – Another new buzz word in fundraising circles – a “HENRY.” That is shorthand for “Higher Earning, Not Rich Yet.” Fortune Magazine says this category is in the \$250,000 to \$500,000 bracket. Others might define it differently. Often HENRY status requires two income earners in the family. *So there is not only an association for everything, but an abbreviation too. Whatever the definition, a HENRY can expect numerous charitable solicitations, and based on past performance those in the HENRY category are generous donors.*

A VERY TWO-EDGED SWORD – Those proclaiming that the health care system changes pushed through the Massachusetts legislature when Mitt Romney was governor are no different than the health care plan pushed through at the national level in 2010 by the Obama administration and Democrats in Congress with nary a Republican vote might want to take a closer look at the financial results in Massachusetts. Yes, health care coverage was expanded to millions of uninsured people, but the touted savings simply are not there. *Massachusetts is struggling to pay for the expanded health benefits which are eroding funding for other state programs. It's time to look at the outcomes, not just who supported it back when.*

SAME OL' SAME OL' – A recent report of a bookkeeper who defrauded 10 Florida charities of \$1.5 million was the usual recitation of “borrowing” enabled by a lack of division of responsibilities or supervision. *Why are such basic protections ignored? The Board of Directors should be blaming themselves as much as the bookkeeper.*

GOOD READING ... See you in September

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NOT-FOR-PROFIT LAW DEVELOPMENTS

PUBLIC SCHOOL CREDIT FOR NONPROFIT RELIGIOUS INSTRUCTION OKAYED – A federal appellate court in Richmond, VA, which hears appeals from district courts from Maryland to South Carolina, has ruled that it is constitutional for a school district in South Carolina to allow public school students credits toward graduation for religious instruction provided by nonprofit educators away from school grounds. Parents of two students and others challenged that policy, saying it violated the Establishment Clause of the First Amendment to the U.S. Constitution. But a federal trial court disagreed, and the appellate court affirmed that decision on appeal. *In the last school year, around 7,500 public school students in South Carolina received credit for religious instruction provided by 21 nonprofit organizations. Allowing public school students time off from classes for private religious instruction, with parental approval, is more common nationally and has been approved by the U.S. Supreme Court. South Carolina is the only state that currently allows public schools to give credits for private religious education. However, it may not be alone in that regard for long, as Alabama, Colorado, Florida, Louisiana, Michigan, Nebraska, Oklahoma and Virginia filed “friend of the court” briefs supporting the school district’s position in this case.*

ONCE AGAIN THE BOY SCOUTS OF AMERICA ARE IN THE (BAD) NEWS – The Boy Scouts of America (“BSA”) once again find themselves unhappily in the news – and courts – as the Oregon Supreme Court has forced BSA to release more than 1,200 confidential files dating from 1970 to 1991 of suspected or established molestation of young scouts by local scout leaders (the “BSA Perversion Files”). The BSA Perversion Files reveal instances of alleged or established predators removed from local scouting positions who managed to return to local leadership roles in different and on occasion even the same troops from which they had been removed. Sometimes scout officials failed to removed predators, or predators simply moved on to other troops which were unaware of their personal histories due to a lack of controls or screening of scout leaders. *Whatever the cause, the failure to better follow up and prevent such predators from continuing their predatory actions is going to cause additional legal and financial problems for the BSA. One can readily imagine a plaintiff’s attorney urging significant damages against BSA, which professes to oppose gay scouts or local scout leaders but did too little to prevent repetitive predatory actions by local scout leaders. Jury awards against Catholic dioceses and parishes in similar circumstances should have been sounding alarm bells at BSA headquarters. And what of 1991 to present? More such confidential files yet to surface?*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

AH, BUT WOULD IT WORK FOR OTHERS PROTECTING THEIR IP? – A recent article on using a soft-sell approach to protect the Jack Daniel’s label against infringement by an author and publisher paid off for both sides. The book cover for the author’s third novel was very similar to the black and white label on a Jack Daniel’s whisky bottle. Rather than the usual hard-nosed, no nonsense cease-and-desist letter most lawyers would send the alleged infringer, the in-house lawyer for Jack Daniel’s sent a much softer letter saying the distiller was flattered by the similarity of design, but would appreciate the author and publisher changing the cover design on any future reprint of the novel. The author posted the letter on the Internet and it went viral, greatly boosting sales of the novel and drawing admiration for the lawyer’s low-key approach and generating good will for Jack Daniel’s. The author said he will comply. *This illustrates a different approach to dealing with an infringing work. It seems to work for Jack Daniel’s lawyers, protecting the brand without offending, but they keep the club available if it is needed. Whether a softer approach would work for others lacking such an establish brand image is hard to say, but it is something to keep in mind.*

EMPLOYMENT LAW DEVELOPMENTS

EMPLOYERS' DEFINED CONTRIBUTION MATCHES DOWN BUT NOT OUT – The Society for Human Resource Management (“SHRM”) recently reported at a major conference that the percentage of employers the SHRM had surveyed who matched employee contributions to defined contribution plans had decreased since 2008 from 75% to 67%, but about 2% planned to add a match feature within a year. The widely circulated report is no surprise, and includes other interesting items regarding benefit changes. *As defined benefit plans are eliminated, frozen or closed to new employees, defined contribution plans are pretty much the norm in the private sector. Defined benefit plans remain a fixture in the public sector, but pension loads have become a budget disaster for many state and local governments, e.g., California, Illinois, Rhode Island, Detroit, and Stockton, CA (which just filed for bankruptcy) to name a few. In the economic downturn since 2008, many employers have laid workers off, and with mediocre financial results and rising expenses, optional pension contributions are an all too logical cutback target.*

WHAT IS NEXT FOR EMPLOYEES' HEALTH CARE BENEFITS? – Now that the U.S. Supreme Court has ruled 5-4 to uphold the Patient Protection and Affordable Care Act of 2010, what will employers do about the steadily rising cost of providing health care benefits? One option that some are considering is getting out of the health care insurance provider business and instead directing employees to get their health care coverage through the insurance exchanges which the Affordable Care Act directs the states to establish and operate. Employers would have the option of contributing to their employees' out-of-pocket expenses to help pay for such health care insurance. *Many employers strapped for cash have already cut back or eliminated employee health care coverage for employees, but it is still seen as a desirable benefit when recruiting or retaining employees. Keep in mind the mandated state insurance exchanges are still in the future in nearly all states; will take time to establish, staff and underwrite; require a massive education campaign so individuals will understand their options; and some governors are saying they will not establish them in their states. Who knows how much will change by 2014? What we do know is that health care benefits are still very much a moving target regardless of the Supreme Court's June 28 decision.*

REGULATORY LAW DEVELOPMENTS

REGULATORY MORASS TO FOLLOW? – “Morass” is defined as a swamp, or a situation that traps, confuses or impedes. The health care insurance arena for employers, and employees for that matter, seems to qualify as a morass following the U.S. Supreme Court's 5-4 decision upholding most of the Patient Protection and Affordable Care Act of 2010 after two years of heated litigation. As the Act was debated, modified and finally enacted, even legislators said they didn't know what was in it, but now regulators have to generate the regulations to implement the Act so insurers and employers can abide the Act's provisions and current and future regulations. Starting as early as mid-September when the fall open-enrollment period for employer-sponsored health care plans commence, most employers must provide their plan participants and beneficiaries with a “Summary of Benefits and Coverages.” *This is more complicated than it first appears so talk to your benefits consultant or insurance carrier to be sure you are complying with this initial requirement, and get a timeline for other upcoming deadlines such as the 2013 W-2 reporting requirements for health care benefits (precursor to eventually taxing them?). Into the swamp....*

MEETINGS & TRAVEL LAW DEVELOPMENTS

UNITED IS NEXT UP FOR TSA PRECHECK SCREENING AT O'HARE – The Transportation Security Administration has announced that it now permits passengers on United Airlines to undergo expedited security screening at O'Hare Airport. Passengers on American who have applied and been accepted for expedited screening are already eligible at O'Hare and 15 other airports. Initially participating airlines nominate selected passengers in their frequent flier programs, but passengers may apply for TSA's PreCheck program, submit required information, pay a fee, and go through an in-person interview to review required documentation. *Why go through all this? If you qualify, you don't have to shed shoes, light outerwear and belts, unpack your computer, or display liquids and gels of 3 Oz. or less. But Pre-Check passengers may still be subject to random inspections. Consider applying online for the TSA Pre-Check program if you fly frequently, especially if your airport is one of the 16 airports where the program is now in effect.*

AN UPTICK IN ATTRACTING TRADE SHOW BUSINESS TO CHICAGO – Chicago is seeing some positive movement attracting trade shows following a revised labor agreement covering events at McCormick Place, Chicago's premiere trade show and convention facility. A revamped Hyatt Hotel property at McCormick Place should also help. Three more trade shows recently announced future shows at McCormick Place with starting dates from 2012 to 2016. *Why did it take so long to work out new labor agreements in the face of shows voting with their feet to go elsewhere because of Chicago's high costs? Sometimes we have to learn the hard way.*

YOU CAN TRY IT, BUT WE DON'T RECOMMEND IT – A frustrated passenger going through a Transportation Security Administration ("TSA") inspection at an airport recently was finally so incensed at the inspection process that he stripped naked to go through the inspection line. TSA called the cops and he was arrested. His defense in court was that he was exercising his First Amendment right of free speech to protest the TSA process. The judge bought the defense, but limited going naked at an airport to protests. *Let's face it, we have all harbored such thoughts when going through the TSA inspections at airports. You can try it, but we don't recommend it. And you will probably miss your flight.*

TAX LAW DEVELOPMENTS

IRS TIPS FOR THOSE STARTING A NEW SMALL BUSINESS – The Internal Revenue Service from time to time offers tax tips to for-profit and not-for-profit entities. The IRS recently provided the following tax tip to start-up businesses. Start-up not-for-profit leaders, pay attention as the advice applies to you too. First, decide on the type of business, e.g., a corporation, partnership or sole proprietorship, or one of the new hybrids such as a LLC. Learn the type of tax system that applies to that type of business, and don't forget self-employment, employment and excise taxes in addition to income taxes, and any state and local income and property taxes and fees. Get an employer identification number from the IRS, which will be necessary for opening a bank account. Decide on necessary bookkeeping and records. Decide on your tax year; it does not have to be January 1 to December 31. Decide on your accounting method, cash or accrual. *All of these seem basic to our readers, but our experience with start-ups in the not-for-profit and for-profit communities lends credence to this IRS advice. Start-up leaders are usually focused on the ends more than the means, so getting them to focus on such details often requires gentle persuasion and coaching. Whoever said "the devil is in the details" speaks directly to the start-up experience.*

DEDUCTIONS ALLOWED FOR CONTRIBUTIONS TO CHARITY-OWNED LLC – The Internal Revenue Service has issued a notice advising that contributions made to a limited liability company (“LLC”) organized under the laws of the U.S. or any state, which is wholly owned by an organization to which deductible donations can be made, are deductible as charitable contributions just as if they had been made to the parent organization, provided the parent treats the operations and finances of the LLC as its own for tax and information reporting purposes. The IRS especially notes that the parent will be required to meet substantiation and disclosure requirements of the Internal Revenue Code with respect to such donations because the parent will be considered the recipient of the contributions for income tax purposes. However, the IRS also points out for employment and certain other excise tax purposes the LLC will be treated as an entity separate from its owner. *Nonprofits may find it beneficial to create such LLCs to engage in activities that might produce significant non-tax legal liabilities for the parent if the parent itself engaged in them, such as owning and managing property. Those potential liabilities will remain with the LLC, not the parent, and the LLC can pass along income from those activities to the parent, which will, in any event, have to treat all of the LLC’s income as its own. But, as long as the LLC’s activities would not endanger the exempt status of the parent if the parent were conducting them (involvement in politics or excessive business or lobbying activity), the parent should have no other adverse income tax consequences.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

ONE MORE WAY ONLINE SELLERS DIFFERENTIATE THEIR CUSTOMERS – Online sellers are using software to differentiate their customers, based on such customer information as where customers reside, or what computer they use (e.g., Apple users are thought to have higher incomes than Microsoft users), or the manner in which they shop online, thereby facilitating “price customization” by sellers. Wealthier customers are thought to be less price-sensitive and may be charged higher prices. An older expression for this is “whatever the market will bear.” Orbitz is one online seller that does this, although it claims it does not offer the same product at different prices, but different products to different groups of customers. What makes this possible is the amount of information that shoppers provide in the way of online “cookies” which is collected, mined and sold by online data aggregation to online sellers. *So how should shoppers respond? One practical response is to check price comparison websites for prices when feasible. Don’t be in a hurry to complete a transaction in order to allow sellers time to offer discounts or coupons to close a sale, and understand the real difference between something free or extra as opposed to a discount. Basic math will often show a discount beats a freebie or extra.*

VOTING WITH THEIR FEET – AND DOLLARS – It seems that a number of Canadian fliers who live near U.S. airports close to the Canada-U.S. border are opting to drive across the border to catch a flight to their U.S. destination. Why would they want to do that? Because Canadian taxes and ticket prices and fees can be significantly higher in a very competitive market. The Canadian dollar has also appreciated significantly against the U.S. dollar in recent years and is pretty much at par, another factor making it less costly for Canadian fliers to cross the border to catch a flight. *Those of us who live close to the border or travel to Canada are well aware of how much the Canadian dollar has appreciated, so it is nice to know there are still some benefits south of the border.*

LINES IN THE SAND – WHO WILL BLINK FIRST? – The European Union, citing ten years of unsuccessful negotiations on aircraft carbon emissions, unilaterally imposed a tax on all civilian flights into, within and out of the European Union’s airspace. While that might have passed muster if the carbon emissions tax had been limited to flights while they were within EU airspace, the EU went farther and imposed its unilateral tax from the point of origin anywhere in the world to an EU destination and from the EU to

protested on a number of grounds, primarily on the extraterritorial effect of the EU tax way beyond EU borders. China, Russia, the United States and other nations have directed their airlines not to comply, and there are mutterings of a trade war if the EU persists. Millions of dollars are at stake. Many say this should be decided within the UN's International Civil Aviation Organization. The EU response is that the ICAO has been unable to act on this issue. The latest development is that leasing companies which finance about one-third of airlines' aircraft are quietly rewriting their leasing contracts to require compliance with the EU carbon tax, to avoid one of the really onerous penalties for not complying with the EU directive, impoundment of offending aircraft. *The tax per passenger is relatively small, but when computed from anywhere in the world on today's jumbo jets, the cost to the airlines is substantial, and their profits are already diminished by rising fuel costs, restive labor unions, and a world economy in near recession. So who will blink first on this? In the end the tax will be passed through to the passengers, but the EU may have to back down on taxing flights when they are outside EU airspace. Stay tuned. This clash is still slowly unfolding. If you fly into or out of the EU, you will be affected by this wrangling and pass-through cost.*

H & H DEVELOPMENTS

In August...

Jonathan Howe co-presented "The Art of Contracting in an Improving Market" at the annual meeting of the American Society of Association Executives in Dallas, Texas.

C. Michael Deese spoke twice at the Association Management Company Institute Community Conference in Dallas on August 11. He presented a session on "Key Legal Issues for Emerging AMCs," and another entitled "Legal Issues for Association Account Executives."

Naomi Angel presented three highly interactive programs to meeting professionals at Connect Marketplace in New Orleans: "Legal Issues Affecting Emerging Technologies," "Contracts Quiz Show," and "Meetings and the Law – Creating and Managing a Risks Management Plan." She also participated in the Morning Call roundtable session at Connect Marketplace.

James Gossett gave a report on legal, legislative and regulatory developments at a membership meeting of a trade association in Santa Barbara, CA.

See upcoming presentations as posted online.

Josh Peterson Joins FINRA – We are sad to report that our associate Josh Peterson left the firm in early August to accept another position. Josh, who is also pursuing a Masters in Public Policy at Northwestern, will be working for FINRA, which is the largest independent regulator for securities firms doing business in the United States. Josh has served the firm and our clients well in the five years he has been with us. Please join us in wishing Josh well as he embarks on this new position.

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Contributors to this issue...

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