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:

COMFORTING TO KNOW – It is truly comforting to know that TSA does not mean "Thousands Standing Around," according to Congressmen Paul Broun and John Mica (who helped to write the law creating the Transportation Security Administration). With the TSA workforce having added another 3,300 positions in 2011 and the TSA administrator asking for 3,500 more this year, a traveler might wonder who all those people in the maroon jackets are at the nation's airports and what they are doing. With a workforce of 55,000 now, the TSA administrator says "maybe" the 4,000 administrative staff in D.C. could be "thinned." *We will not hold our breath waiting for any staffing reductions to happen, especially with the union representing TSA employees saying some airports are insufficiently manned although he could not identify which airports he meant. Bureaucrats don't do "thinning" unless forced to do so.*

FREE FEDERAL 1040EZ TAX RETURN FILING SERVICE BY WALMART – Walmart, in conjunction with H&R Block and Jackson-Hewitt, is offering free federal income tax filing services at more than 3,000 Walmart locations during the tax-filing season to single and married persons who use Form 1040EZ. The filers must not claim dependents or itemize deductions on their 2011 returns. Tax-filing services for state and local returns, or more complex federal Form 1040 returns, are provided for a fee. Walmart will also provide refund check-cashing services for a small fee for those receiving tax refunds by check. *It's an interesting way to get people into Walmart stores and also drive business to Walmart partners H&R Block and Jackson-Hewitt. Associations should also be thinking of useful services they could provide at low or no cost to their members or which could drive business to their sponsor partners.*

LEST WE FORGET – The short-term funding authorization for the Federal Aviation Administration expires January 31, 2012. The FAA is hoping to avoid another shutdown like the one last August. *With dysfunctional Congress just returned from recess and political gamesmanship likely when it reconvenes, who knows? And the payroll tax extension machinations to follow… Oh happy day!*

GOOD READING … See you in February

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COURT AWARDS NONPROFIT ROSA PARKS MEMORABILIA BEQUEST – The Michigan Supreme Court has sided with a nonprofit fighting for control of a bequest made by civil rights pioneer Rosa Parks. Parks left memorabilia valued in the millions of dollars and almost all of the rest of her estate to a nonprofit she and a friend had set up to teach young people leadership and character development. Her nephews and nieces contested her will and trust and, in 2007, entered into a settlement agreement with the nonprofit. But the relatives more recently sued the nonprofit for alleged violation of the confidentiality provisions in the settlement agreement because of statements about legal fees made by the nonprofit's attorney, and they succeeded in obtaining a lower court order that the nonprofit turn over property to the relatives in compensation for the breach of the agreement. Now, the Michigan Supreme Court has stepped in, found the agreement was not breached, and overturned the lower court's order. *Unfortunately, nonprofits receiving bequests sometimes get into nasty legal battles with relatives who want to acquire a deceased person's property. Nonprofits anticipating receipt of large bequests should make legal preparations to head off such challenges, preferably while the donor is still alive and can assist.*

HACKERS STEAL CREDIT CARD INFO TO MAKE DONATIONS – Computer hackers reportedly have stolen credit card information from a California security consulting company's client files (irony there) and have charged donations to a variety of charities. Now that the thefts have been discovered, the charities are likely to lose time and money trying to identify invalid charges and refund donations, while possibly facing penalty fees from the credit card companies. *Nonprofits are always looking for additional funding sources. But, as they say, with friends like these, who needs enemies? Further, this report leads us once again to wonder about the security of the records kept by the businesses, nonprofits and governmental entities that are always mining everyone they come in contact with for data. How secure are your files? Are you sure?*

EGYPT CRACKS DOWN ON NONPROFITS, THEN APPEARS TO BACK OFF – Egyptian authorities recently raided the offices of local American and German-backed nonprofit human rights groups that have been critical of Egypt's military for not handing over the government to civilian leaders. The authorities now say they will return property that was taken from the offices of at least ten nonprofits. But the lives of the organizations remain tentative because most such groups are operating in Egypt without licenses from the Egyptian government that are technically required by law but almost never granted. *Nonprofits in the U.S. can lose their tax exemptions for excessive involvement in politics. But this story is a reminder that nonprofits and their personnel getting involved in the politics of other nations can lose whatever the local government wants to take from them, including property and personal freedom. NPOs in Russia have endured similar government crackdowns. NPOs are easily scapegoated.*

FORGET THE PITTSBURGH PIRATES, IT'S THE PITTSBURGH PILOTS! – "PILOTs" is the new buzz word in nonprofit tax circles – Payments In Lieu Of Taxes. Pittsburgh and Boston are among the national leaders pushing this concept to address tanking city revenues. Pittsburgh's finances are in such trouble that a state agency has to review and approve the city's budget. This agency rejected the latest budget because it included over $3 million in PILOT funds from nonprofits exempt from property taxes. In 2010 nonprofits paid about $2.6 million in PILOTs, and pledged the same for 2011 but fell short by 20%. *This should be an interesting game of municipal "chicken" with the state agency rejecting the city's budget and the city blaming its nonprofits. Look for other municipalities to go after PILOT funds from owners of tax-exempt properties.*

EMPLOYMENT LAW DEVELOPMENTS

ILLINOIS SUPREME COURT CREATES NONCOMPETE UNCERTAINTY – A recent ruling by the Illinois Supreme Court is likely to create uncertainty around the enforceability of noncompete clauses in employee contracts because it eliminated established guidelines in favor of a review of the evidence that looks at "the totality of circumstances" in each case. Prior to the court's decision in *Reliable Fire Equipment Company v. Arnold Arrendondo*, Illinois courts had established only two legitimate business interests that permitted a company to enforce a noncompete clause: protecting confidential information and protecting near-permanent business relationships with customers. In *Reliable* the Supreme Court ruled that these two do not make up the entire list of legitimate business interests, but provided no guidance as to what those additional legitimate business interests might be. *Employers may find this more vague standard works to their benefit in that they will be able to argue for consideration of other legitimate business interests, such as the "good will" between a company and all of its customers, not just with those with which it has a near-permanent relationship. Associations and employees may find this decision a two-edged sword, depending on circumstances.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

RESEARCH PUBLISHERS VS. TAXPAYERS – A bill pending in the House of Representatives, The Research Works Act, would bar the National Institutes of Health ("NIH") from requiring that medical research funded by NIH be provided free of charge on the National Library of Medicine's web site within a year of its initial publication where it is freely available to researchers and the public. Instead, peer-reviewed research would be available only by expensive subscriptions or pricey individual downloads from publishers of peer-reviewed journals. So taxpayers would fund the research and then be obliged to pay for access to the resulting study, often performed by researchers at publicly-funded universities and laboratories. *The Association of American Publishers and some highly placed congressional representatives from both sides of the aisle are backing this legislation. In contrast, research performed at the NIH campus in Bethesda, MD is excluded from copyright protection because researchers there are federal employees. Should public ownership be expanded to all federally-funded research? A lot is at stake for such a broadening of public ownership of publicly funded research, and not-for-profits are in the thick of the fight on both sides of the issue.*

REGULATORY LAW DEVELOPMENTS

JUDGE APPLIES FIRST AMENDMENT TO CELL PHONE WARNING LAW – *H&H Report Update* – A federal judge barred the City of San Francisco from compelling cell phone providers to supply warnings concerning alleged radiation hazards due to cell phone use. The wireless industry claimed the warnings amounted to compelled speech violating First Amendment free speech rights, and the court agreed. Where the government can demonstrate no threat to public health, there can be no justification for forcing a party to disseminate messages with which it disagrees. Although the court did not completely invalidate the ordinance, it did require significant changes in order to protect the product sellers' First Amendment rights. In particular, the judge struck down the requirement for posters to be placed in retail stores and warning labels to be affixed on phones. These requirements were found to be impermissible, unconstitutional compelled speech by the government. *For years there have been claims that cell phone use presents radiation hazards, and numerous studies rebutting those warnings. San Francisco's ordinance was the first to require such warnings on cell phones. Score a victory for the First Amendment.*

UPS OBLIGED TO PROVIDE SIGN LANGUAGE INTERPRETER – The Equal Employment Opportunity Commission and United Parcel Service have settled an employment discrimination case in California involving a deaf employee's demand for a sign language interpreter for all meetings he was expected to attend. The UPS facility did not have an interpreter on staff and its policy was not to bring one in for meetings under two hours. The employee was provided summaries of what was said at the meetings. He claimed that was not enough and the EEOC agreed. A federal appellate court in California overturned a district court decision saying UPS had accommodated the employee's disability. The appellate court said the employer must accommodate the employee even for situations which were not essential to his job performance as a junior accounting clerk. As a part of the settlement UPS paid $95,000. *There may be more to the story. Apparently UPS did not cite cost as a reason for not bringing in a sign language interpreter for meetings under two hours, and that might have been a reasonable accommodation cost issue. One can only speculate if the settlement will result in fewer meetings at that facility, or fewer meetings this employee is expected to attend. Will the settlement following the appellate decision be a persuasive precedent elsewhere?*

WHEN INDUSTRY SPLITS, REGULATORY RELIEF LESS LIKELY – Abraham Lincoln in one of his early famous speeches declared, "A house divided against itself cannot stand." This was recently illustrated in a split by companies in the U.S. solar industry who argued with each other before the U.S. International Trade Commission ("USITC") on whether or not China's subsidies to its solar industry are injuring the industry here. Some companies argue this has resulted in illegal dumping here while other companies argue it means lower prices to buyers here. The factions are represented by the Coalition for American Manufacturing and the Coalition For Affordable Solar Energy respectively. The Solar Energy Industries Association ("SEIA"), which has members in both factions, has not taken a position on the petition to impose duties by the USITC. In early December the USITC issued a preliminary determination of possible injury, so the petition now goes to the U.S. Department of Commerce for its investigation and determination. *Associations in this predicament are usually unable to find a common ground satisfactory to competing factions, especially on an issue with obvious economic winners and losers. The SEIA has undertaken an education campaign on its website, carefully avoiding taking a stand on the ultimate outcome. Even that course can prove contentious.*

A HARD SELL THESE DAYS? – American Airlines says it will replace charts in the cockpit with iPads for flight crew use. Many airlines also want passengers to turn on their can't -live-without tablets, Droids, Kindles, Nooks and other electronic devices so long as they use the plane's fee -based electronics network. But the Federal Aviation Administration insists that "[A]ll electronic devices be turned off and stowed away before takeoff… (and landing)." *As the recent Alec Baldwin episode demonstrates, refusing to comply with flight personnel instructions to turn off electronic devices can get you in a heap of trouble. Will the FAA change its position? Too early to know. The concern of interference with aircraft electronics is a harder sell now with flight crews using electronic devices in the cockpit and passengers encouraged to use their devices while flying. So what's up next? Unlimited cell phone use*

TAX LAW DEVELOPMENTS

IRS ANNOUNCES 2012 STANDARD MILEAGE RATES – The Internal Revenue Service has announced 2012 optional standard mileage rates used to calculate the deductible expenses of operating a car on various business, medical, charitable or moving expenses. The rates are changed little from 2011 Those using IRS standard mileage rates will continue to use 55.5 cents per mile for business travel, 23 cents per mile for medical or moving travel, and 14 cents for medical-related travel by car. *See Rev. Proc. 2010-51 and Notices 2011-116 and 2012-01 for more detailed information.*

ANOTHER TAX GEM INSERTED IN THE PAYROLL TAX EXTENSION – While all eyes were focused on the down-to-the-wire negotiations regarding the two-month extension of the 2% payroll tax deduction before December 31, 2011, the administration and Congress slipped in another provision that will hit many not-for-profit executives and staff. Those who are paid more than $18,350 in January and February, which happens to be two months' pay of the annual compensation of $110,100 maximum on which social security taxes are based in 2012, will be required to pay an additional income tax "recapture" of 2% on their pay over $18,350 in January and February. This added income tax is not subject to reduction by credits or reductions. The added tax is due April 15, 2013. *This provision is effective immediately, but the implementing regulations still must be drafted and promulgated by the IRS. Of course what happens after February 29, 2012 regarding the 2% payroll tax deduction extension is still to be determined, and whether this income tax addition will be continued after February is unclear. Don't blame this fiasco on the IRS. It's Congress and the administration at fault for all the confusion and uncertainty. More work for accountants and HR specialists.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

AIRLINE ASSOCIATIONS ASK ONE-YEAR DELAY IN NEW BAG FEE RULES – The U.S. Transportation Department ("DOT") is being urged by associations representing domestic and international airlines and airports, and ten airlines to delay implementation for a year of new rules regulating much more detailed disclosure of baggage fees imposed by airlines on fliers. One particularly troublesome requirement is that a baggage fee imposed by the marketing carrier (or most significant carrier) must apply throughout a flight which means connecting carriers must coordinate all their fees and disclosures, and that requires resolving all sorts of software problems for starters. Airlines are warning check-ins will be delayed, the use of remote kiosks for baggage checks reduced, and fliers can expect longer lines at airports. With a current effective date of January 24, 2012, for implementation of the new disclosure requirements, the airlines and their associations say the required information system changes simply cannot be accomplished by that date. *Life was less complicated for airlines, airports and fliers before the airlines became addicted to baggage fee revenue streams, and now they are stuck with a passenger and regulatory response demanding much more transparency regarding the baggage fees. But keeping in mind the old adage that nothing is impossible for the person who doesn't have to do it, the steps for implementing these disclosures are a good deal more complicated for those doing it than those simply ordering it. Stay tuned for the next development in enhancing the joy of flying.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

CHUTZPAH! – It may be difficult to top this example of chutzpah. A convicted kidnaper is suing a couple in Kansas whom he held as hostages while he was a fugitive on the run. He wants $235,000 for damages (actually a counterclaim since they have sued him for home invasion and emotional distress) for an alleged breach of an oral contract to hide him in exchange for money. They escaped and called the police after he fell asleep. He claims the breach led to his capture in which he was wounded and it's all their fault. *Interesting theory. An oral contract may be valid in some circumstances. Duress would be a validdefense to breach of an oral contract in the circumstances. Before landing on lawyers for another frivolous claim, his claim is a handwritten filing, and a court in Kansas is considering the couple's motion to dismiss, while the kidnaper faces a separate murder charge in Colorado in addition to the 11-year sentence he received in Kansas. Unfortunately this is not the first time a convicted criminal has sued in such circumstances.*

MORE FUEL FOR THE HEALTH CARE COSTS DEBATES – The (federal) Agency for Healthcare Research and Quality ("AHRQ") recently reported that 1% of the American population accounted for 22% of health care costs in 2009, the most recent data collection period, up from 21% in 2008, but down from 28% in 1996. Five percent accounted for half of health care costs. *The relevance of this and earlier such studies is their use in predicting future health care costs and ways to reduce anticipated costs. The report goes into more detail, noting that of the 10% of patients with the highest medical expenditures in 2009 approximately 60% were women, more than 40% were age 65 or older, and the 18-29 age group accounted for only 3% of medical expenditures. The last point illustrates why the insurance industry and proponents of the Affordable Care Act of 2010 are so set on having younger persons among those mandated to buy health insurance.*

THERE SEEMS TO BE A DIFFERENCE OF OPINION – Airlines and airline authorities around the world are taking strong exception to the European Union's imposition of a carbon cap -and-trade "emissions trading scheme" on flights wherever they originate from if the flight requires an EU airport. An airline is required to purchase pollution emission credits through an emissions trading scheme, already set up in Europe for factories, utilities and other emitters, to offset the emissions for each flight to or from Europe. What galls authorities and airlines outside the EU is the EU is imposing its carbon tax for an entire flight that may barely enter European airspace, e.g., a flight from Chicago to Shannon Airport on the west coast of Ireland, and flights that are largely in the national airspace of nations outside the EU, e.g., India, Africa, China, Russia, South America, etc. The EU completely ignored the International Civil Aviation Organization, the body within the United Nations that is supposed to coordinate international aviation issues. Airline authorities in the U.S., China, India, Russia and elsewhere are protesting the EU action which was upheld by the European Court of Justice in late December. The airline industry is forecasting a $3.5 billion cost on its operations. International responses include threats of retaliation against the EU. *Some forecasters are saying the recently effective carbon tax cap-and-trade plan in Europe will result in a 3% air ticket increase on flights to and from European airports as airlines shift the carbon tax to passengers. Some U.S. airlines are already raising fares $3.00 each way on European flights, not 3% – so far. This one isn't over by a long shot, so anticipate higher airfares for now.*

H & H DEVELOPMENTS

Jonathan Howe and **Samuel Erkonen** presented separate sessions to attendees at an annual conference of a major association held in Kansas City, MO. Jonathan Howe presented, "Dodging Risky Business," and Sam Erkonen presented "Advanced Contract Negotiations." **Nathan Breen** presented two sessions: one on contract negotiations to a non profit organization and the other on social media to the California chapter of a large meeting professionals organization. **Barbara Dunn** co-presented a debate on today's hottest contract issues at an annual conference of meeting professionals in San Diego. **Naomi Angel** presented "Risk Management In Uncertain Times" – an advanced-level 3-hour interactive workshop on disaster management and business continuity planning at a large association's Leaders Annual Conference in San Diego, and also delivered a current Legal Trends Report at 3 meetings of an international trade association of manufacturers in Orlando, Marco Island, and Miami as well as one for the Facilitated Product Liability and Safety Committee for an annual trade association meeting in Naples, FL.

Contributors to this issue…

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