THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

OCTOBER 2013 VOLUME 2013 ISSUE 10

THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

SURPRISE, SURPRISE, OBAMACARE DID NOT ROLL OUT SMOOTHLY — It should not come as a surprise that the Patient Protection and Affordable Care Act ("PPACA" or "ACA" or "Obamacare") exchanges did not roll out smoothly on day one. Sure, there were glitches, and long waits, and log-in problems. This is a complicated process, and millions of people were attempting to log in, and each state exchange operates differently. There are also a number of governors and legislators doing what they can to interfere, and attempting to make the systems fail in their states. Then, of course, we had the federal government partial shutdown to cope with as well. So before condemning the whole process, give it some time to get underway. Like it or hate it, it is not going away, or at least, not any time soon. *There will be a long learning curve, lots of glitches to work out as individuals, businesses, medical providers, insurers and exchanges learn the systems, and state and federal data bases have to work seamlessly too. We have all had our share of horror stories working with insurance companies to understand coverages and rejected claims, or trying to figure out hospital bills, and those are supposedly well established. So why expect this to be smoothly implemented on day one or even year one, or condemn it for not going smoothly from the start? In Chicago, we cannot even implement a new electronic fare card for public transit without major birthing pangs.*

THAT PRETTY MUCH SUMS IT UP — There is often more truth in the comic pages and late night comedians' jokes than on the front page of the newspaper, as illustrated by Jay Leno's quip about the partial shutdown of the government: "The government is shut down. Even Al Qaeda couldn't do that." *May your association board never be this dysfunctional.*

WOULD YOU PAY MORE TO FLY IN AN ADULTS-ONLY SECTION? — No, this is not a rhetorical question. Some airlines outside the U.S. are already offering adults-only sections on some flights, especially in business-class sections, but also in some economy sections. *So what would it be worth to you if such an offering were made? How big a fee would you be willing to pay?*

GOOD READING … See you in November 2013

Howe & Hutton, Ltd.:
20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685
Washington Office:
1901 Pennsylvania Ave., NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • Fax: 202/466-5829
E-Mail: hh@howehutton.com

TEXAS JUDGE ORDERS AQHA TO REGISTER CLONED HORSES — *H&H Report Update* **—** The federal judge in Texas who presided over the trial in which a jury returned a verdict finding the American Quarter Horse Association illegally restrained trade by refusing to register quarter horses that resulted from a cloning process has now ordered the AQHA to register cloned quarter horses in the AQHA's registry system. The decision should result in cloned horses being permitted to compete in quarter horse races throughout the U.S. and elsewhere, and enhance the market value of the cloned horses, which was the aim of the lawsuit brought by owners whose cloned animals could not be registered or allowed to race in AQHA-authorized races. The AQHA plans to appeal the decision. *If the jury verdict and judge's order hold up on appeal, it could not only have repercussions for the AQHA and its activities but also lead to challenges to other associations prohibiting the registration and legitimacy of cloned animals. "Well, hello, Dolly."*

COURT OKAYS STATE BINGO LICENSE LOBBYING RESTRICTIONS — A federal appellate court in New Orleans reheard a case from Texas previously ruled upon by a panel of the court, and upheld the panel's previous decision that the Texas charitable bingo program does not violate the First Amendment to the U.S. Constitution solely because charitable organizations are being granted state licenses to hold bingo games in Texas conditioned on their not using bingo proceeds for certain types of political advocacy. A group of charitable organizations had challenged the political advocacy limitations on free speech grounds, specifically contending they were prohibited by the U.S. Supreme Court's decision in the *Citizens United* case, in which that Court struck down certain federal restrictions on corporate expenditures in connection with elections, finding the restrictions were precluded by the First Amendment. The appellate court, though, distinguished the Texas case from *Citizens United*, finding the Supreme Court's decision inapplicable because the Texas charitable bingo restrictions do not "penalize free speech" but only represent a decision by the State of Texas not to "subsidize" political speech through the issuance of a bingo license. The court declared, "Charities are free to participate in the bingo program and engage in political advocacy; they simply must not use bingo proceeds to do so." *As governments seek to continue various restrictions on nonprofit political advocacy post-Citizens United, we can expect more "distinguishing" of this kind.*

EA SETTLES PLAYERS' LAWSUITS ON USE OF THEIR LIKENESSES — *H&H Report Update* **—** After two adverse federal appellate decisions from New Jersey and California rejecting Electronic Arts' ("EA") First Amendment defenses to the use of former players' information in creating EA's popular sports video games, EA has thrown in the towel and settled the various lawsuits filed by a number of former college football and basketball players against EA and the National Collegiate Athletic Association ("NCAA"). The lawsuits allege the NCAA and EA, as the NCAA's licensee and agent, wrongfully use the players' likenesses in EA's popular video game series, "NCAA Football" and a separate basketball series, without their consent or compensating them in any way. The series strive to replicate as accurately as possible the colleges, players, uniforms. statistics, etc., of the players' actual college performances in developing avatars who can be manipulated by game buyers in simulated games. The former athletes allege the games violate their rights of publicity. EA had requested time to appeal the California decision to the U.S. Supreme Court but apparently decided settling was the more prudent course of action. The NCAA has vowed to continue defending the lawsuits all the way to the U.S. Supreme Court. *The terms of the settlements are confidential at this time, and have to be approved by the federal trial judge in California. The NCAA is no stranger to state and federal courts, but the potential damages if class action status is approved by the trial courts, and the sheer number of class members, could be very substantial. Sometimes you hold 'em, and sometimes you fold 'em. Meanwhile, the NCAA also faces other lawsuits, including one suit filed by former football players over concussion injuries, similar to the recently settled NFL lawsuit by former players.*

Intellectual Property & Computer Law Developments

SO WHEN DO WE START TO PROTECT OUR INTELLECTUAL PROPERTY? — A pair of senior government officials who witnessed at first hand the impact of intellectual property ("IP") theft from U.S companies and the government have gone public with a report detailing what is involved in such thefts, the impact on U.S. competitiveness, the loss of American jobs, the plain old theft of valuable resources, and how little we are doing as a nation to address such theft. Admiral Dennis Blair, USN (Ret.) is a former director of national intelligence, and John Huntsman, Jr. is a former ambassador to China, former governor and unsuccessful 2012 Republican presidential candidate. They co-chaired the U.S. Commission on the Theft of American Intellectual Property. Their report on the impact of IP theft boggles the mind: the revenue loss to U.S. businesses equals U.S. exports to Asia; the loss of some 2.1 million jobs due to China IP theft alone; the importation of counterfeit products that are almost indistinguishable from those made in the U.S. (many ending up in American airliners and Defense Department equipment among notorious examples). So what are we doing to stop or prevent such thefts and counterfeit goods? Not a great deal that is effective, unfortunately. The Commission's report offers a number of steps to deter IP theft. *Yes, this is a major problem for U.S. businesses and governments. Associations are also affected if they publish standards or other intellectual property of value to IP thieves, or if their members are adversely affected. This is an area where associations might contribute to addressing such IP theft problems by lobbying their representatives in Congress to take steps recommended in reports such as the Commission's report, and not have its practical steps briefly noted and then ignored. See the report at IPCommission.org.*

Employment Law Developments

TOO CLEVER BY HALF — That old British expression seems appropriate for a manager's poor judgment in how he obtained information he relied on for terminating an employee. The manager decided to find out if the employee was saying inappropriate things on his Facebook page about his employment situation so the manager created an imaginary person, a woman, who asked to "friend" the employee. The manager was able to access the employee's Facebook page, discovered uncomplimentary entries relating to the employee's employment situation, and terminated the employee for bad judgment. The employee filed suit, and an arbitrator ruled the manager was the one who displayed bad judgment by violating the (federal) Stored Communications Act, 18 U.S.C. Chapter 121, §§ 2701-2712, reinstating the employee with back pay. *There are lessons for employers and employees here. Using false premises to obtain access to an employee's social media accounts is usually a bad idea, resulting in potential criminal and civil violations under federal and state laws, creating mistrust in the workplace when word gets around, and may even be violating federal labor laws governing collective bargaining. On the other hand, employees are well advised to be circumspect in what they record in their social media entries. Employers do take those entries into consideration if they obtain them, and they may be obtained in lawful as well as unlawful ways. "Round and round the little entry goes. Where it stops nobody knows."*

SO HOW MUCH IS ENOUGH, AT LEAST IN ILLINOIS? — One question that must be addressed in any noncompetition agreement, at least in Illinois, is what compensation is required to enable the employer to enforce the agreement? It is not always clear, but in Illinois there are some basics to keep in mind. The offer of employment of itself is not a sufficient basis for the consideration which Illinois courts look for in determining whether or not to enforce a noncompetition agreement that a current or former employee is alleged to have breached. Illinois courts have been requiring a minimum of two years' continuous employment as a substantial period of employment necessary to underpin a restrictive covenant such as a noncompetition agreement. This is especially so if the employment is at-will, and not for a contracted period, and this seems to be the standard even if the agreement's restrictive period is less than two years. In one recent lawsuit, the court applied the two -year standard even though the employee resigned a few months into his contract to work for a competitor. *So what should an employer do in such a situation? One option is to offer the employee compensation something extra in the way of pay or benefits in addition to the position's pay and benefits, as additional consideration, which may be persuasive to a court. How much must be worked out on an individual basis. For employers in states other than Illinois, recognize that local courts look at different requirements so you must be familiar with what the courts do in your state. The standards vary.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

FAA ADVISORY PANEL SAYS ELECTRONIC DEVICES NOT DISRUPTIVE — A federal advisory panel has prepared a report for the Federal Aviation Administration regarding the use of electronic devices while flying, and concluded that most devices are not a potential safety hazard so long as they are not connected to the Internet, and they may even be used safely during takeoffs and landings. This report could lead to some changes in current rules governing the use of electronic devices while flying. If the FAA accepts the panel recommendations, it might relax current rules and permit passengers to use their e-books, watch prerecorded programs and movies, listen to music, etc., during an entire flight, even during takeoffs and landings. Some newer aircraft, especially those used on international routes, are already regarded as safe for electronic devices, and some airlines permit the use of cell phones hooked to stations on the aircraft. *As technology evolves, so does the regulatory scene. Some airlines outside the U.S. seem to be much more lenient regarding the use of electronic devices, including cell phones. There does not seem to be much interest so far in FAA circles for relaxing the current rules banning the use of cell phones, which are deemed likely to cause electronic interference with aircraft electronics, but cell phone technology and applications are among the fastest-changing so the present ban may be short-lived.*

TAX LAW DEVELOPMENTS

IRS GOOD NEWS AND BAD NEWS DURING THE GOVERNMENT SHUTDOWN — The Internal Revenue Service announced it would not be issuing tax refunds while the government was partially shut down, and would not be processing tax returns and other filings filed in paper format, but would be automatically processing returns filed electronically. The IRS cautioned that filing deadlines for all tax deadlines for individuals and corporations would remain in effect, including all payroll tax filings. Other statutory deadlines such as tax appeals would not be extended. And if you asked for a tax return filing extension, Tuesday, October 15, remained the deadline to file whether the IRS was open for business or not. The good news was much more limited. The Tax Court was closed, and scheduled meetings with IRS agents for examinations, audits and collections were canceled until further notice. *As always, the onus is on the taxpayer to comply whether the government is open for business or not. If you filed by paper, make sure you can prove you met any filing deadlines. Let's see what January brings.*

FOUNDATION CAN SUE IRS OVER RELIGIOUS ORGANIZATION FORM 990S — *H&H Report Update* — Previously, we reported on a Wisconsin federal district court ruling that the Freedom from Religion Foundation had standing to sue the IRS over its alleged failure to enforce legal prohibitions on political campaign activity against religious organizations while enforcing the same laws against other entities that, like religious organizations, are exempt from federal income taxation under §501(c)(3) of the Internal Revenue Code. As further proceedings are being held in that case, the same court has now held the Foundation also has standing to sue the IRS for exempting religious organizations from filing Form 990 annual reports with the IRS while requiring such reports from other nonprofits exempt under Section §501(c)(3). *The IRS had filed motions to dismiss all of the Foundation's claims on grounds that the Foundation had no standing to bring them because the Foundation itself could not escape political campaign prohibitions or Form 990 filing requirements even if the court ruled that the IRS could not waive such prohibitions and requirements for religious entities. But those motions have been denied by the district court. The court still must decide whether the Foundation has standing to bring further charges against the IRS in the latest case over alleged discrimination in generally requiring §501(c)(3) organizations to file Form 1023 applications for recognition of exempt status with the IRS, but not religious organizations. Stay tuned for more litigation in the federal district court and almost certain appeal of its rulings to a federal appellate court in Chicago.*

THIS LAWSUIT HAS POTENTIAL REPERCUSSIONS FOR MANY UNIVERSITIES — Any university that is exempt from state and local property and income taxes should be interested in the outcome of a lawsuit between a group of local taxpayers in Princeton, NJ and Princeton University in the Tax Court of New Jersey. In brief, the taxpayers claim that royalties paid to Princeton by Eli Lilly on a drug used worldwide for cancer treatments, which was patented by a Princeton faculty member who was required to assign his rights to Princeton, constitute "profits" while Princeton is also claiming to be exempt from local taxes as a nonprofit educational entity. This is not chump change. The royalties on this one drug have exceeded half a billion dollars since 2005. The judge denied a motion to dismiss the lawsuit earlier this year, and is on record recognizing the potential impact this has not only for Princeton but for other universities whose faculty members are engaged in potentially lucrative research. According to the Association of University Technology Managers, there are more than 10,000 products which have been patented and licensed by universities, and they generated more than $2.6 billion in royalties in 2012 alone. *The taxpayers who are suing Princeton acknowledge its importance to the city as its largest taxpayer for school, sewer and other such taxes, but see Princeton as the largest property owner, with an endowment over $17 billion, getting a pass on taxes which they think is unfair. As other municipalities look to increased PILOT (payments in lieu of taxes) revenues from their nonprofit property owners, many more such lawsuits could follow if these taxpayers are successful in their lawsuit or get Princeton to fork over a higher PILOT-type payment to the city.*

REGULATORY LAW DEVELOPMENTS

FTC UPDATES ITS DO-NOT-CALL REGISTRY TELEMARKETER FEES — The Federal Trade Commission announced slightly higher fees as of October 1, 2013 charged to telemarketers for area code lists of telephone numbers registered on the FTC's Do-Not-Call registry. A single area code listing of registered numbers will now cost $59, an increase of $1, and a listing of all area code registered numbers will cost $16,228. Charities and others exempt from the Do-Not-Call rule still get the lists for free. There is no charge for individuals listing their phone numbers on the FTC's registry. *So not much has changed. Telemarketers are still obliged to obtain such lists every year. Charities, politicians and others trying to solicit funds and votes, and market researchers and other survey callers are still exempt from the rule, and you can still anticipate calls during meals and other inconvenient times.*

NEW HIPAA PRIVACY REGULATIONS EFFECTIVE SINCE SEPTEMBER 23 — Employers and their insurance providers need to be aware of new regulations governing the handling of healthcare records under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), which went into effect on September 23, 2013. Among the many considerations under HIPAA, which is a very complex federal statute governing many aspects of medical care, that arise for employers, insurers and healthcare providers is protecting patients' privacy against disclosure of their medical information. In conjunction with passage of the Genetic Information Nondiscrimination Act of 2008 and later amendments to HIPAA, responsibility for protecting patient information is extended beyond "covered entities" providing healthcare and insurers to "business associates," which now includes anyone who may handle medical records. So employers, including associations, need to take a hard look at how their employees' medical records are handled, stored, shared, and protected against unauthorized disclosure. *HIPAA provides for criminal and civil penalties for violations. How often do we read about stolen computers with thousands of records containing individuals' confidential information? Bring in your HR personnel, and do a thorough risk analysis on how such information is protected. Are they up to speed on the new HIPAA regulations? Regulators and plaintiffs' attorneys will be watching.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WILL IRIS SCANS BE THE NEXT COMMON IDENTIFICATION SYSTEM? — Move over, James Bond. Iris scan reader technology is rapidly moving from the fiction pages and very expensive, limited use systems to much more mundane uses, such as banks and other financial facilities, airport security lines, healthcare facilities, and government facilities including jails. As the cost of such systems has come down, their use has gone up. Advantages include greater accuracy than fingerprint and facial recognition systems, many fewer false matches, speed, and duration of the images. Your eyes do not change that much over the years, unlike faces. Greater use is also due to expiration of a key patent so open standards have been adopted, bringing down costs and promoting the use of iris scanning technology. *Anticipate much greater use in the immediate future. Biometric identification including iris scan technology is coming on fast these days, and will soon be built into electronic devices such as smart phones and tablets to identify authorized users. The FBI is expected to add iris scan images to its fingerprint data base. The State of Missouri is incorporating such technology into its law enforcement records system. In short, what was once way out there will soon be routine, faster than the blink of an eye.*

H & H DEVELOPMENTS

In October . . .

Jonathan T. Howe presented "The Legal Aspects of Taking Your Meeting Abroad: What You Must Know Before You Go" at the SMU Caribbean 2013 Conference at the Hilton Cartagena in Cartagena, Columbia. He presented a webinar for Meeting Jobs, "We Are From The Government And We Are Here To Help You… Really?" He also presented a session on trends in contracts and clauses entitled, "What's Happening" in Sand Key Florida.

Naomi R. Angel presented sessions in five different states this month including "An Update On Legal Trends and Developments" at a midyear technical meeting of a trade association of manufacturers in Baltimore, Maryland; and a program for the Small Meetings Market Conference in Sioux Falls, South Dakota, "Top Ten Legal Issues You Should Be Concerned About". She presented two programs for the MPI-Wisconsin Education Day in Stevens Point, Wisconsin – "Legal Issues Affecting Emerging Technologies" and "Advanced Negotiation Techniques for Meeting Planners and Suppliers." For the Rejuvenate Marketplace in Daytona Beach, Florida, she presented "Managing Risk and Liability – A Belt and Suspenders Approach" and participated in the panel discussion "Negotiations Panel: Hear From the Experts." She also presented " An Update On Legal Trends and Developments" at the annual conference of a professional engineering society in Indianapolis, Indiana.

PLEASE VISIT OUR LINKEDIN AND FACEBOOK PAGES

Contributors to this issue…
Terrence Hutton, and James F. Gossett