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DISTRACTED DRIVING CASE DISMISSED AGAINST DRIVER IN GEORGIA — *H&H Report Update* — The Cobb County, Georgia prosecutor moved to dismiss the charge against an Alabama driver ticketed in Marietta, Georgia for distracted driving based on the driver's act of eating a McDonald's Double Cheeseburger while driving at highway speeds. The prosecutor said he did not think there was sufficient evidence to make the charge stick. *While this charge drew nationwide attention on social media and produced a lot of chuckles, make no mistake, distracted driving is a major cause of accidents. It may come as a surprise to our readers, but experienced, middle-age drivers who text while driving are regarded as among the most dangerous drivers. Don't do it!*

USOC AND CITY OF BOSTON TELL EMPLOYEES "NO BAD-MOUTHING" — After promising a transparent effort to land the 2024 summer Olympics, the Boston bid was largely kept under wraps. Now that the U.S. Olympics Committee has selected Boston as the U.S. site to be considered by the International Olympics Committee to host the 2024 summer games, the *Boston Globe* has uncovered a formal agreement signed by Boston's mayor with the U.S. Olympics Committee that bans city employees from criticizing Boston's bid. Not only are city employees not to bad-mouth the bid effort, they are required to promote the bid in a positive manner. *Of course we don't mean that, say representatives of the mayor. City employees are expected to exercise their First Amendment rights. "This was standard boilerplate language for the Joinder Agreement with the USOC that all applicant cities have historically signed.." We don't mean it and it's just boilerplate – until we do mean it and use it to discipline someone. The Boston bid is controversial, just as Chicago's unsuccessful bid to host the 2016 games was controversial locally. Despite the non-profit label, an Olympics hosting bid is very big business, all too often with long-term financial consequences.*

TWO ASSOCIATIONS' SETTLEMENTS WITH FTC ARE FINAL — *H&H Report Update* — The Federal Trade Commission announced that consent decree settlements with the Professional Lighting and Sign Management Companies of America and the Professional Skaters Association, which we reported back in January, are now final. *The associations had the option of backing out of the antitrust consent decrees they had accepted from the FTC, and wisely chose to avoid further litigation.*

GOOD READING ... See you in April

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NOT-FOR-PROFIT LAW DEVELOPMENTS

CONTRACT WITH CITY DOES NOT MAKE NONPROFIT'S RECORDS "PUBLIC" — The Nebraska Supreme Court has ruled a nonprofit's ongoing contractual relationship with a city is not enough to make the nonprofit's records subject to disclosure under that state's "public records" law. The nonprofit was providing economic development services to the City of Falls City, and a citizen had asked for disclosure of the nonprofit's documents concerning a specific economic development project, obtaining a lower court order for the production of certain documents the court did not consider to be privileged. However, the Nebraska Supreme Court rejected the argument that the nonprofit's records were subject to disclosure under the Nebraska public records law just because the nonprofit had a contract with the city, ordering the lower court to dismiss the lawsuit in its entirety. The Supreme Court found that documents in the possession of a private entity could be considered "public records," but following a rule that courts in other states had established, the Supreme Court concluded that the private entity would have to be the "functional equivalent" of a government agency. Furthermore, where a private entity has an ongoing relationship with a government, the Supreme Court ruled that "functional equivalency" should be judged by a four-part test involving consideration of whether that entity performed a governmental function, the level of its governmental funding, the extent of governmental involvement in or regulation of its activities, and whether that entity was created by government, with no single factor being dispositive. Interestingly, the Supreme Court found that economic development was not a "governmental function," in the sense of something government had a duty or responsibility to perform, but merely something that some governments "chose" to perform, and the fact that the nonprofit received 63% of its funding from its government contract was the only factor indicating that the nonprofit might be functionally equivalent to a government agency. *Not all courts have followed the Nebraska Supreme Court's reasoning, and it would depend on statutory and case law in a particular jurisdiction whether nonprofits there might be subject to state public records laws.*

WHAT DOES A "HAIL MARY" PASS HAVE TO DO WITH ASSOCIATION LAW? — You might be surprised. An Oklahoma high school football team lost a game when its "Hail Mary" last second touchdown pass was disallowed because the game referee called the wrong penalty. The losing team appealed, wanting to replay all or part of the game. The appeal went to the Oklahoma Secondary Schools Activities Association which disallowed the appeal. A lawsuit followed against the association. The court declined to intervene. *Numerous experts on association law applauded the court's decision. One expert's comments are right on point. In addition to not wanting to intervene in athletic contests, courts generally do not interfere with the decisions of private associations. "They also lack the experience to evaluate the minutiae of associations' internal rules unless there are allegations of bad faith or clear violations of federal or state law." That pretty well sums it up. This goes way beyond athletics to association governance matters in general.*

REGULATORY LAW DEVELOPMENTS

U.S. SUPREME COURT UPHOLDS FTC ON DENTAL COMPETITION — The U.S. Supreme Court by a 6-3 margin upheld a decision by the Federal Trade Commission that the North Carolina State Board of Dental Examiners ("the Board") exercised unsupervised authority to suppress competition in the practice of teeth whitening by barring non-dentists from performing such services and decreeing only dentists could offer whitening services to patients in North Carolina, in violation of the Federal Trade Commission Act, Section 5. The Board is composed of dentists and they regulate the practice of dentistry in North Carolina as a state agency. The FTC responded to complaints the Board was suppressing competition in teeth whitening by non-dentists who charged less for teeth-whitening services. The Supreme Court ruled that a state may not give private market participants unsupervised authority to suppress competition even if they act through a formally

designated “state agency.” The Board appealed the FTC position to a federal appellate court in Richmond, VA which upheld the FTC position in 2013, and now the Supreme Court has endorsed the two prior rulings. *North Carolina might expand its Board to include a majority of non-dentists, or exercise much more explicit supervision of the Board’s actions as approaches that might overcome the FTC’s and courts’ rulings. More important, the Supreme Court has given notice that many state licensing schemes to oversee professions and trades which depend on boards composed of competitors to those practitioners they oversee are potentially subject to challenge.*

MORE SWEEPSTAKES CONDUCTED THROUGH SOCIAL MEDIA — More sweepstakes are being conducted through social media these days, and that means sponsors must not only comply with the laws applying to sweepstakes in general, but also the rules promulgated by the specific social medium being used (for example, Facebook). The laws involved are requirements enforced by the Federal Trade Commission, state attorneys general, the U.S. Postal Service, and the Federal Communications Commission, and they include requirements of the federal Children’s Online Privacy Protection Act and anti-gambling laws that may come into play if applicants are required to pay money or provide any other form of “consideration” for entry. In addition, to the extent sweepstakes participants may reside in countries other than the United States, the laws of those countries may be applicable. *Sponsors of social media sweepstakes, and, for that matter, all sweepstakes, need experience in dealing with these laws and rules, or the assistance of attorneys and others who have that experience. Clearly notifying potential participants of eligibility restrictions, making sure that all eligible entries are collected and ineligible entries rejected, documenting the fairness (often, the randomness) of the process by which winners are selected, and protecting applicant personal information from unauthorized disclosure all are important considerations, and, in some cases, it may be necessary to provide an alternative method of entry besides through the preferred social medium.*

TAX LAW DEVELOPMENTS

BILL WOULD GIVE NONPROFITS NOTICE OF EXEMPTION REVOCATION — *H&H Report Update* — A bill recently introduced in Congress would give nonprofits notice before they automatically lose their tax exemptions under existing law for failing to file annual reports with the Internal Revenue Service for three straight years. S.400, sponsored by Senators Ben Cardin (D-MD) and Dan Coats (R-IN), would require the IRS to notify nonprofits of the potential loss of exemption no later than 300 days after they become delinquent in filing returns for the second straight year. If the bill is enacted by Congress, nonprofits whose exemptions are automatically revoked under current law after the third straight year of not filing could have their exemptions retroactively reinstated if they could show that they never received the notice required by the new bill, and they wouldn’t have to file a new application for recognition of exempt status. *We’re not sure how nonprofits could prove that they never received the notice, but some relief is certainly needed for nonprofits losing their exemptions under existing law. Many nonprofits have lost their exemptions under the automatic revocation requirement.*

NYC CONSIDERS TAXING RECEIPTS OF NONRESIDENT BUSINESSES — New York City’s Mayor has proposed levying local taxes on the receipts of nonresident businesses that sell to customers in the Big Apple. Under the proposal, companies with \$1 million in receipts from sales to New York residents would be taxed even if they have no physical presence in the city. *If adopted by the city, the new measure would apply retroactively to sales made on or after January 1 of this year. However, this new tax proposal, even if adopted, is almost certain to be subjected to challenges under the U.S. Constitution that may delay its implementation. Expect to see more state and local governments exploring such revenue opportunities.*

TIME IS RUNNING OUT ON FEDERAL DISABILITY INSURANCE PROGRAM — The federal disability insurance system is about to run out of money to pay disability claims if something isn't done. The disability trust fund is projected to run out of money by the end of 2016 unless new sources of revenue are found and/or perhaps changing some of the criteria for qualifying for disability benefits which were watered down in 1984. Demography is partly to blame. As the Boomer Generation retires, there are simply more people getting older and more are seeking disability payments. As long-term unemployment has sidelined more older workers, disability claimants have increased as a form of unemployment benefits. Claims for stress and difficult-to-diagnose back pain are on the rise. Whatever the reasons, over 9 million claimants plus some 2 million dependents are drawing benefits, greatly outstripping revenues coming in to pay benefits. *So what will Congress do to address this approaching freight train? Divert money from Social Security again? Raise payroll taxes? Implement reforms to toughen eligibility requirements (in an election year)? Somehow kick the can down the road again? Associations, the same as other employers, have a stake in the outcome. 2016 is coming fast.*

SUSPENSION WITH PAY OR CEO'S CONSTRUCTIVE DISMISSAL? — The Canadian Supreme Court has ruled on a CEO employment contract issue which should be of interest to association executives, boards of directors and their respective legal counsel, namely when does a suspension with pay constitute a breach of contract for constructive dismissal entitling the CEO to damages. An executive and a government commission established by law entered into a seven-year employment contract. About four years into the contract, and while the parties were negotiating a buyout of the CEO's contract while he was on medical leave, the board decided to put him on indefinite suspension with pay while simultaneously recommending to the Provincial Minister of Justice who oversaw the commission that the CEO's appointment be terminated for cause. After eight weeks the CEO sued for breach of contract which the board regarded as his resignation and stopped his pay and benefits. A trial and appellate court agreed with the board. The Supreme Court of Canada ruled otherwise. The Supreme Court said the trial court erred by ignoring the board's intent to end the CEO's employment; the board suspended him indefinitely and reassigned his duties; the board did not provide any assurance his pay would continue in the future; all indications the board did not intend to be bound going forward on key provisions in the contract. The trial court's second error was ignoring the board's recommendation to the Provincial Minister of Justice that the CEO's appointment be revoked for cause, this unbeknownst to the CEO. Some of the Court's points provide guidance in similar circumstances. The CEO was not informed why he was being suspended. He was not told the board was seeking his termination for cause. (The Minister of Justice was required to appoint the person selected by the board, and the recommendation for revoking the appointment would have occurred in like manner.) The Court also found persuasive that the CEO was unable to perform his duties spelled out in the statute establishing the Commission, even after he inquired regarding the terms of his suspension, and was met with silence. *There are numerous points made in the Court's decision including two separate concurring opinions, as the justices did not all agree on the analysis in the majority opinion. But a CEO faced with a suspension or anyone considering putting a CEO on suspension with pay could profit by looking at all the points considered by the justices in determining whether a suspension with pay is administrative and authorized or constitutes a wrongful dismissal. Various summaries reported in the legal press do not get into the details where arguments pro and con may be found. The decision is Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10, No. 35422, 03/06/2015 can be found at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14677/index.do>, or just Google the case name. The applicable law in your jurisdiction may differ but the arguments for each party may be useful to you.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT EXPLAINS PATENT INFINGEMENT ROYALTY CALCULATION — Some nonprofits which own patents on occasion need to sue patent infringers, and that leads them to the question, “How much can we get?” The U.S. Court of Appeals for the Federal Circuit which hears patent case appeals recently was faced with a case where an infringer argued that the most it should have to pay for infringing was the amount of money it made from the infringement. Overruling the decision of a lower court, which had agreed with the infringer, the Federal Circuit said that the amount of money made from an infringement may be relevant to a calculation of damages to be paid by an infringer, “but only in an indirect and limited way.” Instead, the Federal Circuit held the amount the infringer must pay is a “reasonable royalty” based on a hypothetical negotiation between the patent owner and the infringer in consideration of their anticipation of the profits that could be earned from the infringement, not what actually was earned by the infringer. *It makes it kind of hard to calculate “how much can we get” when you have to get into the minds of two parties hypothetically negotiating over something. One more reason why patent lawsuits are so complicated, time-consuming and expensive to litigate.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

BEWARE THAT BARGAIN “BARE FARE” — A recent article in the *Wall Street Journal* reported the most profitable and fastest growing airline in the U.S. also draws the most complaints. Spirit Airlines is well aware of this. Flying on Spirit compared to other U.S. airlines can be a financial and physical surprise if you are unaware of how Spirit provides its lowball fares to attract bargain-hunting customers. Spirit’s “bare fare” is just that. Everything else that other airlines bundle into basic fares is an add-on fee at Spirit. Check your bag? A fee. Carry your bag aboard? A fee. Talk to an agent or fail to print out your boarding pass? Pay more. Reserve a seat? Pay varying fees depending on seat location. Coffee, a soft drink or water? Pay again. *This barely scratches the surface of Spirit’s add-on fees. Just be aware before you go that’s Spirit’s approach. And in an era when airlines are cramming more seats into coach class, even there Spirit is in a class by itself for limiting space for passengers. Caveat emptor. Know before you go.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

DOES THIS REMIND YOU OF “MISSION IMPOSSIBLE?” — A former commissioner of the Internal Revenue Service has reportedly announced he is running for president. He served as IRS Commissioner from 2003 to 2007, and left to serve as CEO of the American Red Cross. He resigned six months later under a cloud for personal actions. He wants to restore funding to the IRS which has been cut by Congress. *Now there’s a winning campaign slogan to run as a Republican candidate. Mission Impossible? No, much more difficult than impossible.*

WE DON’T MAKE THIS STUFF UP — We don’t have to. There were numerous stories in the media about a 27-year-old woman in Florida who was so focused on her cell phone text messages that she walked around a lowered train crossing gate into the path of an oncoming freight train. She suffered broken bones but survived the experience. *We all see it on the streets, in public transit and by drivers in cars. Is any text message or email worth dying for or killing or injuring someone else?*

SUPREME COURT SAYS FEDERAL COURT CAN HEAR STATE TAX CASE — The U.S. Supreme Court ruled unanimously that a federal court can hear a lawsuit against a Colorado sales tax on Internet sales to Colorado customers applicable to large out-of-state retailers without a physical presence in Colorado, affirming and remanding the lawsuit to a federal appellate court in Denver for further review. Federal law bars state taxes from being challenged in federal court, but the plaintiffs challenging Colorado’s collection of sales taxes on Internet sales from larger retailers took a different approach. Colorado’s law required out of state retailers without a physical operation in Colorado to inform online customers they were liable for Colorado’s 2.9% sales tax on their purchases, and to provide to the state a listing of all customers whose purchases totaled \$500 or more. The Supreme Court focused on that, saying this was a challenge to providing the list of high-spending customers, not a challenge to the tax itself. *Is providing such lists an undue burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution? The lower courts will address that next. But many commentators have noted Justice Kennedy stated that the 50-year old Supreme Court precedent holding that requiring out-of-state retailers without a physical presence in a state to collect and remit sales taxes on customers’ out-of-state purchases was an undue burden on interstate commerce should be reviewed again in light of many retailers doing extensive sales that might well constitute a sufficient nexus for taxation purposes. As the swing vote on many Supreme Court opinions, Justice Kennedy’s statement is likely to encourage more state efforts to collect sales or use taxes from out-of-state retailers and in-state customers.*

MORE WORD GAMES — “Porn” seems to be the new appendage to phrases to indicate disfavor, as in “poverty porn” which is described as using some media form exploiting the poor or miserable situations to generate sympathy (and donations), and may also mean media intended to cause anger or outrage. Another example is “ivory tower porn” which refers to wanting to attend an elite private school or university when a publicly funded state university will suffice. *“Famine porn” and “development porn” are other examples. Why resort to it? Because it is successful in generating donations or emotional reactions*

H & H DEVELOPMENTS

In March...

Gerard (Jerry) Panaro will give a presentation on USERRA – the Uniformed Services Employment and Re-employment Rights Act – to the D.C. Committee of Employers In Support of the Guard and Reserve (ESGR) on Saturday, March 28 at the D.C. Armory.

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