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:

SOMETHING TO KEEP IN MIND – Are you aware that if you loan your car to someone, and that person has an accident, the insurance policy that covers the accident is provided by you as the primary owner, not the driver's insurance policy? At least that is the law in Illinois, by statute and by federal and Illinois state court decisions. *Keep that in mind the next time you lend your car to another driver or ask someone to drive you using your car. Not from Illinois? Check the law in your state.*

GEORGIA SUPREME COURT JUSTICES QUESTION DRACONIAN FAX REMEDY – Several justices on the Georgia Supreme Court seemed taken aback at a $459 million damages award in a class action lawsuit for sending junk fax messages when only six persons were identified as having received any of more than 300,000 ads sent by fax to persons who had not given permission to the sender. *The penalty for sending unwanted faxes is draconian, especially when awarded in class actions. The beneficiaries of these enormous damages, assuming even a portion of the damages can be collected, are usually the lawyers who bring the lawsuits. It's an awfully high penalty for a nuisance, but all too typical when Congress runs amuck. So keep the potential in mind for high damages when sending faxes to parties who have not agreed to accept them, and hope the same remedy is not applied to emails.*

TWO CONFLICTING VIEWS OF THE U.S TAX SYSTEM IN ONE SPEECH – The Commissioner of the Internal Revenue Service was recently heard to opine in a speech that the U.S. tax system is the envy of the world, while also describing it as a monstrosity. It is envied for balance, he said, collecting what is due by law but doing it fairly and efficiently. It is a monstrosity due to its complexities and sheer length. *We can agree, especially when working through all the forms and receipts, that it is a monstrosity. As for others envying our tax system, that may be harder for U.S. taxpayers to imagine.*

A SHORT REMINDER FROM THE IRS – The Internal Revenue Service reminds the not-for-profit community that the IRS is obliged to disclose exemption applications and information returns, and warns that personal information should not be included on such forms. *Pretty basic stuff ... 'nuff said.*

GOOD READING … See you in July

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NOT-FOR-PROFIT LAW DEVELOPMENTS

VETERANS' SCAMS SHOW NEED FOR CAUTION BY DONORS – Donors need to exercise caution when solicited by a charity for contributions. Two recent illustrations show why. The head of the United States Navy Veterans Association was arrested on charges of defrauding donors by operating a bogus charity. When questions were raised, he closed down his operation and fled, but not until he took in some millions of dollars. When arrested he had $1 million in cash in two suitcases. The Disabled Veterans National Foundation is reported to have raised over $56 million in five years, but dispersed almost none of it to veterans or veterans' groups, but claims its revenues went for fundraising expenses. *These two are only the tip of the iceberg. Way too many organizations purporting to raise money to assist veterans are mostly assisting the people who organize and run them. In a time of war or more accurately wars, appeals to help veterans receive more acceptance and less scrutiny than in ordinary times. More than ever it behooves those to whom such appeals are made to get more information from CharityWatch or other organizations about charities you may not be familiar with but carry names that seem reliable and trustworthy.*

EGYPT GOES FURTHER IN PERSECUTING NONPROFITS – *H&H Update* – While recently rejecting requests from eight U.S.-based nonprofits to operate in its country, the Egyptian government went even further in persecuting pro-democracy organizations by asking Interpol, the France-based international law enforcement agency, to issue worldwide arrest warrants for 15 employees of U.S. nonprofits that have previously functioned in Egypt. Those employees weren't in that country when the government began cracking down on nonprofits accused of encouraging political dissent. The current military government has raided nonprofit offices and detained their personnel, charging that they violated Egyptian sovereignty by illegally receiving foreign money and operating without required government registration. Interpol clearly understood the real basis for the government's actions, refusing to issue the warrants because its rules forbid "political, military, religious, or racial" interventions. The generals now ruling in Egypt are supposed to hand over power to the winner of presidential elections at the end of June. But we aren't holding our collective breath for that development. *We have previously warned readers to be very careful when engaging in nonprofit activities outside the U.S., as nonprofit employees have no immunity from foreign government prosecution and politically motivated actions. As recent developments in Egypt show, governments of other countries won't necessarily stop chasing after nonprofit personnel even when they have returned home to the United States or elsewhere.*

DEFINITION OF "PURELY PUBLIC CHARITY" UP TO COURTS – The Supreme Court of Pennsylvania recently held that it need not defer to the Pennsylvania General Assembly's statutory definition of the term "purely public charity" in deciding whether a nonprofit was entitled to a property tax exemption for such Pennsylvania charities. The court noted "purely public charity" was a term appearing in the state constitution, and said that defining terms in the state constitution was the province of the courts, not the General Assembly (quoting no less an authority than Alexander Hamilton on that), even if the General Assembly, in this case, had "noble purposes" in trying to come up with a legislative definition of the term in question. *This case shows how reluctant courts can be to give up their authority to resolve legal disputes, even to the elected representatives of the voters. Now that Governor Quinn and the Illinois General Assembly have resolved their dispute over what qualifies a nonprofit hospital for a charitable property tax exemption in this state, they had better make sure that the courts will go along with them. Other charities, take heed.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

OUCH! THAT HAS TO HURT! – A federal trial court jury awarded a record company statutory copyright damages of $675,000 for willful infringement against a postgraduate student who illegally downloaded 30 songs through a file-sharing program. The trial court judge reduced that to $67,500 on constitutional due process grounds. The record companies appealed the reduction and a federal appellate court in Boston reversed the trial court reduction. After the student's appeal to the U.S. Supreme Court was denied, the record companies

can ask for another trial on damages or settle for a something less than $675,000. *A jury can award between $750 and $150,000 statutory damages per violation. The jury's award of $22,500 per violation is well within those limits. The student's Fair Use defense argument was rejected. His only leverage now appears to be a bankruptcy filing to get from under the damages claim. The damages may appear to be overkill for the offense, but the evidence and the student's own admissions at trial showed he had engaged in illegal copying and file-sharing of thousands of songs for eight years despite knowing it was illegal and being warned and directed repeatedly by his own father not to do it, by his college which prohibited such copying using the college's computer system, and by the plaintiff record companies. It's hard to feel sorry for him in the circumstances. Anyway, be careful what you download or distribute.*

EMPLOYMENT LAW DEVELOPMENTS

EEOC ISSUES NEW GUIDANCE ON EMPLOYER'S USE OF CRIMINAL RECORDS – The Equal Employment Opportunity Commission ("EEOC") recently approved the issuance of a revised enforcement guidance document concerning an employer's use of criminal arrest and conviction records in making hiring and other employment decisions. The guidance reaffirms that the employer may not intentionally discriminate, on the basis of race or national origin, against individuals with similar criminal histories. However, according to the new guidance, the EEOC will assume that an employer's racially/ethnically neutral policy (e.g., a "criminal record exclusion" that excludes all applicants from employment based on certain criminal convictions) will have a disparate impact on race and national origin, and thus will be subject to EEOC investigation. To defend such a policy, the employer will need to establish that the policy is "job related and consistent with business necessity." An employer may not be sued under Title VII when complying with (but not exceeding) a federal law or regulation that requires employers to consider an applicant's criminal record. However, compliance with a state or local law or regulation requiring or permitting criminal background checks may nevertheless result in liability if in conflict with Title VII. *Clear as mud? What's clear is that businesses can expect the EEOC to be aggressively pursuing more investigations of employer use of criminal background checks when making employment decisions. Be sure to get knowledgeable advice about this. The document can be accessed at: http://www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm.*

REGULATORY LAW DEVELOPMENTS

GROUPS FUNDING POLITICAL ADS MAY NOT KEEP DONORS ANONYMOUS – A federal appellate court for the District of Columbia, pending further review, has decided not to disturb a federal district court judge's order vacating a Federal Election Commission ("FEC") ruling that groups funding political ads generally need not disclose the names of their donors to the FEC if the groups refer to federal candidates in their ads but stop short of advocating their election or defeat. The judge's decision reinstated an earlier FEC rule that organizations independently making expenditures for election-related ads must disclose all donations of $1,000 or more dating to the first day of the preceding year, even if the ads do not expressly advocate a candidate's election or defeat. In such cases, the FEC, since 2007, had been requiring groups to disclose only the names of those donors who gave explicitly to finance a particular ad. *Several advocacy organizations are seeking further review of this matter by the appellate court, which, thus far, has merely ruled that it will not stay the effect of the judge's ruling while it is being formally challenged in the D.C. Circuit. Further court deliberations and rulings are likely in the case, especially in this election year.*

EVEN THE FED CHAIRMAN WARNS CONGRESS ON YEAR-END GRIDLOCK – Federal Reserve Chairman Ben Bernacke went on record warning Congress that the Federal Reserve can only do so much, and cannot prevent a major economic turndown if the administration and Congress are unable to come to some sort of consensus on tax rates and expiring tax cuts by December 31, 2012. He cautioned against waiting until the small post-election window from November 7, 2012 to December 31, 2012 to take action on expiring business, individual and estate tax rates and payroll tax cuts, other business tax credits and the spending cuts Congress imposed in connection with the last federal debt limit increase, and the need to increase the federal debt limit again by year-end. *But taking definitive action before the election would seem to take more political creativity, will and courage than either side seems capable of at this juncture. That sure complicates planning for individuals, estates, businesses, state and local governments, and last but not least associations, charities, and, oh yes, the IRS, which is supposed to enforce the tax laws and prepare the tax forms enabling the collection of 2012 taxes. And they wonder in D.C. why businesses are reluctant to hire and invest.*

JUDGE RULES ILLINOIS INTERNET SALES TAX LAW UNCONSTITUTIONAL – A Cook County (IL) Circuit Court judge has declared unconstitutional the Illinois Main Street Fairness Act, a law passed by the state General Assembly last year that required online retailers to collect Illinois taxes on sales made to Illinois residents if the retailers had affiliated companies in the state, even if the retailers themselves were located elsewhere. Judge Robert Lopez Cepero held the Act violated the Commerce Clause of the U.S. Constitution and conflicted with federal legislation prohibiting some Internet-related state and local taxes. After passage of the Act, some Internet-related affiliate businesses left Illinois for Indiana and Wisconsin rather than lose commissions from Amazon.com and other Internet sellers. *The Illinois Department of Revenue was the defendant in the case, and the Department is "reviewing its options," which certainly include appealing Judge Cepero's decision to a higher court. Illinois nonprofits purchasing goods from Internet sellers, as well as out-of-state nonprofits selling goods by Internet to Illinois residents, will want to keep an eye on this case.*

IRS DENIES TAX EXEMPTION FOR PROMOTING FOREIGN POLITICIAN – The Internal Revenue Service recently denied a federal income tax exemption under Internal Revenue Code §501(c)(4) to an organization formed to promote the political interests of a candidate for President of a foreign country. The IRS found that 80% of the organization's activities consisted of distributing books about the foreign politician and maintaining a website with personal information about the candidate, as well as articles concerning his policies and plans. According to the organization, the purpose of this activity was to create positive views about the candidate among citizens of the foreign country who reside in the U.S. but are eligible to vote in the other country's presidential election, as the organization considered that candidate the "most reliable and suitable politician" for the job of President. However, the IRS didn't see this political activity as promoting "social welfare" in the manner required of a §501(c)(4) group. *This is a change, at least, in that we hear more often about some nonprofit allegedly trying to influence elections in our own country. But we hope that the organization wouldn't have been considered any better qualified for this tax exemption if it were promoting a candidate for President of the United States.*

IRS REVOKES EXEMPTIONS FOR POLITICAL TRAINING ACADEMIES – *H&H Report Update* – In a series of nearly identical determination letters, the Internal Revenue Service has revoked federal income tax exemptions previously recognized by the IRS under §501(c)(4) of the Internal Revenue Code for a number of nonprofits having a primary purpose of identifying and training young women to

participate in political party leadership roles. It is clear that the activities of these organizations were intended to benefit one national political party unspecified in the determination letters, and that was the IRS reason for revoking recognition of exemption. These organizations were affiliated with each other through a national parent organization, but there is no indication in the determination letters as to whether or not they were related to some other nonprofits whose initial applications for recognition of exempt status under §501(c)(4) as a "social welfare" organization were recently denied by the IRS because they engaged in similar partisan political activities. *The key to these IRS decisions was that these nonprofits were engaged in partisan political activity rather than some nonpartisan political action, such as encouraging people to participate in the political process generally. Also the organizations were engaging in partisan political activity as their primary, if not exclusive, purpose and not as an activity secondary to other functions promoting social welfare. The boundaries of §501(c)(4) are being stretched a good deal farther than before these days but these were too far.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

SPIRIT'S CARRY-ON BAG FEE ESCALATES TO $100 – Spirit Airlines has announced its fee to carry a bag on a flight will increase up to $100 (from the current $45) starting in November. Of course, there are options: different and lower rates apply if the fee is added at the time of reservation, or if made using the Spirit check-in kiosks or at the Spirit ticket counter. Will other airlines follow suit? So far Allegiant appears to be the only one, but time will tell. Meanwhile, other airlines are continuing to quietly raise their bag fees for checked bags. *The airlines are now addicted to these ancillary fees for luggage, and anything else that the flying public will accept. Will it become a contest between Southwest's "Bags Fly Free" and Spirit's lower ticket price before all the add-ons? Stand by for other charges; this is just the early stage. The new fee disclosure requirements federal regulators have imposed on airlines should make purchasing a ticket even more of an ordeal.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

SOME POINTERS REGARDING LONG-TERM CARE INSURANCE – We are encouraged in various ways to consider long-term care insurance policies to help pay heath care needs as we age or run into health problems from disease or accidents. For those who itemize, long-term care premiums are partially deductible. But insurance carriers underestimated the claims and are belatedly taking major steps to protect themselves at the expense of policyholders. Some insurers have simply gone out of business in this field, stranding former policyholders. Others are steadily raising premiums, by 40% or more, and warning premium increases are likely to occur again. So much for those sales promises that your premiums are fixed and won't increase as you age. But the catch was "unless we raise the premiums for everyone in your class," and that is exactly what is happening. *Read the policies carefully before you sign on; understand premiums can and almost certainly will be raised for everyone; and consider agreeing to shorter coverage periods such as three years instead of for life, or forgoing an inflation-protection benefit, one of the major cost factors for insurance carriers. You may be surprised how those two moves will reduce your annual premiums.*

SHOULD TEXT MESSAGE SENDERS ALSO BE LIABLE FOR ACCIDENTS? – That was the question presented to a New Jersey state court trial judge by two persons badly injured in an auto accident resulting from distracted driving. The driver admitted he was responding to text messages from his girlfriend at the time of the accident. The injured couple sued the girlfriend on the basis that she should have known he was driving, and her messages and his responses would lead to his distracted driving and the resulting accident. The judge said no, the text message sender can reasonably assume the recipient of the messages will act responsibly and only read and respond when safe to do so. Otherwise any distractions leading to an accident could be the basis for a lawsuit. *Well, now, judge, if the message sender was aware her message recipient was driving, and responding to her messages while doing so, why is there some sort of presumption he would do so only responsibly and safely? Most states have laws against texting or emailing while driving, so why is it a stretch to say the sender who is aware the recipient is responding while driving is not contributing to an unsafe situation which state laws recognize as unsafe? The decision is headed to a New Jersey appellate court. Let's see what that court has to say.*

SEEN ON AN ELEVATOR MONITOR – *"*Outlet Outrage" is the term coined for unhappy computer, smart phone and other electronics device users unable to find electric outlets to charge their devices in public places. *Annoyance OK, but outrage?*

H & H DEVELOPMENTS

In June …

Jonathan Howe presented an Educational Familiarization Program entitled "The Lawyer Is Here" to a group of meeting planners interested in legal issues related to international locations for their events. He gave a webinar, "Meeting Professional, Event Planner – Count Your Keys Before You Finalize Your Plans." He also presented "It's A Brave New World: Current Trends Facing Associations" for a Kansas City, MO association.

Samuel Erkonen did a presentation entitled "Internet Policing of Trademarks Latest Developments" for a large manufacturing association.

Nathan Breen presented "Advanced Legal Issues for Meeting Professionals " in Atlanta, Georgia. Congratulations to Nathan also for his recent award from Lexington College as Educator of the Year. Nathan teaches Hospitality Law.

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