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THE HOWE & HUTTON REPORT

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TRENDING NOW

MONEY BUYS ELECTIONS? – Maybe the most surprising lesson to be drawn from the 2016 U.S. Presidential election is how small a role money can sometimes play in politics. Those who contend that money buys elections are generally political fund-raisers, whose jobs depend on people believing such things, and members of the media who like to trash right-wing politicians, who are presumed, often wrongly, to have the most money behind them. This year, official reports indicate that multi-billionaire Trump's campaign was, in fact, greatly underfunded compared with Clinton's. *Trump had a message some people wanted to hear, and he was able to get it out to them while spending comparatively little on media buys. How? By constantly saying outrageous things that the media and his opponents reported, assuming that they would turn voters against him. Not a recipe for political success that we would recommend, but it apparently works when you know enough of the voters well enough.*

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NOVEMBER REFERENDA OKAY MARIJUANA USE (SORT OF) – In November referenda, voters in eight states approved marijuana-related ballot measures, bringing the total number of states that allow marijuana use in some form to 28. *Theoretically, federal law still prohibits pot use, including use for medicinal purposes, anywhere in the U.S. But enforcing federal laws against marijuana use wasn't one of Obama's priorities, leaving it up to states to decide whether they wanted to do something about it. Will Trump try to change that course?*

SAME GREAT SERVICE ... NEW LOCATION

We are pleased to announce that as of January 1, 2017, our Chicago office will be relocated to the following address

Howe & Hutton, Ltd.
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Chicago, IL 60606

All phone, fax numbers, and email addresses will remain the same.

MEETING AND TRAVEL DEVELOPMENTS

DOT ISSUES NEW AIR TRAVEL REGULATIONS – The U.S. Department of Transportation has issued a few new regulations for airlines in response to an executive order from President Obama. The new regulations will require the airlines to tell the Department how many of their flights are operated by affiliated airlines, usually smaller, regional ones. Another regulation will require the airlines to report to the Department their total numbers of mishandled bags and checked bags. Travelers whose luggage is substantially delayed will be entitled to a refund of baggage fees. *An airlines trade association warns that the new regulations will drive up the cost of air travel. But the Obama Administration believed they would allow fliers to make better informed decisions when arranging flights, help ensure that airlines treat passengers fairly, and give passengers a voice in how airlines are regulated.*

HAPPIER AIR TRAVELERS? – The U.S. Department of Transportation reports that complaints about the airlines were down 12% in the first half of 2016 as compared with the same period in 2015. Gripes about delays, misconnections and cancellations were down 14% from the first half of 2015. But claims of discrimination were up, including complaints about treatment of disabled customers. *Not all types of complaints seem to have been recognized or reported by the Department. Aircraft cabins getting too crowded as airlines jam in more fliers? Baggage fees undisclosed in advertised ticket prices? Did nobody complain to the Department about those things?*

REGULATORY LAW DEVELOPMENTS

LOSE ONLINE, LOSE IN COURT – A federal district court judge has ruled that people who lost real money playing the "Casino" portion of an online computer game called "Game of War" can't sue the producer of the game under the Illinois Loss Recovery Act or Consumer Fraud Act. The plaintiffs in a class action lawsuit argued that the game involved illegal unlicensed gambling under Illinois law, and they claimed that they each lost at least $50 buying chips and in-game items that help players advance more quickly in the game. But the judge held that, even if the Casino portion of Game of War was illegal gambling (which the court did not decide), and even if Illinois law imposed other penalties for conducting improper gambling activities (which it does), the game producer couldn't be sued by "losers" under the Acts in question. The court said the producer wasn't liable in the suit because the producer didn't "win" money from the plaintiffs, since it had none of its own money at stake in the outcome of games in the "Casino" and made money only through its sale of the game, the chips and in-game items. Moreover, the judge said he would not hold the game producer responsible to the losers for the voluntary choices players made that cost them money in playing the game. *Nonprofits often try to raise money by conducting raffles, drawings and other games of chance that are actually prohibited or highly regulated under the complicated anti-gambling laws of many states, including the laws of Illinois. Some nonprofits, such as charities, can be licensed to legally conduct certain games, and, in doing so, they can avoid fines and government confiscation of game proceeds, which are often the penalties for conducting illegal games of chance. But this court did not consider whether the producer of Game of War was involved in illegal gambling, because the court didn't have to. Courts consider only matters they have to consider in order to decide a case. In this case, the only question the court considered was whether the "losers" in the Casino could sue the game's producers, and the court answered "no," whether or not this "game" was illegal!*

REGULATORY LAW DEVELOPMENTS (cont.)

DIFFERENT TREATMENT OF COMPETITORS FOUND DEFENSIBLE – An association representing owners of taxicabs and delivery vehicles failed to convince the U.S. Court of Appeals for the Seventh Circuit in Chicago that its members should be governed by the same municipal regulations as those applying to Uber and other competing ride-sharing companies that are new to the Chicago transportation market. The City of Chicago allows ride-sharing companies to set their own fares, while the association's members cannot, and are otherwise more tightly regulated by the City than are the ride-sharing companies. In this case, the association charged that the stricter regulation applied to the association's members was unconstitutional in that it discriminated against them and, by allowing competing ride-sharing companies an easier regulatory scheme, effectively took the cab companies' property rights (their licenses) without compensation. But the Court of Appeals disagreed, finding that the U.S. Constitution didn't require that new competitors in a market be forced to comply with every regulation that applied to incumbents in the market. Further, the Court of Appeals ruled that there were enough differences between taxicabs and ride-sharing services to justify imposing different regulations on them. *Okay for the City, but nonprofits applying different rules to competitors can be subjected to stricter antitrust scrutiny and punished for it.*

JUDGE TURNS COLD SHOULDER TO ICED BEVERAGE SUIT – Do you serve iced beverages at events? Ever thought you could be sued for putting "too much" ice in them? The chances of that happening became a little lower recently when a federal judge in Chicago dismissed a class-action lawsuit accusing Starbucks Corp. of ripping off customers by putting too much ice in their iced tea and coffee, allegedly in violation of various laws against consumer fraud and deceptive business practices. The judge rejected the idea that consumers were being deceived by Starbucks, noting that its menu included "iced" as part of the name of the drinks at issue in the case, menus indicated the drinks were served "over ice" or "with ice," and on-line ingredient listings for the drinks included ice. *Maybe you don't go through as much trouble as Starbucks to disclose that drinks you serve are "iced," "with ice," "over ice," and contain ice. But maybe you should. We know consumers who get enraged when they receive a drink loaded with ice. They get upset that they have to tell servers "no ice" just to receive a container of their drink that isn't half full of cubes. A similar suit was dismissed in California earlier this year. Watch out. Those militant ice-haters are on the march.*

FCC ADOPTS NEW CUSTOMER PRIVACY REGULATIONS – The Federal Communications Commission has adopted new customer privacy rules that require Internet service providers to obtain customer approval before marketing sensitive information they have collected, such as web-browsing histories. *The new regulations were adopted despite intense opposition from Internet service providers, some of whom are trying to cash in on the huge volumes of data they have collected on individuals.*

TAX LAW DEVELOPMENTS

COURT OKAYS MUNICIPALITY'S ENDING ANNUAL TAX REBATE – Your organization receives a discretionary rebate of municipal property taxes for several years, but the local government decides not to provide the rebate this year. Can your organization sue for denial of a government benefit without due process required by the U.S. Constitution? Not necessarily, even in this "entitlement" society, the U.S. Court of Appeals for the Seventh Circuit has ruled, finding that property owners had no protectable interest in a rebate authorized under a since-repealed local ordinance because the ordinance contained no guarantee of a continuing benefit. In fact, the language of the ordinance and the face of a rebate application form, in capital letters, showed that the municipality could deny requests for rebates and that approval by the city council was not guaranteed. *In this case, the fact that the rebate had been provided to the plaintiffs for 11 consecutive years was not enough to confer on them a constitutionally protectable property interest.*

RETAILER DIDN'T "RECKLESSLY" DISREGARD ILLINOIS TAX DUTIES – The Illinois Appellate Court for the First District has ruled that a California retailer's obligation to collect and pay Illinois use tax on its catalog and Internet sales in Illinois was legitimately unclear to the retailer, even after it had made good faith efforts to determine the extent of its tax liability. Therefore, though it might have to pay tax to the State of Illinois, the retailer wasn't required to pay a law firm $110,000 in attorney's fees when it sued the retailer under the Illinois False Claims Act on behalf of the State of Illinois. Sellers headquartered out of state are required by Illinois law to remit the use tax on Illinois sales when they have a "physical presence" in the state, such as a local office, but goods are sold by them from out-of-state through interstate commerce for use outside of Illinois. Attorneys are authorized under the Act to also sue to collect their legal fees from a retailer when collecting use taxes on behalf of the State, provided the retailer has "recklessly disregarded" its tax obligations. But the Appellate Court concluded that, in this case, even if the retailer was liable for the tax at issue, it wasn't liable for the attorney's fees under the Act because it had not "recklessly disregarded" its legal obligations in failing to pay the tax. Rather, the retailer was genuinely unclear regarding the extent of its tax liability, even after consulting attorneys and accountants about it, and it acted in good faith in failing to pay the tax while its specific tax obligations were unclear. *States today are doing their best to collect sales and use taxes from out of state sellers, and laws such as the False Claims Act help them do so by making it less expensive for states to bring a suit to collect the taxes, since the seller can be forced to pay the state's attorney's fees. In this case, the company's alleged tax liability was $5,181, which was dwarfed by the claim for attorney's fees presented by the law firm. Note, the ultimate tax liability for the retailer wasn't determined in the case, but only whether it was liable for the attorney's fees, which it won't be unless the Illinois Supreme Court reverses this court's ruling. The amount of the tax liability may have to be determined in further legal proceedings, and the State and the law firm may have to fight over the legal fees based on whatever contractual arrangements they have made or can agree to.*

EMPLOYMENT LAW DEVELOPMENTS

NO PRIVACY ACT EXCEPTION FOR ALL WORKERS HANDLING CREDIT CARDS – The Illinois Employee Credit Privacy Act generally prohibits employers from asking about or using credit histories of employees and prospective employees in making employment decisions. But the Act has an exception for employment that "involves access to personal or confidential information." So, does that mean employers can consider the credit history of prospective salespeople just because they could be called upon to handle customer credit cards? No, said the Illinois Appellate Court for the First District in a recent case involving an applicant for a sales position at Neiman Marcus who alleged that she was denied a job because she failed a credit check. The court found that Neiman Marcus sales associates do not have "access" to personal or confidential information within the meaning of the Act just because they receive credit card applications and place them in the cash drawers for delivery to the cash department at the end of the day. Rather, the court found that the Act's exception should be construed as applying only to managers and other select employees, such as credit office and loss prevention employees, who process credit cards and have access to credit card information after it is submitted. *This was a rare case where Illinois legislative history existed that could help a court decide a case arising under a statute. Legislative discussion of the Act showed that lawmakers had not intended to give employers the right to examine the credit histories of prospective sales people just because they might briefly handle credit cards.*

EMPLOYER CAN'T PAY WORKERS, BUT OFFICERS AREN'T LIABLE – An employer suffered financial reversals and failed to pay money it legally owed to its workers as a result, later suspending its operations. When the employer found a new funding source from investors two years afterward, it reopened and raised worker pay to its earlier level, but it never restored back pay that the employer had failed to give workers previously. Can the workers sue the employer's officers if the employer still hasn't the money to pay them their back wages? Employees in one case tried that recently, in addition to suing the employer. But the Illinois Appellate Court for the First District ruled that officers of the company could not be sued in such circumstances. Although the Illinois Wage Payment and Collection Act required the company to pay money legally owed to the workers to the extent it had the funds to do so, the Act extended liability for lost pay to an employer's officers only if they "knowingly permitted" the employer to violate the Act by failing to pay workers money they were owed. In this case, the Appellate Court concluded that the officers did not "knowingly permit" violation of the Act because the employer, at first, had no money to pay the workers, and, when the new funding was received, it was on condition from the investors that the company use the money for "specific and detailed purposes" not including payment of the back wages. *One key to the court's decision was the fact that there was a two-year lapse of time between the failure to pay employees and the receipt of new funding, during which time the employer had shut down. Also important was the fact that the officers continued to invest their own money into the employer when it was suffering financial troubles, which made it appear to the court that they had not acted with wrongful intent in denying pay to the workers.* *the failure to pay employees and the receipt of new funding, during which time the employer had shut down. Also important was the fact that the officers continued to invest their own money into the employer when it was suffering financial troubles, which made it appear to the court that they had not acted with wrongful intent in denying pay to the workers.*

EMPLOYMENT LAW DEVELOPMENTS (cont.)

NO WORKERS COMP FOR INJURY RETRIEVING DROPPED PEN – So you dropped your pen at work and injured your wrist bending sideways in your chair and falling out of your chair to retrieve the pen. Can you claim workers' compensation? A clerical worker for the City of Chicago couldn't because a divided Illinois Appellate Court for the First District found that his risk of the injury that he suffered was not specific to the work he performed, he had no duty to try and retrieve the pen while sitting in his chair, and the general public was just as likely to experience the same injury as he was. *Evidence that the worker couldn't bend forward to pick up his pen because of previous disk replacement surgery does not seem to have figured in the Appellate Court's majority decision. But one of the Appellate Court's Justices, in a dissenting opinion, said the court's finding that an employer would not reasonably expect a clerical worker to pick up a dropped pen "defies common sense."*

INTELLECTUAL PROPERTY AND LAW DEVELOPMENTS

TRUMP SUED FOR USE OF SKITTLES PHOTO – During the 2016 Presidential campaign, Donald Trump, Mike Pence, the Trump campaign and Donald Trump, Jr. were sued in a Chicago federal district court for copyright infringement arising from use of a photograph without the photographer's permission. The photo, showing a bowl of Skittles candy, was posted on Twitter by Trump, Jr. to warn against accepting Syrian refugees in the U.S., along with the comment, "If I had a bowl of Skittles and I told you just three would kill you, would you take a handful? That's our Syrian refugee problem." *Ironically, David Kittos, the amateur photographer now suing for copyright infringement, fled Cyprus as a refugee in 1974. Politics aside, publishing a photo without the copyright holder's permission is copyright infringement unless one of a limited number of exceptions applies. But letting your kids get you into a lawsuit with their tweets is also generally a bad idea, even if you are as rich as Trump.*

COPYRIGHT INFRINGEMENT LEADS TO $2.57 MILLION DAMAGES AWARD – The U.S. Court of Appeals for the Eighth Circuit In St. Louis has upheld a lower court's award of $2.57 million dollars in damages for copyright infringement by a company that extracted images from films belonging to Warner Brothers, such as 'Wizard of Oz" and "Gone With the Wind," for use on shirts, lunch boxes and souvenir items. Warner Brothers never authorized such use, and, even though the infringer argued on appeal that the award was disproportionate to the offense, the Court of Appeals let it stand, believing that a substantial award may have been necessary to deter future infringement and adequately provide restitution to Warner Brothers. *In this case, the courts found it significant that the infringer never ceased its infringing conduct during the eight years the case was being litigated. Further, the courts noted that the infringer kept such terrible records of its sales that it was difficult to calculate Warner's actual damages, which cut against the infringer's argument that the award was too high. At least two lessons can be derived from the case. First, if you know you might be infringing on someone's rights, and you're sued for it, at least stop doing it until the law determines that you aren't doing something you shouldn't. Second, keep good records of your ill-gotten gains so a court won't think you made even more money from illegal conduct than you actually did.*

OTHER ISSUES

LAWSUIT ALLEGES SEX TOY SPYING – A manufacturer of a vibrator is being sued by a woman who alleges that the sex toy can be used to secretly collect "highly sensitive" usage information and transmit it over the Internet. The vibrator is Bluetooth and Wi-Fi-compatible, can be controlled remotely by sex partners using a cellphone, and can transmit text and video messages. "Unbeknownst to its customers," the complaint reads, the manufacturer designed the vibrator to collect and record the dates and times of its use, the selected vibration settings, and the users' personal email addresses for transmission to the manufacturer's servers, demonstrating "a wholesale disregard for privacy rights." *Wholesale or retail, if it functions as alleged in the complaint, we think this toy goes a bit too far. It seems like we're all under a microscope these days, subject to round-the-clock surveillance wherever we are.*

SUIT FOR LIMITING SALES OF SUPER BOWL TICKETS FAILS TO SCORE – The U.S. Court of Appeals for the Third Circuit has upheld a lower court's dismissal of a lawsuit filed by football fans against the National Football League and its affiliates for limiting their own direct sales of Super Bowl tickets, allegedly "forcing" the fans to buy tickets at inflated prices on a resale market from teams and other "league insiders." The Court of Appeals found that the fans had no standing to litigate the matter because their suit was based on nothing more than "conjectural assertions of causation and injury." Just as the "realities of supply and demand mean that not everyone who wants to attend a popular event will be able to do so," the court noted, "federal courts, too, are not open to everyone who might want to litigate in them." Further, the court feared that, "Were we to decide otherwise (for the fans), anyone who purchased a Super Bowl ticket on the resale market would have standing to sue in federal court…" *Yes, and maybe fans who can't afford a Super Bowl ticket at all, in any market, would have standing to sue. As it is, the Court of Appeals decision supports the Free Enterprise right to limit ticket sales to an event and charge the highest price available for them, something to remember the next time you are on the outside looking in at a "sold out" event.*

CALL SCAM BROKEN UP – *H&H Report Update* – Federal authorities have announced that they have broken up a scam ring that duped people out of more than $250 million over a period of more than four years. Telephone callers posing as agents of the U.S. Internal Revenue Service and Department of Homeland Security falsely claimed that the victims owed back taxes or had other problems with the federal government that could be resolved by sending money to the callers. At least 56 individuals in India and the U.S. were involved in the scam and have now been indicted for various crimes. The takedown of the scammers represented the largest law enforcement action ever directed against activities of this kind. *This scheme targeted the elderly and immigrants to the U.S., but not all of the victims fit that profile. Never send money to anyone claiming to be a government agent unless you receive adequate paperwork supporting the demand. Scammers want you to respond to their phone calls and send money to them immediately, which alone lets you know that they are scammers. Call recipients who want to report scammers can do so through the Federal Trade Commission website at www.ftc.gov or call the offices of their state attorney general. Stay alert out there, all you readers.*

HOWE & HUTTON NEWS AND EVENTS

Naomi Angel reported on the preliminary injunction against implementation of the DOL overtime rule at a trade association Board of Directors meeting in Orlando. She also discussed current legal developments concerning product liability at a Board of Directors meeting of trade association of manufacturers in Dallas.

On December 1st , **Jonathan Howe** presented "Business Resolutions to Make for 2017" at the Destination Texas Conference in Houston, Texas.

On December 8th, **Jonathan** along with MaryAnne P. Bobrow, presented"Tech Swim Up: Risky Business: Cybersecurity" at the IAEE Annual Meeting and Expo in Anaheim, California.

On December 2nd, **Jonathan** presented "Market Negotiations and Contracts" for a group of meeting professionals in Nassau Paradise Island. Those in attendance earned a CMP credit for one hour.

Gerard P. Panaro co-presented a webcast on December 12th on **2017 Legal Trends for Non-profits**, sponsored by 501(c) Agencies Trust. He also covered the DOJ/FTC new guidelines forbidding "anti-poaching" agreements (agreements not to hire one another's employees); EEOC position on mandatory arbitration agreements (EEOC opposes them); NLRB enforcement of the NLRA with respect to social media, restrictive personnel policies, and OSHA directives on workplace violence.

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