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:

TRUTH IN HUMOR? YOU HAVE TO WONDER – Late night comedian Jay Leno commented in one of his monologues following the debt ceiling deal that after months of wrangling, Congress cut a deal as their annual five-week recess loomed. Not until it was time to go on vacation did legislators decide it was time to get a deal done. *Maybe Leno is on to something.*

WHEN DOUBLE-DELETE IS NOT ENOUGH – Many computer users assume that a double-delete is sufficient to erase files from their computers, and indeed double-delete entries are a basic way to get rid of unwanted data. But users should keep in mind that computer forensic experts have a variety of ways to recreate purged files, even if users have used simple or more advanced scrubber programs such as CCleaner. Keep in mind there are both good and bad reasons to clean or scrub or delete files, including running out of memory, outdated information, document retention and destruction policies, preserving confidentiality when getting rid of old equipment, etc., versus to get rid of records after a lawsuit is filed or subpoena is received, to hide wrongful or prohibited activities using workplace computers, use of illegal software, and similar reasons. *Once again, employers should have a policy in place that addresses data retention and destruction, use of outside or unauthorized software, and emphasizing that workplace computers are for the business activities of the employer who may inspect them for improper uses at any time.*

NOT THE HEADLINE THE IRS WANTS TO SEE RIGHT NOW – The Internal Revenue Service cannot always pick and choose the timing of headlines it would prefer not to see, so the news in August that 1,470 millionaires had not paid any income taxes in 2009 comes at a particularly bad time given current economic upheavals. Some millionaires escaped income tax due to legal deductions, tax-free income from municipal bonds, charitable contributions, and other exemptions, also called loopholes if they don't apply to your situation. *Wasn't the dreaded Alternative Minimum Tax or AMT imposed by Congress a number of years ago supposed to put an end to this? Back to the drawing board….*

GOOD READING … See you in September

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Not-For-Profit Law Developments

FAIR DEALERSHIP LAW APPLIED TO GIRL SCOUT CHAPTER TERMINATION – A federal appellate court in Chicago recently held the Wisconsin Fair Dealership Law, which prohibits termination of franchisees by their franchisor without good cause, could be applied to termination of a local chapter as part of a general chapter reorganization by the national Girl Scouts organization in the same way the statute limits termination of fast food and other franchises. A lower court had held the statute could not be applied to the Girl Scouts chapter termination because doing so would infringe the free expression rights of the national organization under the First Amendment, given that one of the stated purposes of the chapter reorganization was to promote diversity in chapter membership. But the appellate court reversed that decision and ordered further proceedings, finding the statute did not infringe the Girl Scouts' freedom of expression because the national organization, rather than terminating the chapter, could "just as easily" promote chapter member diversity by encouraging the terminated chapter to step up minority recruitment efforts. The appellate court also declined to read a general "nonprofit exception" into the statute, finding the Girl Scouts are commercially "not readily distinguishable from Dunkin' Donuts" in view of their cookie sales. *Say, judges, we can help with that distinction. Dunkin' Donuts is pursuing profits for its owners, whereas the Girl Scouts organization has no owners and is trying to raise funds to achieve governmentally approved public purposes. Usually state and federal courts do not get into the internal processes of not-for-profit organizations. Will this decision lead other not-for-profit chapters or affiliates to raise state law franchise claims in connection with termination or reorganization efforts? It appears to us to be a misapplication of a statute intended for the for-profit world.*

Intellectual Property & Computer Law Developments

GOOD ADVICE ON PROTECTING YOUR DOMAIN REGISTRATION – Oak Brook, IL accounting firm Selden Fox Ltd. offers the following suggestions on protecting your organization's domain registration(s). First, pick a major registrar that has been and will continue to be around, not just the least expensive one. Second, you do the registration filing; don't farm it out. Third, list yourself as the registrant, the administrative contact, the technical contact, and the billing contact, so that you are point person on all domain-related matters including e-mails. Fourth, use a mailing address and an e-mail address that you are likely to keep for a long time, and be sure to calendar or docket any renewal dates well in advance. And fifth, check on your registration regularly, several times (Selden Fox suggests four!) a year just to be aware if anyone tries to make changes. *With the proliferation in domain registrars we reported last month, you need to be even more aware and more proactive in protecting your domain registration(s).*

Regulatory Law Developments

FTC SETTLES DO-NOT-CALL VIOLATIONS FOR $100,000 FINE – The Federal Trade Commission entered into a settlement with an electric scooter manufacturer which had called more than 3,000,000 consumers who had placed their telephone numbers on the FTC's Do-Not-Call Registry. The company ran a sweepstakes promotion using direct mail, newspaper and television ads offering a free electric scooter. The sweepstakes entries provided a space for consumers' telephone numbers. Those who provided their phone numbers received telemarketing calls. The calls were in violation of the (federal) Telemarketing Sales Rule. While companies are permitted to make telemarketing calls to consumers with whom they have an established business relationship, such a relationship is not created by a sweepstakes entry. *You have to wonder at times why some companies consistently violate federal and state laws directly applicable to their businesses. The Tele-*

marketing Sales Rule and FTC enforcement regulations are well known, and consumers who put their names and numbers on the FTC registry are likely to complain if called. This company incurred a $2,000,000 penalty which it was unable to pay, and settled for $100,000. Even so, that had to hurt.

TAX LAW DEVELOPMENTS

COALITION TO FORCE AMAZON TO COLLECT SALES TAXES GROWS – There is an expanding coalition to support legislative efforts to force Amazon to collect sales taxes as other retailers with "bricks and mortar" facilities are required to do. More recent and notable supporters of requiring to Amazon to collect sales taxes are such retail heavyweights as Wal-Mart, Target, Best Buy, Home Depot and others who sell nationally and regionally in competition with Amazon. Amazon clings to a 1992 U.S. Supreme Court decision which essentially stated retailers without a physical presence in a state could not be compelled to collect sales taxes on products they sold and shipped into states. (Instead state and local government are supposed to collect use taxes from their residents on out-of-state purchases. California, for example, estimates it loses $1.1 Billion annually in uncollected use taxes.) A number of states have already forced Amazon to cut ties with sales affiliates, including Illinois, Rhode Island, Hawaii and North Carolina, rather than collect sales taxes based on ties to affiliates in those states, a strategy first developed in New York and which Amazon is contesting in court. Other states are expected to follow that approach to increase the pressure on Amazon. *With state and local governments desperate to find new or additional revenue sources, and competitors becoming even more unhappy as Amazon expands into ever more lines of products, the lobbying and legislative efforts to force Amazon to collect sales taxes will increase, and other online and catalog sellers across state lines will be caught up in the result. Associations selling across state lines should keep a wary eye on this effort.*

POLITICAL TRAINING ACADEMIES DENIED EXEMPTION – In a series of private letter rulings, the Internal Revenue Service has denied a group of nonprofit political training academies a federal income tax exemption under Section 501(c)(4) of the Internal Revenue Code as social welfare organizations. The goal of the academies was to train individual members of a particular political party to campaign for and become elected to public office. According to the IRS, notwithstanding any benefit the academies' educational activities might provide to the community, the organizations were not entitled to a social welfare exemption because they primarily served private interests in that their activities chiefly benefited a political party and its candidates. *The U.S. Tax Court previously denied such organizations an educational purpose tax exemption under Internal Revenue Code Section 501(c)(3). Now, the IRS says that an exemption under Section 501(c)(4) also is off limits to such entities.*

A PIGGY BACK RIDE ON A FOUNDATION LEADS TO TAX EXEMPTION – Lollapalooza, Chicago's biggest music festival of the year, will be exempt from paying Chicago and Cook County amusement taxes for the seventh straight year. According to Chicago officials, the reason for the exemption is because the promoter, C3 Presents LLC, partners with the Parkways Foundation, the Chicago Park District's nonprofit fund-rising organization. Parkway will receive a maximum of 10.25 % of the festival's revenue. Approximately 270,000 people were expected to attend the August 5-7 festival. This means that C3 Presents LLC will save in excess of $1 million by not having to pay the 1.5 percent amusement tax. *This is an example of a partnership between a for-profit events promoter and a charity teaming up for a win-win situation. However, before assuming that your joint venture will get the same treatment, make sure to consult local officials and an experienced attorney. Even though the city certainly could have used the tax revenue, the weekend's festivities should still be a boon for local businesses.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

FEDERAL COURT RULE UPHOLDS USE OF BODY SCANNERS BY TSA – A federal appellate court in the District of Columbia upheld the use of body-imaging scanners in airports by the Transportation Security Administration, rejecting a challenge to the use of such scanners as an invasive and unaccountable suspicionless search of individuals in violation of the Fourth Amendment's protection against unreasonable searches and seizures. The court acknowledged that the use of body-imaging scanners intrudes on persons' individual privacy, but the court concluded the government's requirements for security outbalances individuals' privacy expectations. *This challenge was brought by the Electronic Privacy Information Center ("EPIC"), often at the forefront on invasion of privacy issues presented by our wonderful world of electronic information -gathering. EPIC was pleased that the appellate court did say travelers have a right to opt out of the body-imaging scanner search (but end up with rigorous pat-down searches instead). Travelers had better get used to the scanners. TSA plans to double the current 478 scanners currently in use at 78 U.S. airports.*

NRA REPORTEDLY OFFERED $2 MILLION TO STAY AND SHIFT DATES – The National Restaurant Association, the other and more valuable to Chicago NRA, has reportedly been offered $2 Million to keep its 2012 trade show in Chicago next May, shifting its dates to May 5-8 rather than its previously contracted May 19-22 dates to avoid a conflict with the more recently scheduled NATO and G-8 summits which will be conducted in Chicago for the first time. The $2 Million bundle of financing is composed of public and private moneys and other promotional support, and is intended to offset costs and losses the NRA may incur with the change of show dates. The details of the deal so far are not publicly available. *The NRA trade show is a perennial top draw worth many millions to Chicago and the local business community. Its loss would have been a serious blow to the city for a variety of reasons. The competition between the NRA show and summits for hotel rooms alone could well have been a force majeure event for the show. Hosting a summit may seem prestigious for Chicago but it's exceedingly costly for security alone, while major trade shows deliver the economic goods as Chicago has previously discovered hosting presidential conventions versus trade shows. $2 million may have been a bargain in the circumstances.*

EMPLOYMENT LAW DEVELOPMENTS

CFAA AND EMPLOYEE'S PERSONAL USE OF WORKPLACE COMPUTER – A federal district court in Florida rejected an employer's creative use of the federal Computer Fraud and Abuse Act ("CFAA") in a counterclaim against an employee who had filed a pregnancy discrimination claim. The employer alleged the employee's excessive use of the Internet to spend time on Facebook and other social media accounts violated the CFAA. In rejecting the employer's counterclaim the court noted the CFAA was originally a criminal statute to deter hackers, and courts that have upheld CFAA use by employers were addressing claims involving transmission of trade secrets and proprietary information on company computers. This employer did not allege misuse of its workplace computer system to access its information or damage to its computers, or wrongful conduct causing more than the statutory minimum of $5,000 in one year. The CFAA was not intended to address excessive use of the Internet by an employee. *Nice try but no cigar. The employer was stretching too far to find a claim to use against its former employee. What this and every employer needs is a good policy addressing the use of employer-provided computers for personal use, a policy that is comprehensive, well-documented, well-publicized, and enforced.*

EMPLOYERS ARE USING OFF-DUTY SURVEILLANCE TO CHALLENGE CLAIMS – Employers are increasingly using off-duty surveillance tactics to counter what they regard as suspicious or unwarranted claims for worker compensation benefits based on workplace injuries and abuse of sick leave policies. Among the most common techniques is the simple videotaping or photographing of employees who engage in activi-

ties which they claim they are unable to do because of workplace injuries or other medical issues requiring an absence from work. Another common technique is having a person followed in public and the testimony of the person conducting the surveillance being used to contradict a claimed inability to work. *Are the fruits of such surveillance illegal, or inadmissible, or distasteful to judges or juries hearing such claims? No, no and sometimes yes, sometimes no. Evidence based on claimants' activities done in public is generally legal, admissible in court, and commonly used to rebut evidence submitted by claimants, including testimony of medical experts as to a claimant's inability to perform specific activities. Another source of such information is sometimes found on claimants' social networks. A picture or video may be worth a thousand words indeed!*

HERE IS AN ADA TREND TO WATCH OUT FOR – Claustrophobia is a potential Americans With Disabilities Act ("ADA") claim that employers may encounter going forward. An employee working for a county government recently sued her employer claiming that working in a cubicle led to an increase in her severe anxiety. The employer settled her claim for $150,000. Employment lawyers are predicting more ADA claims based on psychological disorders. *Employers must be aware that such claims must be taken seriously and accommodations considered lest they lead to significant damages being awarded. A recent ADA lawsuit in Illinois was based on a claim of acrophobia, a fear of heights. There are lots of other phobias that may lead to workplace claims.*

RETIREMENT INCOME RISKS FOR WORKERS – A sobering look at the shift from defined benefit plans to defined contribution plans, typically 401k plans, emphasizes that governments and private employers have transferred retirement income risks to workers. That improves employers' bottom lines but workers in many instances are not saving enough for their retirement needs. One of the solutions is for workers to work longer, and Social Security requires working past age 65 to obtain a 100% benefit. But employers are not always receptive to older workers staying past "retirement age," and many older workers may want to retire or at least cut back on their hours. *When 401k plans first came out, the not-for-profit sector was ineligible. Most associations, especially smaller groups, did not offer pension plans. When 401k plans were made available to the not-for-profit sector, many associations soon after offered them on a contributory or noncontributory basis. Today they are the norm for associations offering pension benefits. Associations could help their workers by providing information about what they must realistically do to save for retirement. Those who need that information the most may be least prepared or knowledgeable about what to anticipate.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

INVITATION TO A REGULATOR – There is a certain irresistible logic to the thinking espoused by the leaders of the United Mariachi Organization of Los Angeles ("UMOLA"), recently featured in a national newspaper covering the competition between allegedly low-ball priced and inferior mariachi music offered by some bands and the higher quality music by bands that have joined the UMOLA. But what is likely to attract the ears of regulators is not the difference in the quality of the music provided by the competing musicians but the words of the pledge agreed to by UMOLA members – dues of $10 a month (OK!) and an agreement to charge $50 per hour or more (not OK!). *The logic is something we have heard before so many times. Low-priced competition is the result of inferior products, service providers, etc. The list goes on. But there is an antitrust regulatory regimen in this country that says the market will weed out the inferior providers and products, and solutions based on agreements to charge above a minimum are per se violations of federal and states' antitrust laws. The UMOLA may be dancing to a different tune soon. Regulators do not deem even very small groups as beyond their purview.*

DOES THIS MAKE SENSE? ONLY TO CONGRESS! – As the nation (and much of the financial world) heaved a temporary sigh of relief that the U.S. Congress finally dithered its way to a compromise on lifting the debt ceiling and reducing future spending increases, a little sidebar played out over the Federal Aviation Administration's funding authorization bill. A stalemate partially shut down the FAA and would have continued past Labor Day as Congress took its usual summer recess without coming to any agreement on FAA funding. In addition to furloughing some 4,000 FAA employees, and stopping work on airport construction projects and laying off some 70,000 construction workers while the congressional impasse continued, the FAA could not collect an estimated $30 million a day in federal taxes on airline tickets. This was expected to add up to an estimated $1.2 billion in lost revenue because Congress could not agree on cuts in subsidies for rural air service and some labor rules. But even Congress can be shamed with enough public exposure and a deal was cut to extend the FAA's funding authorization through the end of September, putting FAA employees and construction workers back on the job for the time being. *Does this sound familiar? One side demands spending, the other cuts in spending and rule changes, meanwhile current tax revenues are lost and the economy is hammered. Now we recognize a mere $1.2 billion is chump change in D.C., and what are 74,000 more unemployed when millions are out of work, but it's one more indication how politics trump economics inside the beltway. Come September we face a renewal of our dysfunctional Congress at it again.*

SOCIAL ENTERPRISES TAKE A NEW FORM – In recent years, 9 states including Illinois have amended their Limited Liability Company and partnership laws to provide for a special form of social enterprise – the Low-Profit Limited Liability Company or L3C – designed to secure private sector as well as foundation investment. In a recent presentation by the Chicago Chapter of Association of Fundraising Professionals, it was noted that 65 L3C entities have been established in Illinois as of June 2011. Several charitable and educational organizations in Illinois have formed specialized Social Enterprises to pursue a variety of community improvement efforts, including major employment initiatives for vulnerable populations. In Illinois, such enterprises file as regular corporate or partnership taxpayers with the IRS, and send a copy to the charitable oversight bureau of the Illinois Attorney General's office. *One can expect to see more such well-organized and well-capitalized community and social enterprises, given cutbacks in many public human service agency budgets, and the growth of social networking business ventures which seek community partners to reach customers in underinvested communities. Happy flying.*

H & H DEVELOPMENTS

In August…

Jonathan Howe presented the following sessions: At Navy Pier, Chicago: "Legal Considerations for Meeting Planners," "Road Map To Successful Contracts," "Legal Matters For Meetings/Boot Camp," Parts I and II; in Orlando Florida: "I'll See You in Court!: Navigating Dispute Resolution" and "What's Happening From A Legal/Business Viewpoint?"; and in St. Louis, Missouri: "Ask The Lawyers Your Most Pressing Questions," "Legal Issues Impacting Association Management Companies and Their Clients," and "What's Happening From A Legal/Business Viewpoint?"

Contributors to this issue…

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