Just the Right Fit, Just in Time

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investigations; managing electronic data, including document destruction policies; dealing with independent contractors and vendors; advising it on worker's compensation and insurance coverage issues; negotiating with and responding to inquiries from regulatory agencies; dealing with local agencies to ensure compliance with local zoning and ordinances; advising on purchase and sale transactions; and filing and defending claims arising from each of these issues. Most recently, we recovered attorney's fees and costs the client incurred defending a workers' compensation action filed by an independent contractor that claimed the client was his employer. In that case, because the Workers' Compensation Board had determined that another entity and not the client was the true employer, we sought and obtained indemnification for the client the attorney's fees and costs it incurred from the true employer. Three years ago, all of this would have been done in-house.

But the *Just In Time* approach to managing legal costs only goes so far. The ability of outside counsel to provide excellent legal services with economic efficiency is equally critical. It has to be *Just The Right Fit*. We manage this efficiency by assigning the right person with the right legal expertise for the particular task. We do not layer attorney upon attorney, and we do not use matters as training grounds for new or inexperienced attorneys.

The optimal strategy we now see employed to cut legal costs is *Just the Right Fit, Just in Time.* ■

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Served Today, Trial Tomorrow

by Mark S. Adams

You could be in trial tomorrow on a case that was filed last week. This has been a surprising reality for clients – and lawyers. A special provision in the California Corporations Code Section 709, requires a trial to begin within five days once an action to determine the validity of a shareholder election or the appointment of a director is filed. I have handled many of these Section 709 Actions, and I have yet to appear before any judge that has ever even heard of them.

> Section 709 Actions have no specific statute of limitations, but since they are equitable claims, they are subject to laches.

Section 709 Actions do not simply challenge a vote count. Rather, courts are given wide discretion to consider all matters relevant to determining who the directors should be, not just technical or procedural issues.

The provision refers to both the "shareholder" filing the action, and "any person who claims to have been denied the right to vote." Courts have granted standing to those who merely assert they are entitled to vote, considering the merits of the action without first determining whether the plaintiff did in fact have a legal right.

The facts leading to Section 709 Actions are diverse. Some examples are as follows:

- Two self-appointed boards of directors were created when certain stock transactions lacked clear documentation and effective dates. A purported shareholder who had acquired stock through one of the suspect transactions brought a Section 709 Action to invalidate the other board.

- A Section 709 Action sought to validate the election of a board of directors, rather than to invalidate it, to ensure that subsequent actions by the board could not be challenged over questionable authority.

- Two competing shareholder factions claimed their representative director held the decisive fifth seat on an otherwise evenly divided board of directors. A special meeting of the shareholders was called by one faction, and only they showed up to the meeting. Because there was no quorum, the meeting was adjourned until immediately before the next shareholder or board of directors meeting. At that new meeting, defendants were able to elect their representative as the fifth director. A Section 709 Action determined whether the "adjournment" leading to the election was proper.

- A board had seven seats with three vacancies. The four directors were deadlocked. The bylaws provided a certain process for shareholders to elect directors at annual meetings. No annual meeting had been held for years. The bylaws provided that a majority of directors, although less than a quorum, could fill the vacancies and

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Protecting Ownership of Your Property:
The Importance of Employment Agreements

by Stanley M. Gibson

A recent decision from the Federal Circuit Court of Appeals, *Stanford University v. Roche*, 516 F.3d 1003 (Fed. Cir. 2009), highlights the importance of employment agreements in protecting the ownership of intellectual property. In *Roche*, the Federal Circuit faced the issue of whether Stanford University owned certain patents or whether a third party owned the patents of a Stanford researcher who performed some of his research while visiting Roche. In ruling in favor of the third party, Roche, the Federal Circuit examined the conflicting agreements, one that the inventor executed with Stanford (the "Stanford Agreement") and another that inventor executed with a predecessor of Roche (the "Roche Agreement").

> The ownership turned on the use of just a few words.

One of the central issues in the case turned on whether Stanford or Roche owned the invention created by the inventor who was visiting Roche while serving as a researcher at Stanford. The Stanford Agreement used the language of "agree to assign" while the Roche Agreement used the language of "agree to assign and do hereby assign." The Federal Circuit construed the language in the Stanford Agreement as a mere promise to assign in the future, which required Stanford to obtain a subsequent assignment by the inventor, which was not done. In contrast, the Federal Circuit found in favor of Roche because its language included an immediate assignment ("do hereby assign") of the future rights with no further action being necessary.

Obviously, the difference in the language is only a matter of a few words, but in this case–as in many others–the ownership turned on the use of just a few words. The lesson learned from this case is that companies should review their employment agreements and make sure they are adequately protected and that the assignments of inventions, designs and creations, as well as other intellectual property, are adequately protected. Otherwise, it may turn out that someone else owns what you thought was your intellectual property. ■

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any directors so chosen would hold office until the next election of directors at an annual shareholders' meeting. Two of the directors held a special directors meeting, filled all of the vacant seats, then appointed new officers and management of the company. A shareholder brought a Section 709 Action to determine the validity of the board.

- A shareholder brought a Section 709 Action challenging the election of the company's directors by written consent. The dispute was whether such an election required the signatures of a simple majority of shareholders, or all of the shareholders.

Clearly, the plaintiff in a Section 709 Action has a tremendous advantage during litigation. Typically, the plaintiff has fully prepared for trial before they have even filed the action. The defendant, however, is left with only a few days–or even hours–to prepare a defense.

There are ways, however, that the defense could slow the process down, including challenging jurisdiction, removing to federal court, demurring, asserting an arbitration provision, or commencing the trial within the five days and then continuing it.

Section 709 Actions have no specific statute of limitations, but since they are equitable claims, they are subject to laches. I have seen these lawsuits survive six months to a year after the challenged election has occurred. When successful, the actions taken by the errant board may be unwound.

To prevent these problems, a prescient draftsman could attempt to contractually waive the right to a Section 709 Action. For example, a venture capital firm could insert the anti-Section 709 provision into its financing agreements so that it never finds itself trying a case within five days of filing. No reported case has dealt with whether this statute can be waived, but it may be worth the attempt, particularly for venture capital firms who are likely targets of these types of actions. ■

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