



Business Update

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MasudaFunai

TOPIC OVERVIEW

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\$1.26 Billion Judgment Against PepsiCo Shows Importance of Registered Agent

The recent \$1.26 billion dollar default judgment against PepsiCo imposed by a Wisconsin state court has cast a spotlight on an otherwise obscure provision in corporate statutes - the need for a registered agent.

To recap, on September 30, a Wisconsin state court awarded a \$1.26 billion judgment to two Wisconsin men who claimed PepsiCo stole their trade secret, which was selling purified water in bottles. The suit alleges the men met with Pepsi in 1981 to discuss their "trade secret." About 12 years later, PepsiCo began selling its own brand of bottled water, Aquafina. The suit was brought in April, 2009.

Although PepsiCo argued that service (or notice) of the lawsuit was improper, it acknowledged blunders in handling of the claim. It acknowledged that its registered agent in North Carolina (where PepsiCo is incorporated) received the claim in September. (The plaintiffs claim they served the registered agent in June.) PepsiCo said the claim arrived at its deputy general counsel's office, where it was ignored because personnel were "so busy preparing for a board meeting." PepsiCo received the motion for the default judgment on October 5, after which PepsiCo discovered the original, ignored claim. But its actions did not prevent the default judgment.

However, no doubt much to PepsiCo's relief, the default judgment was vacated on November 6, which will give PepsiCo an opportunity to litigate the case on the merits, rather than losing based on a "no show."

But it was a close call, costing PepsiCo great embarrassment, if not (at least, not yet) legal damages. The case illustrates the importance of registered agents and the importance of paying attention to communications from a company's registered agents.

State corporate statutes require a corporation, either incorporated or qualified to do business in the state, to maintain a registered agent and registered office. (For example, see Illinois Business Corporation Act of 1983, Section 5.05 and Delaware General Corporation Law, Section 131)

In Illinois, a "process, notice, or demand required or permitted by law to be served upon a domestic corporation or a foreign corporation having authority to transact business in [Illinois] may be served . . . upon the registered agent." (Illinois Business Corporation Act of 1983,



Section 5.25) Similarly, in Delaware a registered agent is to "accept service of process and otherwise perform the functions of a registered agent." (Delaware General Corporation Law, Section 132)

The real value of a registered agent is in a situation precisely in which PepsiCo found itself. Generally, notices of lawsuits and claims are served on the registered agent. Under most civil procedure statutes, service on the registered agent starts the time in which the defendant must respond to the claim or lawsuit. As PepsiCo found out, failure to heed the time period, even inadvertently, could have disastrous consequences.

Did PepsiCo solve its problem by having the award vacated? In some ways, yes, but in other ways, no. First, in addition to the public embarrassment, PepsiCo certainly did not make a good impression on the judge in the case and is not off to a good start in defending itself. Second, PepsiCo no doubt spent a lot of money in legal fees to vacate the judgment, fees which, if PepsiCo had acted promptly, would have been unnecessary. Third, PepsiCo ran the risk that the judgment would stand, and it could only contest the amount of damages (a result that the attorney for the two plaintiffs clearly wanted). Finally, if there are settlement negotiations, the default judgment, although vacated, clearly did not help PepsiCo's negotiating position.

So the role of a registered agent, to help prevent these bad results, is important. But who should serve as registered agent? Often a corporation will use an employee or officer as a registered agent and will use its place of business as the registered office. Legally, this is acceptable. But the person serving as registered agent should be conscientious to handle promptly communications received as registered agent (and to train someone to do the same if the registered agent is out of the office).

An attorney in a law firm can also serve as registered agent. Attorneys, trained to recognize legal claims when they arrive, can be effective for this purpose. But, of course, an attorney or a law firm can only serve as registered agent where it has a physical office.

Finally, there are corporation service companies that serve as registered agents for a fee. Like attorneys, they are trained to promptly handle notices and claims. They will then send them to an individual designated by the company. But then this individual must know to promptly handle the notice or claim. Apparently, in the PepsiCo case, the individual failed to do so. Service of the claim was made on PepsiCo's registered agent in North Carolina, then forwarded to the deputy general counsel, whose secretary was too busy to pay proper attention.

Whichever choice a company makes as its registered agent, it is an important role to avoid unintended liabilities on a company.

For more information about this or any other corporate law topic, please contact Stephen Proctor, Chair of the Business Group, at 847.734.8811 or via email at sproctor@masudafunai.com.



About the Business Group

The Business Group at Masuda Funai is at the core of our extensive commercial practice. Our Business lawyers provide comprehensive legal advice and counseling to clients on a wide range of business issues from complex corporate and financing transactions to general day-to-day operational issues. We strive to provide, in a timely and personal manner, services that are tailored to each client's needs. We place special emphasis on clearly explaining U.S. laws and practices to our foreign clients doing business in the United States.

About Masuda Funai

Masuda Funai is a full-service law firm representing international and domestic companies operating and investing in the United States. Our 45 attorneys located in Chicago, Schaumburg and Los Angeles counsel clients in every aspect of business, including establishing, acquiring, and financing operations; ownership, development and leasing of real estate; transfer of overseas employees to the U.S.; employment, labor, and benefits counseling and dispute resolution; intellectual property, copyright and trademark; business litigation; creditors' rights and business risk management; structuring the distribution and sale of products and services throughout the U.S.; and estate planning and administration.

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