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“Tip of the Month”

Outsourcing, Intellectual Property, and Fiduciary Duty

A fiduciary is an individual, corporation or association holding assets for another party. Often, the fiduciary has the legal authority and duty to make decisions regarding financial matters on behalf of the other party. It is well established that the directors and officers of a corporation are fiduciaries of the corporation and its shareholders. The fiduciary duty includes the obligation to prevent waste of corporate assets and other actions and omissions that damage the corporation.

With the growing importance of intellectual property in a company’s overall value, any intellectual property mismanagement may be seen as a serious waste of corporate assets.

Offshore outsourcing is now a commonly accepted business practice. A company typically sets up an offshore entity, usually in a lower cost labor market. Although outsourcing has created new opportunities, it has also created new types of risks. By outsourcing, the control over all company functions becomes weakened. Weakened control increases the risk of illegal activity such as piracy, which may constitute a breach of fiduciary duty.

It is important to note that the relationship between a company and its outsourcing entity is not considered to be fiduciary. Consequently, management of the company should consider how effectively it will be able to control functions in its offshore entity. The officers and directors must carefully plan how to supervise the people directly managing the offshore part of the corporation. The effect of outsourcing on the intellectual property rights of a company needs to be critically evaluated. This is more so if the intellectual property makes up a significant portion of the overall net value of the company.

If control is not planned and executed properly, the company may find its intellectual property falling victim to illegal activities. By not devising and implementing a control plan, the directors and officers may be subject to litigation for breaching their fiduciary duty to the corporation and its stockholders for allowing such illegal activities to occur.

If you would like help in exploring the risks to your company’s intellectual property, please give us a call at 603-668-1971 or send an email to mailbox@biz-patlaw.com.

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