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### Employer Anti-Poaching Agreements: A Tale of Disney Legal Troubles

By Jeana Goosmann – February 16, 2016

Can a worker at Disney be snatched away by a competitor with promises of greater fairytales?

Once upon a time, the plaintiff in a shareholder derivative suit pending against Disney and its former and current board members claimed that, starting in the mid-1980s, companies in the animation business—including Pixar and Lucasfilm—attempted to reduce employer competition and depress employee compensation by agreeing not to recruit each other’s employees by “cold calling” them and by sharing employee compensation data. According to the complaint, these practices violated federal antitrust laws. While Disney had no involvement in originating the alleged deal, Disney is being sued now because Disney acquired Pixar in 2006 and Lucasfilm in 2012.

To understand this fully, we need to go back a few years to when the Department of Justice (DOJ) looked into these anti-poaching and employee information sharing agreements. In 2009, the DOJ began investigating the recruiting practices of Pixar, Lucasfilm, and other Silicon Valley companies. In 2010, the companies entered into final judgments with the DOJ agreeing to “refrain from soliciting, cold calling, recruiting, or otherwise competing for employees” unless those agreements were, inter alia, “reasonably necessary for mergers and acquisitions” or “reasonably necessary for . . . a legitimate collaboration agreement, such as joint development. . . .” The final judgments did not include any findings or admissions of wrongdoing, and the judgments did not fine or penalize the companies.

Following the DOJ filings, the anti-trust lawyers swooped in and filed numerous class actions arising out of the conduct in what became known as the High-Tech Employee Antitrust Litigation (HTEAL). Several derivative suits were also filed, and in September 2014, former animation employees filed a class action. Through this animation action, the plaintiff in the derivative suit received internal Disney books and records. Then the plaintiff raced to court to file his shareholder derivative suit in September 2015. In late December 2015, Disney’s lawyers moved to dismiss the suit in a very strong motion.

What can we learn from this Disney litigation tale? Unless an employee is covered by an employment contract, another employer is usually free to recruit the employee away from his or her current employment. If the employee is covered by an employment agreement, the competitors are still able to recruit the employee but may face tortious interference with contract claims in some states. Companies in the same narrow industry, like the animation industry, can get into trouble with the DOJ for violating antitrust laws and end up in endless offspring litigation if they collude with each other to prevent poaching. The sharing of information on employee compensation among the close competitors was another hot button issue.

Moreover, the internal books and records of a company need to be litigation-proof. Company emails remain a plaintiff attorney’s best friend for proving up allegations in a complaint. When the plaintiff in the animation action got his hands on Disney’s records, he then brought the shareholder derivative claim.

Even if the DOJ judgment did not impose any fines or penalties on the company, how many millions of dollars do we think the companies spent in legal fees to defend these actions? Were the savings from the anti-poaching deal worth the later legal fees and exposure? While making an anti-poaching deal may be possible, it should be crafted to show that it is not violating the antitrust laws—and documented accordingly—and the potential defense fees associated with such a written deal should be evaluated when the deal is struck. In practice, business people rarely paper these sort of anti-poaching agreements with their lawyers. Instead, they cut them at the conference and email about them later, and when a project underperforms and an employee doesn’t get the desired bonus, the employee looks for a new job and then has trouble because of the deal that was cut at the conference. The former employee’s sister’s friend is a labor lawyer, and before you know it, the litigation is off

and running.

What about the lessons for the merger and acquisition side of this tale? Well, certainly the DOJ recognized there might be reasonable legal reasons to refrain from soliciting, cold-calling, recruiting, or otherwise competing for employees in a merger or acquisition situation and in the context of a legitimate collaboration agreement such as a joint development. In drafting the reasonable provisions, I would recite with specificity the reasons why such anti-poaching clauses are necessary. Also, I would advise the company to educate the human resources department on the scope and nature of the provisions and remind the team what we put in email and what we do not put in email. The company should have a prepared standard response for situations that could be expected to arise in relation to the agreement.

Now, what if you are looking to protect your board of directors and entice new members to join your board? Certainly, you need to have directors' and officers' insurance in place that will protect them if they get sued in circumstances like this. The company also needs to have oversight systems and controls in place, such as an audit committee and a governance and nominating committee, along with a conduct policy and regular training on employee compliance with antitrust laws. This training should span all the way to the top of the company. This is because the offenders cutting the deals are usually in the C suite while the scandalous emails tend to be sent among the ranks. Prepare in advance for potential litigation and we can all live happily ever after. The end.

**Keywords:** litigation, corporate counsel, Disney, Pixar, Lucasfilm, antitrust High-Tech Employee Antitrust Litigation, HTEAL, employment contract, directors' and officers' insurance

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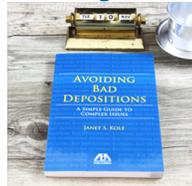
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