

*Sauer Scribbles Presents* (once again) the new singing sensation

# THE SOPRANOS

Volume XI, Issue One

April, 2011

35<sup>th</sup> Issue

With Their Number Two Hit

## ***DIVERSITY***

### Table of Contents

DIVERSITY ..... 1

PAY-WHEN-PAID CLAUSES AND THE NEW 2010 PROMPT

PAYMENT STATUTE ..... 16

JOKES ..... 34

GASTRIC BYPASS SURGERY AND OBESITY: MY STORY ..... 38

THE RUNNERS ..... 45



**“As that kid from the movie said, ‘we’re *baaaack!*’”**

## DIVERSITY

It is the worst of all times and then again, the *very* worst of all times. Nobody had ever seen anything even remotely like this. Businesses - even banks - failing left and right, almost too quickly to keep track of. Some Wall Street guys figuring out ways for cab drivers to buy five or six houses with no money down, maybe some of them not even being legal American citizens, all kinds of people getting rich selling sub-prime mortgages that they knew would never be repaid. The federal government, bloated with useless persons and resources like a dead cow sitting upright in the desert at one hundred and thirty degrees covered with flies, useless, full of nothing but infection and ineffectiveness.



“I never thought the ‘*elegant shredded fare*’ version of Fancy Feast would become an occasional treat ...”

People in their fifties and sixties now working twice as hard as they ever had before for half the money, almost forced to be happy to get even that. The concept of retirement becoming a four letter word, working older people living now on retirement funds, praying that when their time came they would be smart enough to simply die with little or no foreplay. Construction, as an industry, set on its head. A ‘low bidder’ now being virtually anyone willing enough/afraid enough/desperate enough to submit any kind of fixed price bid.

The Satin Lady in Norwood, late on a Friday night. On the Auto Mile where high brow Maseratis and Ferraris rubbed fenders with more pedestrian KIA’s, Toyotas and Nissans, the Toyotas patiently waiting for their return trips to the factory to fix - whatever. A delay, for that, with the recent unhappy experiences in Japan. Plenty of business here at the Satin Lady because people always sought company, even incorrectly reduced to just sex, when they were lonely or scared enough.

At the side of the building where there was a no parking sign, a very small car was flanked by four bikes: a Honda VTX 1800, a Suzuki B King, a Triumph Rocket III and a Honda Gold Wing, all big, heavy competent bikes full of themselves, all shined up waiting to ride *somewhere*. Surrounded by a north end-style deli and by a bail bond office, which was busy every day of the week, especially at night, even more especially on weekend nights when wolves would go out to howl. Busy enough to have a drive-through window - with a line.

A booming bass made the walls vibrate, exciting people getting out of their cars to join in the primal ecstasy of writhing bodies in a mass, a driving beat and a throng of people who know that in these modern times, as in the Depression, they still did, in fact, shoot horses, don't they?

Rocco, Luigi, D-Wayne and The Founder and a couple of lesser crew sat hunched over a scarred wooden table, a variety of meals in various states of being eaten. Killer, the cat, sitting expansively on its mink pillow near the door, watching all of them intently, seemingly wondering what any of them might taste like and how hard would it be to bite through their spinal cords, a feline approach to life - and death. Rocco and Luigi, covered with huge muscles, nonetheless looking over at the cat from time to time, uncomfortable, trying to protect their breath, knowing that cats had the ability at any time to take it, the truth be told.



“The boys seem to be afraid of me.”

“Boss, I can't believe how much weight you have lost,” Rocco said. Crossing his heart, “and I mean that with the greatest amount of respect.”

The Founder waved off the comment. “Don't tell me about losing weight.” He chuckled. “Though the ladies have surely noticed, I might say.”

“I'd be careful about that, Boss,” D-Wayne said. “Looks to me like Guppy Moon Cow might have one hell of a right hook.”

The Founder, seemingly involuntarily, flinched. “I want to hear about how much money I have been losing. Syl, you got the latest figures?”

“Tony,” he began slowly. “You're not gonna like this.”

“Well, I don't like my mother-in-law. And, I certainly don't like my prostate the way I gotta piss all the time.” He moved his right hand, like he was a cop directing traffic, trying to get it to speed up. “Let's hear it.”

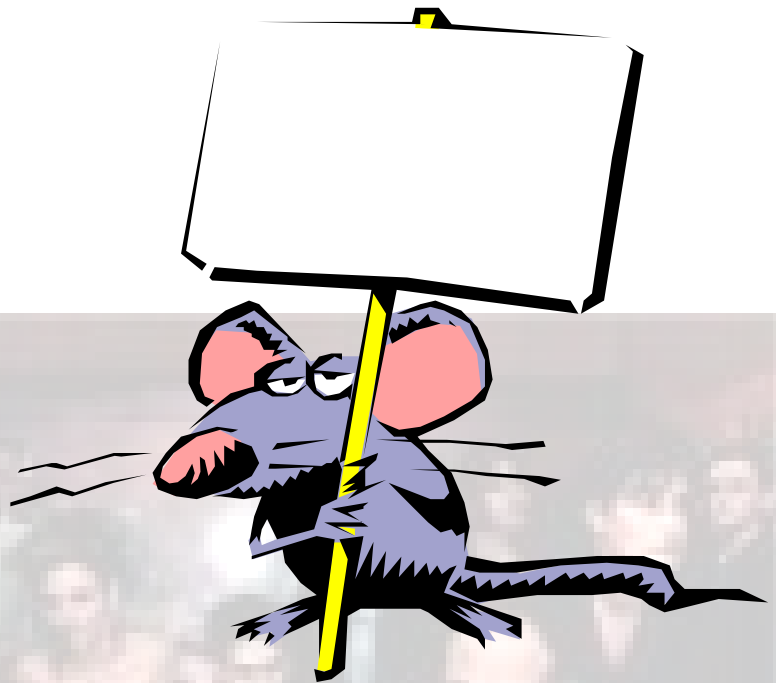
“Well, TRS, our truck retrieval business, which picks up the shit the tractor trailers dump on the ground due to those lousy locks in back . . .”

D-Wayne banged a pair of bolt-cutters on the floor a few times, everyone laughing.

“ . . . TRS is down about twelve percent off this time last year, about forty percent off for the last forty months.”

“And, this is because of . . . ? ” The Founder asked.

Syl shrugged. Even as a larger adult-sized rodent, this movement was fairly subtle. “People aren’t shipping as much anymore because people aren’t buying as much stuff.” He looked at some papers with figures on them, his green eye shade picking up the light of the one lamp on the table. “With less commerce, there is less shipping, so not as much stuff falls out of the back of the trailers.” He flicked his glasses down onto his narrow face. “Says here,” he said pointing, “that with retail business moving away from brick and mortar stores, more and more shipping is directly from the internet. These jokers don’t tend to use your basic common carrier - where we have most of our success - but use Fed Ex, UPS and the Postal Service whose trucks have, uh, better locking mechanisms that don’t open as much, you know, on their own.”



“Tony trusts me. I think this country will, too. Admit it. I have an honest face.”

D-Wayne banged the bolt-cutters against the floor again, more slowly, hitting the concrete hard, the noise dirge-like, no one smiling at all, as who liked not making money? The heavy rock beat was increasing in tempo and volume from the main room: must be that one of the girl’s routines was getting ready to end. One ends, another begins. As Sonny or Cher used to say, ‘the beat goes *on*’.

Syl flipped through some papers. “Catering is down thirteen percent this year, about the same as each of last three years. Our sanitation company also down: not as many construction job-sites.”

D-Wayne cursed. “And it’s getting harder to just dump stuff. The DEP and EPA checking more and more about what goes into the ground.” He grimaced. “Like they truly give a shit. Only that it’s a good source of fines, which goes to the general fund to support our latest war or government give-away.”

“I remember when you could plant anything - *anybody* - in the ground and nobody could care less,” Rocco said fondly. “Them’s was the days! Half the places we used to use are now parks and golf courses.” He sighed with contentment, looking up at the ceiling, his face beaming with the low reflected light. “Look at what we done! We have created what they call ‘societal improvements’!”

Syl looked at a different journal, his expression brightening. “At least people are still suing each other cheerfully and at a very high level. The law business has bigger numbers every year. We got like a standing order at Harvard Law every year: send over six or ten of your best from the current crop. Problem is, they don’t seem to last so long as they did thirty, forty years ago.” He looked thoughtful. “Maybe some of them find the requirement of 4500 billable hours a year is a bit steep. When I was a young lawyer, they worked me from seven am to midnight plenty of times.”

The Founder snorted. “Don’t understand this shit about not wanting to work weekends and holidays. Hell, we make most of our money working weekends and holidays.”

Syl looked at some other papers. “We got offers in on both the deli and the bail bond business. I think they are both going to bite. Guy over at the bail bond business says he’s gotta run it by the German shepherds, makin’ sure they’re down with it. Maybe we should pick up a car dealership or two along the strip. After all, Ernie is long dead and the kid doesn’t seem to fill the britches.” He theatrically cleared his small throat: “Our costs are less, so we can sell for less.” Everyone laughed.

“My old Irish boss used to say,” The Founder said, “that the key to success in construction was to have two failures and a fire.” He looked up at the ceiling, the cigar smoke from his fat Cuban spreading out sensuously along the ceiling in lazy concentric circles. “Guys would drive to bankruptcy court in a Caddy and, when they were done with their business and got their discharge, they’d stop off at a Lincoln dealer on the way back and drive home in a new Town Car.

*That’s the way things used to be!* After all, they went into bankruptcy to *make* money, not to lose it.” The ceiling tiles were bouncing in their metal suspension frames, vibrating from the heavy metal music out on the main floor. “I miss them days. Everything was so *civilized*. Everybody knew what they were doing and *why*.” He paused, sighing. “Now, they file bankruptcy because they are actually broke. Truth be told, I feel kinda embarrassed for these guys. Filing bankruptcy and actually being broke at the same time. It’s like adding insult to injury. It’s just not the way things used to be done!”



“It’s not civilized for me to have to eat Purina ‘or equal’.”

D-Wayne looked at The Founder's ten thousand dollar suit, even more expensive watch, ten carat pinky ring.

"Hey, Boss, you seem to be bearing up under the strain."

"That's not so!" The Founder said, a bit defensively. "I've had to cut *way* back. After all, I got rid of the Escalade and had to get a much smaller car. I can hardly fit in the damn thing."

D-Wayne blinked, shaking his head to the side. "That smaller car is a Bugatti Veyron, Boss, that goes for 1.7 million before the options."

"That may be," The Founder slowly conceded. "But Bugatti is owned by Volkswagen so it's sort of like I'm forced to drive a high end friggin' Beetle."

"High end?" D-Wayne asked.

"All right, *very* high end! Anyways, I gotta good deal on the options. The upgraded entertainment system was only twenty-five, thirty grand. I think I got maybe twenty or thirty speakers and a couple of sub-woofers. The dealer even threw in a free set of floor mats or somethin' and I don't have to pay for oil changes for the first three years." He raised his right forefinger in triumph. "And, I think it gets better gas mileage than the Escalade." He gulped. "God knows, it's got a lot smaller tank than the Escalade. Then again, most fire truck pumpers got smaller tanks than an Escalade," he muttered.

D-Wayne rolled his eyes. "The Space Shuttle gets better mileage than a Veyron. Seems to me I read in one of the car rags that it gets three miles to the gallon at its top speed of 253."

"Yeah, but at 253 mph, you do cover *a lot* of miles," The Founder said. "I make it from Sumner Street to Dean Street like that," he said, snapping his fingers.

"Any way you cut it, Boss, you only cover three miles with one gallon. At that speed, that's like only forty seconds of running time till she runs out of gas, go from a full tank to an empty one."

The Founder jumped up, almost knocking the table over. "Watch your mouth! Show some respect! In the old days, guys talk to the boss like that, they end up in the dumpster five minutes later. Nobody needs a smart ass captain, especially one that is not earning so good lately." D-Wayne shrunk into his seat, a bit hard to do, there being so much of him. The Founder was pointing an index finger at him, shaking from rage. "I put up with a lot from you, D, cause you're a *paysan* and because you *used* to earn good." He lowered his voice. "Keep in mind that



for a lot of guys, being a captain can be a very *terminal* position.” D-Wayne shrunk even lower in his seat, essentially out of sight, various appendages doing some shrinking of their own.

The Founder brightened, the storm having passed. “And I cut my bikes down from seven to just four!” He looked a little sheepish. “Not such a hard decision. Half the time I went to start one of them things, the battery was dead from sitting around too long. I blame it on the Harley, that jealous bitch. Always comparing herself against the others, always falling short. She turned the others against me, I just know it.” He put both hands over his heart. “Even now, it hurts me too much to even talk about these things.”

It was suddenly silent in the building. Maybe they were between dancers. Then again, maybe some one had raided the joint, although usually they got ten minutes warning before that happened, so they could clear out the *Love Tussle* rooms so that there would be no misunderstandings, oil, lotion and lingerie everywhere.

A new song started, softer. Each of the girls got to pick her own music. The house’s silver pole, the house’s stage. But each girl got to choose the music that would get her in the mood to dance.

The Founder looked at the door to the hall, as if someone were getting ready to enter the room. “We need another business,” he said with urgency, rapping his knuckles on the table to the slow beat of the new song, the diamond pinkie ring cutting into the table.

He looked up at one of the tv’s on the wall. There were several going at any given time. Usually, one was set on a financial channel, so they could check their stocks, evaluate their various equity positions. One was set to CNN or Fox, to keep an eye on the news. And, one was set on one of the “Law and Orders” for no other reason than someone was a joker.

Another showed the Court Channel. The President was speaking on one of them. Rocco turned up the volume.

“Son of a bitch, but I never thought they would elect a colored,” Luigi said, shaking his head with wonder.

“Colored? You can’t use words like that any more,” Rocco said. “ ‘Course, my sainted aunt used to call them ‘darkies’, God bless her soul,” he said, growing warm with the memories. “She would make the gravy every Sunday for the whole family. So thick that your spoon would just stand up straight, all by itself.”



“I need another business, too. Unlike White Kitty, my mind isn’t always on my dinner.”

“Been years since your spoon stood up at all, I would bet,” Luigi said. There was some good natured pushing and shoving between the two, Rocco throwing a punch that would have knocked out ten of the last twelve heavyweight champions, no questions asked.

Luigi, his eyes crossed, looked a bit confused. No concussion rules applicable in the crew at all: you get hit, you get hit, live with it. You get shot, deal with that, too. Doctors and hospitals were usually not available, with that goofy rule of theirs that they have to report gunshots to the authorities. “I thought they said was a Filipino or Hawaiian or somethin’,” he said shaking his head, like he was trying to get water out of his ears. “I seen a picture of him with that white hat, that circular thing, on a National Geographic cover.”

Rocco, looking surprised. “You *read* National Geographic?”

“Well, they used to have all them titty pictures back in the day,” Luigi said, reddening.

The Founder burped abundantly. “As usual, you all are full of shit. You call them African-Americans now and they are every bit as good as the rest of us. Lots of them crews earn better than we do. Hell, when you get right down to it, they basically are not much more than really dark Italians.” He looked across the table at each of his crew, their eyes never leaving his face, like back in the day when they were in Catholic school in Attila the Nun’s class, where not paying attention could cause real damage to be done to your hands, the way she liked to swing that ruler. “Anyway, I know for a fact that this guy is a *white* guy, same as us,” said the Founder with finality.



“How do you know that?” Syl asked, surprised.

“I know this guy, who said another guy told still *another* guy who told *him* that he’s a white guy, just like us,” The Founder said. “You know that they admit he’s got a white mother. I always thought it was kind of convenient that the so-called black father kind of just disappears to Africa, like Ernest Hemingway or somethin’. At least, *him* you could find in a bar or on a safari or polishing his shotgun, his not being too particular whether there was one in the chamber or not. This guy said that they just used this guy like an actor and then got rid of him so he didn’t show up on 60 Minutes or somethin’ like his Aunt did when they found out she was in public housing.”

“But why would they do that?” D-Wayne asked, testing the waters of a possible come back from possibly a pretty close call, when the Founder gets like that.

“It’s because you need an angle to get elected today,” the Founder explained. “That’s why they keep runnin’ the broads. And they’ll run one to one gets elected. Hillary nearly made it and no one even likes her. That crazy Alaskan broad has, maybe, half a shot, unless they got her in a picture with a moose or somethin’. The lesson of the twenty-first century is that it’s not enough any more to just keep runnin’ white guys because, in the final analysis, there really isn’t much difference between Republicans and Democrats. All of them guys are about the same. And, boring.” The Founder stood up pointing at the tv picture. “That’s why that Coffee Party is startin’ to really brew.”



“Boss, I think they call it the Tea Party,” D- Wayne said tentatively.

The Founder pounded on the table with both fists. “I’m tellin’ ya that it’s the Coffee Party, and that’s final,” he said, spittle going just about everywhere.

“You’re right, Boss,” D-Wayne quickly said. “My mistake.”

They all listened to the President talk some more. Something about what the Republicans were doing or not doing or going to do or *not* going to do. Personable guy, no doubt about it. Could do sports radio for twelve hour shifts all by himself, the words just flowing out. But what was that thing with the *ears*?

The Founder smiled with appreciation, waiving his hand at the screen. “That guy’s got the golden pipes. He makes Ronald Reagan look practically tongue-tied. He could talk the spots off a dirty window. I mean look at it. Born a poor guy, doesn’t come from much. Relatives in public housing, all that stuff. Gets some help getting a bunch of free rides through some good schools. Then, gets himself a job as a Chicago community organizer, some sort of shit like that. Local legislature for awhile, smart enough to know that he needed a godfather.” He looked around significantly. “A lesson that some of you goofballs seem to need to be reminded of, now and again. Where was I? Oh, yeah. Senator for a year and one-half, hardly long enough to learn where the nearest can is. Then, he runs for President, writes a couple of books, and he is now rolling in . . . *millions*.”

“He got that dog from Kennedy for free,” Syl allowed. “I mean, before he died and everything.”

“That may be, but at least, I bet, he doesn’t have to drive a stinking Volkswagen, like I hafta do,” The Founder bellowed. Most of the time, like summer lightning, these storms passed quickly, especially when there weren’t any guns involved. Guys start getting shot, these things tend to take on a life of their own. “Clinton did the same thing. As Ross Perot said, that guy who liked to hold hands like a fairy under the hood, he was only the governor of a state smaller than Dallas-Fort Worth. At one time he’s asking people, serious-like, to send him money for all his various defense funds for all of his various lawsuits. He practically gets impeached and he’s now rolling in the dough, too.” He nodded his head, judiciously. “Ticker’s not so hot, from what I hear.” “And the Mrs. has a weight problem, too,” he added. He looked down at his size 32 pants, plenty of extra fabric around the belt buckle. “Somethin’ I would know *nothin’* about these last couple of years since I let that foreign doctor from Chile cut me.”



“You gotta figure half the guys in elective office are stealin’ with both hands,” D-Wayne said. “The voters are brain dead, paying zero attention to what is going on, their lives like mice runnin’ on their treadmills in cages like in a pet store.”

Ratsputin gave him a look, very serious look. “You intend on waking up tomorrow morning, D?” he asked in a very low voice.

“Sorry,” D-Wayne said, lowering his eyes. “No disrespect intended.”

The Founder’s attention was elsewhere. “Imagine what we could do if we could bring this thing of ours into national office,” he exclaimed. “There is so much red ink in the federal budget, what, the few footnotes we might generate on page 2600 for a few small withdrawals would go unnoticed.” The songs were louder now, with a stronger beat. The evening was coming to an end and the single men and women left in the room looked at each other nervously, with not much more time left to make a choice, going home alone less and less unthinkable, this being a weekend and all. Out in the parking lot, someone in the drive-through at the bail bond office was leaning on the horn, annoyed.

“There’s gonna be another election in less than two years,” D-Wayne quietly observed.

The Founder looked at him hard. “Now, *that’s* the kind of thinking I want to see,” he exclaimed. “I *knew* we kept you alive for a reason.” A few seconds later, the Founder smiled, D-Wayne not so much. “We *do* need a new gig. Geez, Kennedy in 1960, when they said you couldn’t elect a Catholic. Then, 2008, they elect this Obama, who they think is a black guy, although we know

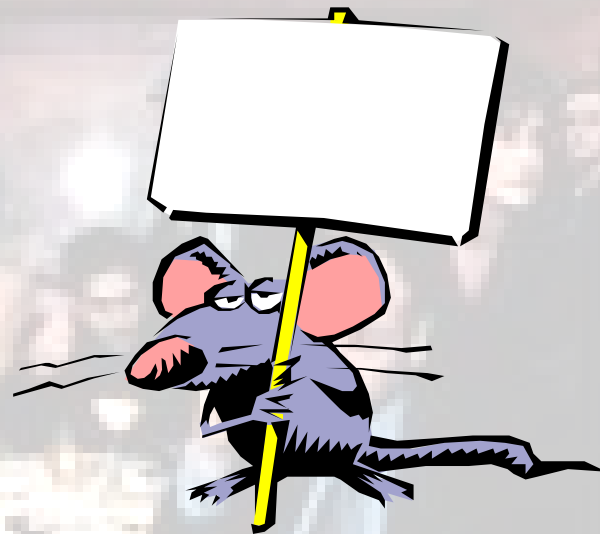
better. Who knows who else or *what* else might get in?" He thinks. "Catholics and blacks are *passee* now. Broads are belying up to the bar, their time nearly here. What we need is some *diversity*. We need to elect a *real* minority. The liberals are gonna eat it up." He rapped his knuckles on the table, the diamond pinkie ring really starting to create a pile of sawdust. "Gotta get one of our guys in there," he said softly. Suddenly he came to something like attention. "Somebody get out our copy of the Constitution."

Syl blinked. "You remember where we left that, Tony" he asked. "I don't think I have looked at it for, oh, I don't know, maybe a few weeks." He could talk to the Founder that way, but he was smart enough not to over-do it.

"It's probably under the take-out menus," Luigi said. They looked through a drawer that they threw all the miscellaneous stuff in and found it.

"Syl, *who* can be president?" The Founder asked.

Syl put on his glasses. A concession to age, bi-focals, but not with that line in them. "Tony, it says here in Article. II, Section. 1 that "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President."



"Who can be President? Natural born citizen, that's me!"

The Founder considers this. "Say, do they ever define who or what a 'Person' is?"

They look some more. Paulo, one of the newer crew, a college boy, looks at the internet. "It says here in one of these references - Wikipedia, maybe? - that, 'A person is a human being, or an entity with attributes that, depending on the context, are recognized as consisting in personhood.'" He read further. "But, later on, it says that in philosophy, these are often described as the features which typically set human beings apart from non-humans, mentally and/or physically, or as those features of their own identity which are of special concern or importance to human beings. However, it continues, those features may not be found in all human beings, or in human beings *alone*. Depending on the theory or definition, the category of "person" may include such non-human entities as animals, corporations, artificial intelligences, or hypothetical extraterrestrial life.'" A number of the crew were looking at each other wondering if the kid had been speaking in Greek or whatever.

The Founder smiles. "Extraterrestrials, it talks about them, too, huh?"

Paulo nodded from the terminal, reading some more to himself, his lips moving, a bad habit from at least third grade.

“I got some ideas along them lines, too,” The Founder said. “Say, does it say anything about what the vice president has to be?” The Founder said, looking at Syl. “Like, does he have to be a ‘Person’, too?”

Syl looked some more at the Constitution, shaking his head from side to side. “Not that I can see. But I haven’t really studied this thing since law school, where I was number three in my class.” He snorted derisively. “Discrimination. You know. No invite to the Law Review or anything.”

“What this country needs is some *real* diversity,” The Founder says with real feeling. He looks at Ratsputin, smiling broadly.

“I’d say, Syl, you’re a Rodent-American, wouldn’t you?”

“Yeah, so what?”

“How many rodents do you think there are in this country?”

“You mean, like counting both mice *and* rats at the same time?”

The Founder nodded encouragingly.

“Being as I’m growing faint with hunger, I’ll happily take both a mouse and a rat right now, as disgusting as that would usually be for me!”

Syl looked up at the ceiling, scowling with concentration. “Not counting the lawyers?”

“Yeah,” The Founder replied patiently. “Not counting the lawyers.”

“Why, there must be hundreds of millions, maybe even billions,” Syl responded. “Maybe even more than that. Trillions, even.”

“Imagine,” The Founder said with real excitement. “If we could just get ten percent of them registered to vote. Why, they could pick one of their own to run this country! They wouldn’t even have to hold an election. Sure, it would end up in the Supreme Court, like Bush and Gore. But, they gonna’ dismiss the claims of a true minority, who is, actually, in the minority? Shit, today’s society, anything goes.” He nodded to himself. “We gotta start voter registration campaigns. Chicago would be a good start.”



“Geez, Boss, it’s no secret that I’m not the sharpest tool in the box,” Rocco said. “But, they’d never let us get away with that.”

The Founder wagged his head from side to side. “You never know. Nothing ventured, nothing gained. If we could get the ACLU on our side and get rodents seen as a real minority, who knows?” He shrugged. “Nothing else, it’s something to keep us busy while we wait for good times to come back, assuming they ever do.” He looked at Syl. “So, you’re thinkin’ we should get a few car dealerships, huh?”

Syl nodded in the affirmative.

“Hey, up the hill from the Satin Lady, there’s that Volkswagen dealership next to that home store that ran into bad times fifteen, twenty years ago. We buy that, I’m not ever gonna have to pay for *any* oil changes!” the Founder said.

D-Wayne looked up from *his* laptop. Used to be that all you needed to bring to one of these crew meetings was a big appetite, a bigger thirst, maybe a heater. Swag, that was always welcome. “Says here that similarities between mouse and human genes range from about 70% to 90%, with an average of 85% similarity.” He read some more. “But there seem to be a lot of variations from gene to gene.”



“Another gene or two and I’d be a Killer cheetah, get me some real respect here.”

“I don’t know if you guys remember that Southern governor George Wallace, who got shot,” the Founder said. They all looked at the table with respect. Getting shot was something they could understand. “The one who fought all the blacks. In WWII, he flew a bunch of combat missions over Japan and got discharged with a 10 percent disability for combat-induced “psychoneurosis”, some crazy doctor word. Anyways, when he was runnin’ against some kind for some office, his opponent challenged him with his wartime psychiatric history. Wallace responded that unlike his liberal attacker, he could prove that he was 90 percent sane.”

“T, what’s the point?” Syl asked. As almost a partner to the big man, he alone, could ask questions like this and still live, at least, so far.

“Well, maybe you can prove that you are 90% human,” The Founder replied.

Ratsputin yawned. Almost three am, the place closed for an hour now. They could hear the

dishwasher cleaning the pots before putting them into the Hobart. Ratsputin got up with dignity, his smaller bones creaking, but quietly, unnoticeable. “Guys, your future *President* is goin’ to the kitchen and get some cheese and maybe a beer and tell that guy to stop making so much noise. Anybody want anything?” Surprisingly, for this crowd, they all nodded ‘no’.

Ratsputin walked down the dimly-lit corridor to the kitchen. He could hear the sound of them in the walls. His peeps. He owned the building through a few limited liability companies and trusts and he *never* used exterminators.

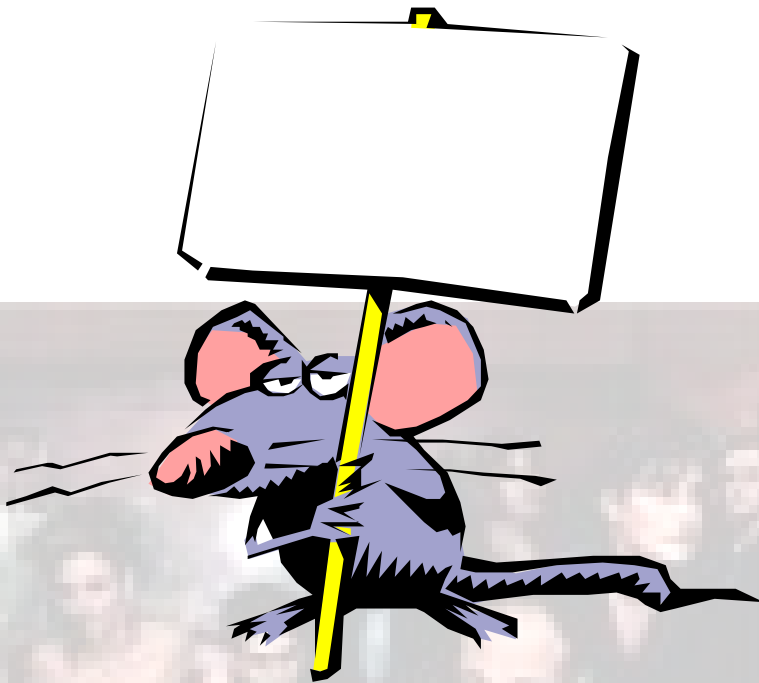
From a human perspective, the building was vermin infested. From Ratsputin’s viewpoint, he was not alone. “Good night to you, my brothers,” he said quietly, his nails tapping on the unpainted concrete walkway, kind of like Gene Kelly ripping off a dance with those shoes.

Three hours later, nearly dawn. The crew was in the back room, mostly half-asleep. Crew life in the family didn’t encourage outside families and some of these guys had no real place they had to go. D-Wayne, he hardly ever left, except it was to get a good meal somewhere other than the Italian. He liked the Chinese place just up the street, although the parking was a bitch. Sometimes, he would go there with Ebony, something they didn’t exactly advertise to their co-workers. She could be a riot with a few Mai Tais in her.

There was a sudden overwhelming noise that encompassed the building, causing it to visibly shake, so loud that it squeezed their very hearts. Everyone woke up quickly, confused, some checking for weapons. Kind of like the noise that Epping Drag Way in New Hampshire made just before the starting tree went to a green light, only to a factor of about *ten thousand*. Bottles were falling off of shelves and they could hear some dishes smashing as they hit the floor. The deep bass sound was so pervasive that you could feel it vibrating your very bones.

They rushed out to the parking lot to see three flying saucers, each about the size of Gillette Stadium, with all kinds of lights flashing on multiple levels descending, steam and other substances emitted through various openings in the vehicles as they landed on the field behind the *Satin Lady*, kind of near the golf course, not so far from the airport.

Ratsputin looked on with awe. “This can’t be good.”



“That’s Mr. President to all you goombahs!”

Out of the lead vehicle, which was a little larger, having landed in the foreground, a nine foot creature that looked kind of like a crocodile or a dinosaur or both with a mess of some other species stirred into the genetic soup came down the ladder. Covered with thick plates like an armadillo or an alligator, with six or seven rows of very sharp teeth in its craggy head. And, eyes. Eyes everywhere! Rows and rows of them. A very unpleasant smell wafting off of it, the bright pulsating lights from the space vehicles reflecting wetly off of the slime covering it, some of it rubbing off on everything it touched. An intense smell like sulphur suffused the field and the ambient temperature immediately raised one hundred degrees, everyone now drenched with sweat and maybe with some other things. Clearly, a few of the guys had pissed themselves. Some, maybe worse.



“Say, can you fellas help me out?”, K’nyacker roared in a deep grating voice, the words understandable but not quite

“Maybe a man would walk a mile for a Camel. I would fly half the universe for some good paint thinner.”

sounding human. The voice so low, James Earl Jones might as well be a soprano. “It’s been a long trip and my pipes are dry. Anyone have anything to drink around this dump?” He smiled, which was truly a terrible thing, something you really wished you would never have to see again. “Anyone have twenty or thirty gallons of paint thinner for me to wet my whistle with?”

He then saw The Founder. “Nice to see you, T. It’s been awhile.”

The Founder nodded, with great respect. “Hey, your Majesty, good to see you again” He went and kind of shook its wing or flipper, whatever the thing was. “Say, like we were talkin’ about recently, what would you think about running for Vice-President of the United States next year?”

The alien - he clearly wasn’t from New Jersey - stared at The Founder for what seemed like several minutes, his visage unknowable, a scene as quiet as the grave if you could tune out all of the noises the spaceships were making as they adjusted themselves. Then, he made that awful gesture again - a smile? - as he could see two of the crew struggling with a heavy load on the two wheeler, bringing out a drum of what looked like industrial solvents.

“The good stuff!” it exclaimed, gesturing at the drum. “First a bit of *vino*,” he said, looking at the Founder. “Then, maybe we can talk about business.” He companionably threw his wing or flipper over The Founder’s shoulder and, with Tony struggling with the weight, they all went back in to the back room. It could be heard to say, “like here, business is not so good in my neck of the universe, either.” The Founder responded, huffing a bit from being leaned on, “you have always been such a good earner, your Majesty.” As if responding to a stage direction, the spaceships ascended and went somewhere else.

After a time, the sun rose, as it has done for every day for the last four and one-half billion years. It was going to be a beautiful early spring day in Norwood. A bit cold. But, for those used to New England and its weather, just the way it was supposed to be. God’s country, really, for anyone in the know.

\*\*\*\*\*

## **PAY-WHEN-PAID CLAUSES AND THE NEW 2010 PROMPT PAYMENT STATUTE**

*By Attorney Jonathan Sauer*

### **A. The state of the ‘common law’ prior to the passage of the 2010 legislation**

In Massachusetts, there are a variety of sources of “law”. These include acts of the legislature, which may be ‘general laws’ or more limited laws, various regulations enacted by governmental agencies and, of course, judicial decisions, which form the “common law”. Up until 2010, the law in this area came from judicial decisions.



This area of the law is complicated. We can summarize it - to some extent - but it’s complicated as is, generally speaking, all issues where people are fighting over money. And, in the final analysis, that is all that pay-when-paid clauses involve: fighting over money and who assumes the risk of the owner’s not paying?

“All talk of that which is ‘common’ bores me ...”

**Introduction.** Initially, Massachusetts’ law has been generally unsupportive of “pay-when-paid” clauses. Now, a little discussion of the language. Some writers refer to “pay-when-paid” clauses as timing clauses, discussed below. Other writers refer to what are commonly understood to be “pay-when-paid” clauses as “pay-if-paid” clauses and that it is only “pay-if-paid” clauses that are to be truly feared and avoided. Was it the Bard of Avon who said “a rose is a rose is a rose . . .”? In this article, I will be generally referring to these types of clauses as “pay-when-paid” clauses, as this is how they are usually referred to by the various courts considering them.

The key concept in these discussions, however the phrase is described, is to ascertain in looking at the contract if there is a clear ‘risk transference’ from the general contractor to the subcontractor of the risk that the owner will not pay. When this occurs, payment to the subcontractor may be prevented, however you describe the clause.

The bottom line in these various analyses is to determine whether any provision relative to payment is express in terms of a certain number of days of receipt of payment (which may be a ‘timing clause’ or whether the provisions of payment within a certain number of days of payment clearly imply that the subcontractor accepts the risk of non-payment, which may become a ‘pay-when-paid’ clause.)

Appellate courts, like other human institutions, appear to waffle and be less firm and clear than one might hope. Due to the fact that “pay-when-paid” clauses are not judicially favored, it seems that many of the cases finding operative language to be mere “timing clauses” may be strained somewhat due to the disfavor of the pay-when-paid clause.



“Courts? In Massachusetts, some of the Current judges are born right out of my very own primordial ooze.”

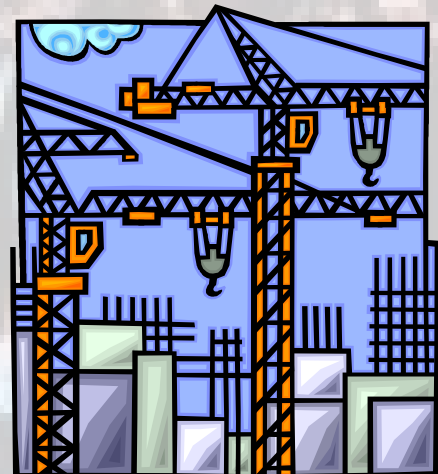
1. **Massachusetts law is clear that only contractees fully performing their contracts have standing to sue to collect under their contracts.**

A ‘contractee’ is a party to a contract. “Pay-when-paid” clauses and their affects on getting paid necessarily assume that the subcontractor is otherwise entitled to be paid. For, a subcontractor not materially performing its subcontract is not generally entitled to payment on its subcontract regardless of whether or not there is such a clause in its subcontract.

This legal principle is referenced in the case of Handy v. Bliss, 204 Mass. 513 518-519, 90 N.E. 864 (1910). As stated by the Court, the general principles in construction cases are:

“To entitle the plaintiff to recover in a case of this kind there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximation to complete performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense or with great risk to the building. There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable. Notwithstanding such an omission, there might be a substantial performance of the contract.”

Here are some additional cases with similar holdings. In the absence of special exculpatory circumstances, an intentional departure from the precise requirements of a building contract is not consistent with good faith endeavor to perform fully, and bars all recovery unless it is so trifling as to fall within the rule “de minimis”. Andre v. Maguire, 305 Mass. 515 (1940). See, also, Acme Plastering Co., Inc. v. Boston Housing Authority, 21 Mass.App.Ct. 669, 490 N.E.2d 445 (Mass.App.,1986), which is in accord. Generally, a party to a contract who intentionally departs from its terms of the contract will be denied recovery under the contract. Chaplain v. Dugas, 323 Mass. 91. (1948). A building contractor who intentionally failed to perform his contract in the important matter of a steel I-beam, but who substituted instead a wooden beam, could not recover on contract. Le Bel v. McCoy, 314 Mass. 205 (1943).



So, whether you are a supplier or a subcontractor or a general contractor, the common law is clear that if you don't substantially perform the material provisions of your contract, you will not be entitled to recover on that contract. Thus, the presumption for our discussion of the pay-when-paid issue is that the supplier or subcontractor seeking payment is otherwise entitled to that payment legally in the sense that it has materially performed the contract upon which it seeks payment.

## **2. The lead case and the issue of “timing clauses” as compared with true “pay-when-paid” clauses”.**

In the case of A.J. Wolfe Company v. Baltimore Contractors, Inc., 244 N.E.2d 717 (1969). This was an action at law brought by a subcontractor against a general contractor for amounts due under the subcontract and for extras. The Supreme Judicial Court, which is the highest court in the Massachusetts state court system, held that a provision of the subcontract that payment would be made by the contractor to the subcontractor on monthly requisitions for progress payments as

received by the contractor from the owners as merely setting the time of payment and not creating a condition precedent to payment by the contractor to the subcontractor.

The specific language in question was as follows: Payments were to be made “. . . and within 10 days after (the owner’s) payment of such monthly progress payments. . . (has) been received by . . . (Baltimore).” The Supreme Judicial Court said on pages 720-1 of the decision that:

“We interpret Art. II(a) merely as setting the time of payment and not as creating a condition precedent to payment. In the absence of a clear provision that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner, such a provision should be viewed only as postponing payment by the general contractor for a reasonable time after requisition (and completion of the subcontractor’s work mentioned in the requisition) so as to afford the general contractor an opportunity to obtain funds from the owner.”

In other words, the general contractor would be required to make payment irrespective of whether or not payment had been received from the owner and language as to when payments were to be made was to simply set forth a time period during which the general contractor could make a requisition to the owner for that subcontractor’s work. Such a clause is typically referred to as a ‘timing clause’.



“Timing clauses, yes ... don’t die quite yet, little mouse, come on, it’s time to play ...”

### 3. Another case on “timing clauses”.

Nine years later, the Appeals Court decided the case of Bayer & Mingolla Industries, Inc. v. A.J. Orlando Contracting Co., Inc., 370 N.E.2d 1381 (1978).

This was a case where a subcontractor brought an action against a general contractor on a state construction project for release of retainage held by the general contractor, *inter alia*. The Appeals Court held that where more than 65 days had passed since the subcontractor’s substantial completion and where there was no dispute as to the quality of the work performed by the subcontractor, the entire balance of retainage was due the subcontractor and was not contingent upon final payment from the owner. The pertinent portion of this decision is on page 1382 as follows:

“The plaintiff is correct in its contention that the phrase ‘upon receipt of final payment by the owner’ should be interpreted as setting a time for payment which is sufficient to give the general contractor an opportunity to obtain funds from the owner, and not as creating a condition precedent to payment where there is a dispute between the owner and the general contractor not

involving the subcontractor. (Case citation). The defendant attempts to distinguish the Wolfe case on the grounds that it involved progress payments whereas the present case involves retainage. That argument is unpersuasive. The court in Wolfe, at 366 n. 8, 244 N.E.2d 717, cited with approval the case of Eastern Heavy Constructors, Inc. v. Fox, 231 MD. 15, 19-20, 188 A.2d 286 (1963). In that case, in which a retainage was to be paid to a subcontractor within tendays after final payment by the owner to the general contractor, the court upheld a decision awarding the subcontractor the full amount retained, although the general contractor had not yet been paid in full by the owner, on the basis that the subcontractor's remuneration should not depend upon a dispute between the owner and the general contractor as to matters not concerning the subcontractors."

A recent Massachusetts case on this issue in the case of Jeremiah Sullivan & Sons, Inc. v. Kay-Locke, Inc., 459 N.E.2d 837 (1984).

The court on page 838 cited both the Wolfe case and the Bayer & Mingolla case with approval noting that the latter case held that a "similar provision did not create a condition precedent to payment where there is a dispute between the owner and the general contractor not involving the subcontractor. The Appeals Court on page 838 talked of "clarity of language" necessary to establish a condition precedent. Moreover, in reviewing the record on appeal, the Appeals Court was looking for evidence that it was "clearly understood (by the parties) as a condition to payment" before finding a condition precedent.

In Framingham Heavy Equipment Company, Inc. v. John T. Callahan & Sons, Inc., 61 Mass.App.Ct. 171, 175-176, 807 N.E.2d 851 (2004), the Appeals Court had this to say concerning pay-when-paid clauses:

"Callahan's primary claim on this appeal is that it was not in breach of contract for not paying Framingham because the subcontract documents contained "pay when paid" provisions, that is, payment to Callahan by the city was a condition precedent to payment by Callahan to Framingham. We are mindful that in construing such a contract, a condition precedent to payment may not be inferred; the contract must clearly state "that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner." A.J. Wolfe Co. v. Baltimore Contractors, Inc., 355 Mass. 361, 365-366, 244 N.E.2d 717 (1969). See Jeremiah Sullivan & Sons v. Kay-Locke, Inc., 17 Mass.App.Ct. 997, 998, 459 N.E.2d 837 (1984); Canam Steel Corp. v. Bowdoin Constr. Corp., 34 Mass.App.Ct. 943, 944, 613 N.E.2d 121 (1993). In the absence of such a direct contingency, provisions should be viewed



"Playing with mice just tires me out ... and makes me hungry."

“only as postponing payment by the general contractor for a reasonable time after requisition ... so as to afford the general contractor an opportunity to obtain funds from the owner.” A.J. Wolfe Co. v. Baltimore Contractors, Inc., supra at 366, 244 N.E.2d 717.”

4. **The general contractor can not rely on the pay-when-paid clause if it is its own conduct which precludes payment.** The Massachusetts Appeals Court in the case of Lobosco v. Donovan 30 Mass.App.Ct. 53, 565 N.E.2d 819 (1991) held that:

“ . . . it is fundamental that a promisor may not avoid his promised performance based on the nonoccurrence of a condition, where the promisor has himself hindered or prevented its occurrence. Rigs v. Sokol, 318 Mass. 337, 345, 61 N.E.2d 538 (1945). Cellucci v. Sun Oil Co., 2 Mass.App.Ct. 722, 733, 320 N.E.2d 919 (1974). Restatement (Second) of Contracts § 245, and comment a, illustration 2 (1981).”

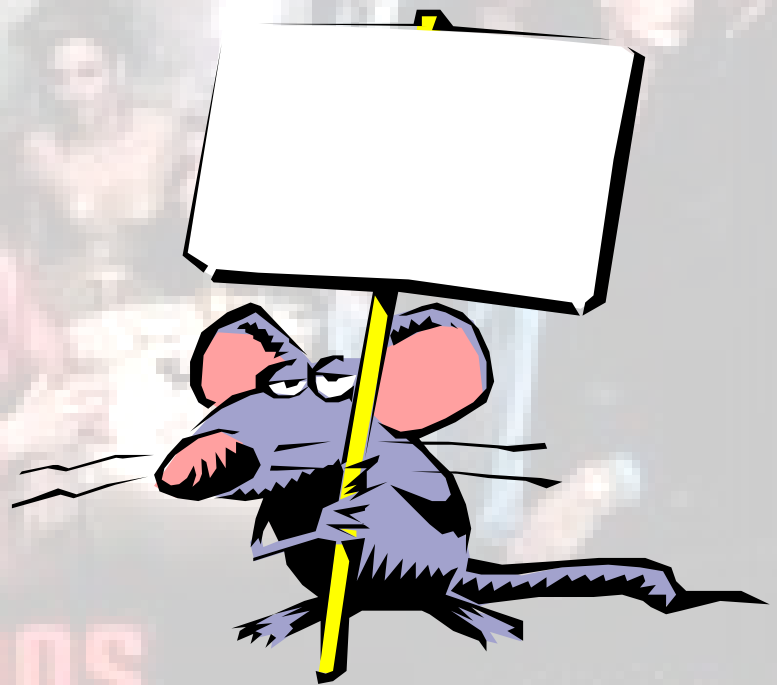
5. **A ‘down stream’ supplier may not be bound by a pay-when-paid clause in its subcontractor’s subcontract with general contractor.** In the case of

Canam Steel Corporation v. Bowdoin Construction Corporation, 34 Mass.App.Ct. 943, 613 N.E.2d 121, 123 (1993) the Appeals Court was called on to determine the applicability of a clear subcontractual pay-when-paid clause (as between the subcontractor and the general contractor) as to how it would apply to the claims of a supplier to a subcontractor. The supplier had been concerned about the existence of this clause and had received written assurances from the general contractor prior to entering into its agreement with the subcontractor that the general contractor would pay the supplier, as follows:

“It is our intent to issue a check

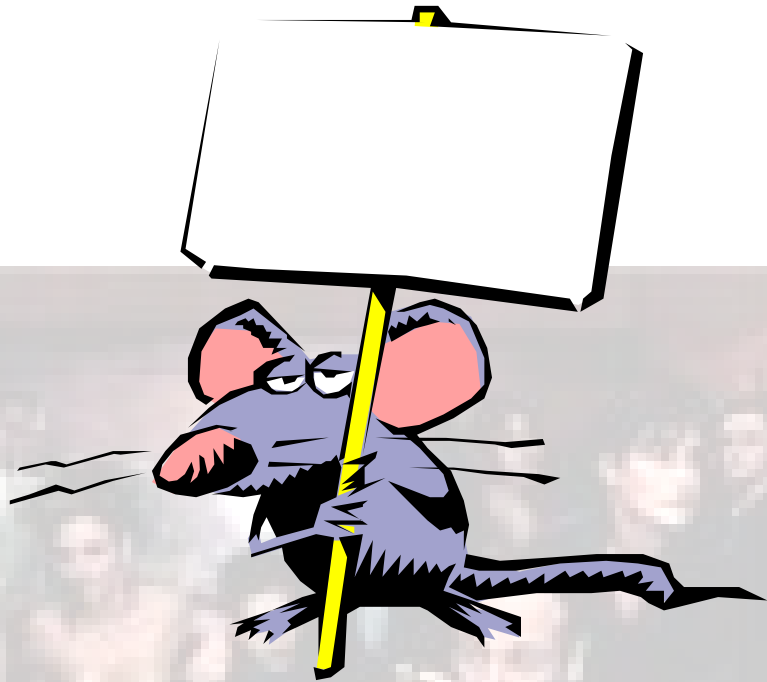
made jointly to Canam Steel Corp. and Boston Boiler Works, Inc. for their P.O. # 1867 in the amount not to exceed \$37,422. It will be paid 60 days from the date of your invoice. This is for materials on Paragon Plaza only. The following signatures will execute this agreement. Payment to be made under the terms and conditions of the contract between Boston Boiler Works, Inc. and Bowdoin Construction Corp.”

As stated by the Court:



“I admit it! I actually wrote this article.”

“Bowdoin's position is that the last sentence of its letter to Canam, referring to the subcontract between Bowdoin and BBW, was sufficient to bind Canam to the “pay when paid” provision. A provision tying payment to a subcontractor to receipt of payment by the general contractor from the owner is, however, not effective unless that contingency is very clearly expressed. A.J. Wolfe Co. v. Baltimore Contractors, Inc., 355 Mass. 361, 365-367, 244 N.E.2d 717 (1969). Here Bowdoin's undertaking to issue a joint check to Canam and BBW within a specified time is express while its reference to the “pay when paid” contingency is at best indirect, viz., through incorporation of the entirety of a three-page printed form set in six-point body type and containing provisions which, by and large, are irrelevant to a supplier of materials. To the principle of the Wolfe case may be added two guides to the interpretation of contracts: first, that ambiguities, if any, are resolved against the party which drew the instruments of agreement, here Bowdoin; and, second, that tailor-made provisions trump the provisions of a printed form.”



“You see, I’m a lot more than just another pretty face.”

In considering this case, please keep in mind that the holding is very much limited to the facts of the case and does not generally establish the proposition that the supplier is not bound by such provisions generally. The operative fact in this case is the general contractor’s specific representation to the supplier that it would make payment. The Court found that the potential conflict in such a *specific* representation and the terms of the subcontract between the subcontractor and the general contractor should be resolved in favor of the supplier.

**6. Even an enforceable pay-when-paid clause may not defeat a claim on a surety bond.**

There was a recent case which says that a pay-when-paid clause will not be operative in a claim against the contractor’s payment bond surety. This is the case of Coastline Fire Protection Co., Inc. v. Peabody Construction Co., Inc. 2004 WL 1791425, pages three and four (Mass.Super.). This decision was issued with regard to a motion for a preliminary injunction and a motion for summary judgment.

There was the following pay-when-paid clause in the subcontract between Coastline, a subcontractor, and Peabody, the general contractor:

“NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT OR IN THE OTHER CONTRACT DOCUMENTS, IT SHALL BE A CONDITION PRECEDENT TO THE OBLIGATION OF CONTRACTOR TO MAKE ANY PAYMENTS TO SUBCONTRACTOR UNDER THIS AGREEMENT THAT CONTRACTOR SHALL HAVE RECEIVED PAYMENT FROM OWNER FOR THE WORK PERFORMED BY SUBCONTRACTOR.”



With regard to Coastline’s claim against Peabody’s surety, the court said the following:

“As a general rule, a ‘surety is not liable to the creditor unless his principal is liable.’” *Mestek, Inc. v.*

*United Pacific Ins. Co.*, 40 Mass.App.Ct. 729, 731, 667 N.E.2d 292 (1996), quoting *Rhode Island Hosp. Trust Natl. Bank v. Ohio Cas. Ins. Co.*, 789 F.2d 74, 78 (1st Cir.1986). There are, however, exceptions to this rule. *Mestek*, 40 Mass.App.Ct. at 731, 667 N.E.2d 292 (citations omitted). The rule does not apply if the surety's performance is made unconditionally. *Id.* In that case, the surety's only defenses are in equity. *Id.*

“Truth be told, even doing nothing makes me hungry.”

Coastline argues that Travelers, as it is the payment bond surety, is liable for the \$34,055 that is due to Coastline under the subcontract. Travelers argues that it is entitled to the same defenses as Peabody and, thus, it should not have to pay Coastline as the money is not due until Haskell pays Peabody.

In the present case, Travelers may not use the same pay-when-paid defense that is available to Peabody. The payment bond unconditionally states that if a claimant does not get paid within ninety (90) days after the completion of its work, the claimant may sue on the bond. See *Mestek*, 40 Mass.App.Ct. at 731, 667 N.E.2d 292. Coastline completed the fire protection work on the Project on or around October 29, 2002 and has yet to be paid by Peabody. Therefore, Coastline may properly sue Travelers on the bond.

Moreover, the payment bond does not refer to any of the payment provisions (i.e. pay-when-paid clause) contained in the subcontract or refer to any subcontract at all. Even if the bond had incorporated the subcontract by reference, the holding in *Canam*, 34 Mass.App.Ct. at 943, 613 N.E.2d 121, contains persuasive language that Travelers would not be bound by the pay-when-paid clause and would not be able to use it as a defense. Therefore, this Court determines that

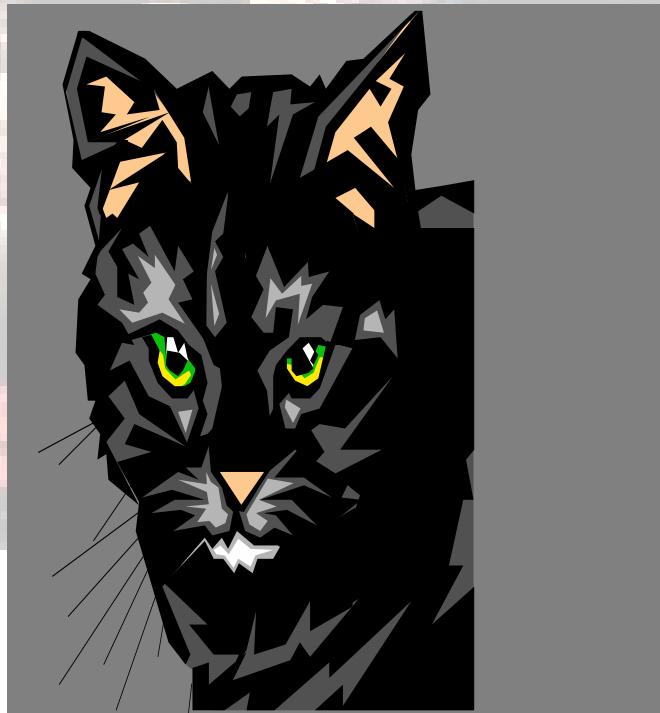
Travelers cannot assert the pay-when-paid defense and is liable as a matter of law to Coastline for the fire protection work that it performed on the Project.”

Within the context of “pay-when-paid” clauses, this would mean that if the general contractor itself contributed to the owner’s non-payment to the general contractor, the act of the owner’s non-payment should not be a defense to the subcontractor’s claim for payment on the payment bond. And, *please* keep in mind two things with regard to payment bond claims. First, generally, the only way to make a *legally effective* claim on a payment bond is to sue it. And, secondly, the first rule does not vary depending on whether or not the subcontractor’s claim is for contract balances *and* retention or only *just* for retention. Put another way, you don’t get additional time to make a claim on a payment bond when your claim is nothing but retention. The one year period of time within which you must sue commences from your last date of performance of work at the job - *period!*

**7. What do all of these cases mean?** In considering these various Massachusetts cases, it appears to me that the Massachusetts appellate courts have tightened up or restricted the ability to enforce a “pay when paid” provision. In the Wolfe case, the court would enforce such a provision where there was a clear provision that payment to the subcontractor would be directly contingent upon the receipt by payment to the general contractor from the owner. This rule was tightened up in the Bayer & Mingolla case as requiring the reason for non-payment to be involved with that subcontractor’s trade. The general contractor would not have to make payment when (but only when ) the dispute between the owner and the general contractor pertained to matters involving the subcontractor. This tightening up of the law was made more clear in the Sullivan case.

It is my sense that a court will generally enforce a “pay-when-paid” clause if the risk of loss clearly is transferred to the subcontractor (by the general contractor) or to the materials supplier (by a subcontractor or a general contractor).

What kind of language should you be looking for? What are the operative words? The following type language is probably a legally-enforceable pay-when-paid clause: “General contractor’s obligation to pay the subcontractor will be triggered when, **and if**, the general contractor receives funds from the owner as to the subcontractor’s line items.” (Emphasis added)

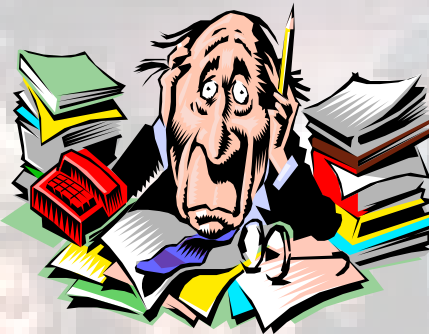


“White Kitty might consider the following line from the Good Book:  
‘Man does not live by bread alone.’”

It is important to note that the court cases make it clear that the risk transfer must be very obvious within the context of the contract document.

That language “and if” gives notice fairly clearly that the subcontractor is assuming the risk of the owner’s not paying the general contractor.

The following clause will most likely be enforced as a pay-when-paid clause: “In accepting this purchase order, the subcontractor acknowledges and agrees that the general contractor’s obligation to pay the subcontractor **is strictly limited to when** the general contractor has received monies from the owner on the subcontractor’s line items.” (Emphasis added) This language is a little more subtle than the prior example but will most likely accomplish the same result.



“Since when does Black Kitty quote from the Bible?”

The key thing to keep in mind when evaluating a tendered subcontract or purchase order is to look for language which predicates or establishes as a condition precedent to your getting paid a payment received by your contracting party from its contracting party. Or, in other words, is the general contractor telling you that he will only pay you when and if the owner pays him?

Pay-when-paid clauses are not favored in Massachusetts, but, as stated above, are generally legally enforceable if clearly-enough drawn. Therefore, you should train those in your organization whose job it is to review tendered purchase orders and subcontracts for sufficiency to look at the language contained in the payment provisions to see if there is any attempt by your contracting party to transfer the risk of nonpayment from another to you. If that language is fairly clearly there, you could have difficulties convincing a court at some point in time that your contracting party is in breach for nonpayment.

As a practical matter, the presence of a fairly clear-cut pay-when-paid clause might be a factor you wish to take into consideration as to whether or not you want to do business with the party tendering this kind of language. As a practical matter, however, we generally see these clauses in custom drawn subcontracts and it is our sense, in discussing the same with subcontractors, that subcontractors frequently accept them.

## **B. The enactment of the Prompt Payment statute in 2010**

A statute was enacted in August of 2010 relative to this issue and other construction issues. A complete copy of this statute follows these remarks.

When you actually read the statute, you may be surprised - and, not a little disappointed - over how *little* this actually has to do with the issue of “pay-when-paid”. However, such as it is, this is what the statute covers. First of all, this statute applies only to *private* construction projects with an original contract price of three million dollars or more, although it does not apply to projects containing at least one but not more than four dwelling units. So, it does not apply to *public* work and it doesn’t apply to a lot of smaller private construction.



There are basically three separate subject matters of this statute.

**(1) Processing of requisitions.** Requisitions need to be accepted at least every 30 days. Approval or rejection of a requisition must then occur within 15 days with an additional seven days allowed for every tier below the general contractor level. Payment of a requisition needs to be made within forty-five days of approval. A rejection of a payment request shall be made in writing stating the "factual and contractual basis" for the rejection and would need to be "certified as made in good faith."

**(2) Processing of change orders.** Approval or rejection would need to occur within 30 days of submission of the request or commencement of work, whichever is later, with seven days added for certain lower tier claims. Failure to act is deemed approval, unless rejected prior to the date payment is due. Any rejection would need to be made in writing, stating the factual and contractual basis for the rejection, and certified as made in good faith: in other words, similar to what is required for the rejection of a requisition.

**(3) Pay-when-paid clauses.** Pay-if-paid clauses would be "void and unenforceable," unless: (a) the money has not been paid due to nonperformance by the person seeking payment (**ED**. As stated above, this is consistent with existing law), who has received written notice of the default and has failed to cure the default within the time provided by the contract or fourteen days if no time is so provided for by contract OR (b) The payor (i.e. the owner as to the general, the general as to a subcontractor) is insolvent or becomes insolvent within 90 days after the pay request is made, AND the party seeking to enforce the conditional payment terms has (a) filed a notice of contract (and, for second tier suppliers and subcontractors has sent a timely notice of

identification, prior to that party's submission of its first payment requisition) and subsequently proceeds to perfect its mechanic's lien and pursues "all reasonable legal remedies" to recover payment "unless and until there is a reasonable likelihood the action shall not result in obtaining payment."

Contract terms requiring a party to continue performance when payment is overdue by at least 30 days would be "void and unenforceable" subject to disputes regarding the quality of work. **(ED.** This is essentially consistent with existing law that does not require subcontractors to work when they are not being properly paid.) Contract terms purporting to waive or limit the effect of the new statute would be "void and unenforceable." If the person seeking payment believes that an upper-tier company was not diligently pursuing legal remedies, that person could utilize the expedited procedure in the mechanic's lien statute for a determination of the same, after making a written request for delineation of the legal remedies being pursued.

### **C. Other sources of legal authority**

Except as modified by the above statute, the common law rules applicable to pay-when-paid will still apply. Here are some rules applying specifically to public construction.



“Soon *I* will be *the* source of legal authority.”

**(1)** For public building projects (vertical construction and those projects where a ‘building’ is the focus of the project) and for public work projects (non-buildings - i.e. paving, water and sewer pipes, horizontal construction), there are the following provisions from MGL C. 30, s. 39F:

“(1) Every contract awarded pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine shall contain the following subparagraphs (a) through (i) and every contract awarded pursuant to section thirty-nine M of chapter thirty shall contain the following subparagraphs (a) through (h) and in each case those subparagraphs shall be binding between the general contractor and each subcontractor.

(a) **Forthwith** after the general contractor receives payment on account of a periodic estimate, the general contractor shall pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor, less any amount specified in any court

proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.

(b) Not later than the sixty-fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor. The general contractor shall forthwith pay to the subcontractor the full amount received from the awarding authority less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.” (Emphasis added - there is no statutory definition for this word).



(2) For public works, there is the following provision from MGL C. 30, s. 39G:

“My head hurts! Maybe I need some bread to sop up the booze.”

“ . . . . The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five days after receipt of written acceptance for such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. **Within 15 days, 30 days in the case of the commonwealth, after receipt from the contractor, at the place designated by the awarding authority, if such place is so designated, of a periodic estimate requesting payment of the amount due for the preceding periodic estimate period, the awarding authority shall make a periodic payment to the contractor for the work performed during the preceding periodic estimate period** and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances. . . .” (Emphasis added)

(3) For public buildings, there is the following provision from MGL c. 30, s. 39K:

**“Within fifteen days (30 days in the case of the commonwealth, including local housing authorities) after receipt from the contractor, at the place designated by the awarding authority if such a place is so designated, of a periodic estimate requesting payment of the amount due for the preceding month, the awarding authority will make a periodic payment to the contractor for the work performed during the preceding month and for the materials not incorporated in the work but delivered and suitably stored at the site (or at some location agreed upon in writing) to which the contractor has title or to which a subcontractor has title and has**



“Black Kitty a scholar? I didn't know the putz could even read!”

authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances, but less (1) a retention based on its estimate of the fair value of its claims against the contractor and less (2) a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty-nine F, and less (3) a retention not exceeding five per cent of the approved amount of the periodic payment. After the receipt of a periodic estimate requesting final payment and within sixty-five days after (a) the contractor fully completes the work or substantially completes the work so that the value of the work remaining to be done is, in the estimate of the awarding authority, less than one per cent of the original contract price, or (b) the contractor substantially completes the work and the awarding authority takes possession for occupancy, whichever occurs first, the awarding authority shall pay the contractor the entire balance due on the contract less (1) a retention based on its estimate of the fair value of its claims against the contractor and of the cost of completing the incomplete and unsatisfactory items of work and less (2) a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty-nine F, or based on the record of payments by the contractor to the subcontractors under this contract if such record of payment indicates that the contractor has not paid subcontractors as provided in section thirty-nine F.. .” (Emphasis Added)

## **CONCLUSION**

As the above makes clear, this is a complex subject and, as with most things legal, there is no consistent, across the board (both public and private) black or white answer. At the same time, whether one accepts - or does not accept - a “pay-when-paid” condition is a matter of contract negotiation and, keep in mind that the root word in both ‘subcontractor’ and ‘contractor’ is ‘contract’. If one insists on language that makes it very clear that the subcontractor does not accept a ‘risk transfer’ of the owner’s non-payment, then this subject becomes only a merely

academic discussion. It is only when one is unwilling to buck the general contractor's insistence on the inclusion of such language that the above cases and statutes and their judicial enforcement become deadly serious.

*(Jonathan Sauer,  
Copyright Claimed 2010)*

**The Statute:**

M.G.L.A. 149 § 29E

Massachusetts General Laws  
Annotated Currentness  
Part I. Administration of the  
Government (Ch. 1-182)  
Full text of all sections at this level  
Title XXI. Labor and Industries  
(Ch. 149-154)  
Full text of all sections at this level  
Chapter 149. Labor and Industries  
(Refs & Annos)  
Current selection § 29E.  
Construction contracts; reasonable  
time periods for periodic progress  
payments and increases in contract  
price; payment conditioned upon  
receipt of payment from third party;  
requirement to continue  
performance of construction  
without payment



“Long-time readers know I have a special plan for the kitties.”

<[ Text of section added by 2010, 293, Sec. 1 effective November 8, 2010 applicable as provided by 2010, 293, Sec. 2.]>

(a) As used in this section the following words shall have the following meanings, unless the context clearly requires otherwise:

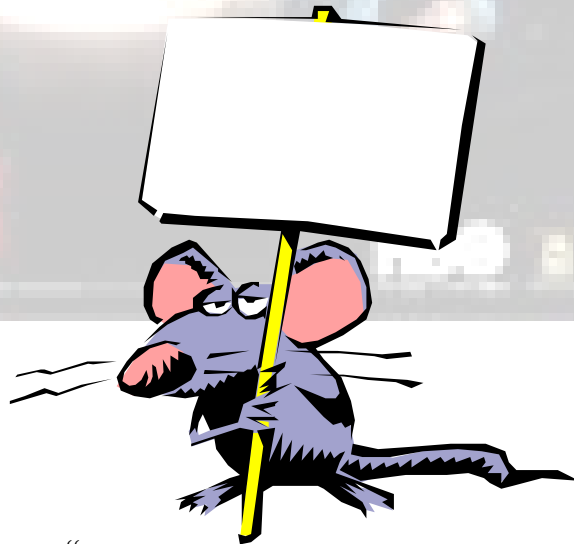
“Contract for construction”, a contract for which a lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of \$3,000,000 or more; provided, however, this shall not include projects containing or designed to contain at least 1 but not more than 4 dwelling units.

“Insolvent”, insolvent as defined under federal bankruptcy law or being a debtor in a proceeding commenced under federal bankruptcy law or under the corresponding law of another country, or being a debtor in a receivership proceeding or having made an assignment for the benefit of creditors.

(b) A communication required in this section to be in writing may be submitted in electronic form and by electronic means.

(c) Every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the

application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved. The time periods for each application for a periodic progress payment shall not exceed: (i) for submission, 30 days, beginning with the end of the first calendar month occurring at least 14 days after the person seeking payment has commenced performance; (ii) for approval or rejection, 15 days after submission; provided, however, that the time period, as applicable to approval or rejection by the person at each tier of contract below the owner of the project, may be extended by 7 days more than the time period applicable to the person at the tier of contract above the person; and (iii) for payment, 45 days after approval, unless the payment is subject to the condition of receipt of payment by a third person but only to the extent enforceable under subsection (e). An application for a periodic progress payment which is neither approved nor rejected within the time period shall be deemed to be approved unless it is rejected before the date payment is due. A rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith. A rejection of an application for a periodic progress payment shall be subject to the applicable dispute resolution procedure. A provision in the contract which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection shall be void and unenforceable.



“I might have to reconsider that plan if I got an adverse reaction from a feline focus group.”

(d) Every contract for construction shall provide a reasonable time period within which a written request submitted by a person seeking an increase in the contract price shall be approved or rejected, whether in whole or in part. The time period shall not exceed 30 days after the later of commencement of the performance of the work on which the request is based or submission of the written request; provided, however, that the time period, as applicable to approval or rejection by the person at each tier of contract below the owner of the project, may be extended by 7 days more than the time period applicable to the person at the tier of contract above the person. A request which is neither approved nor rejected within such time period shall be deemed to be approved and may be submitted for payment within the next application for a periodic progress payment, unless it is rejected before the date payment is due. A rejection of a request, whether in whole or in part, shall be made in writing, shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith. A rejection of a request shall be subject to the applicable dispute resolution procedure. A provision in the contract which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection shall be void and unenforceable.

(e) A provision in a contract for construction which makes payment to a person performing the construction conditioned upon receipt of payment from a third person that is not a party to the contract shall be void and unenforceable, except:

(1) to the extent of amounts not received from the third person because the person performing the construction failed to perform under its contract and failed to cure the non-performance within the time required by the contract after receipt of written notice as provided in the contract or, in the case of contract lacking a cure and notice provision, failed to cure the non-performance within 14 days after receipt of written notice of the failure to perform; or

(2) to the extent of amounts not received from the third person because the third person is insolvent or becomes insolvent within 90 days after the date of submission of the requisition for which payment is sought; provided, however, that the person seeking to enforce the payment condition (i) filed a notice of contract under chapter 254 and in the case of a person having no direct contractual relationship with the original contractor, also sent a notice of identification within the time required under said chapter 254, prior to the person's submission of the first application for payment after commencement of performance at the project site and did not dissolve the lien created by the filing of such notice of contract; and (ii) within the time periods allowed by said chapter 254 files a statement of amount due and commenced or commences a civil action to enforce the lien; and (iii) pursues all reasonable legal



“Oh-h-h! Is the room spinning or is it just me?”

remedies to obtain payment from the person with whom the person had a direct contract unless and until there is a reasonable likelihood the action shall not result in obtaining payment.

The foregoing exceptions shall be expressly stated in any conditional payment provision and the person seeking to enforce the payment condition shall have the burden of proof as to each element. Nothing in this section or in a conditional payment provision shall be valid as a defense to enforcement of a lien claimed under said chapter 254 by the person furnishing the construction nor shall it excuse compliance with said chapter 254. A party aggrieved by the failure of the party seeking to enforce the payment condition to pursue all reasonable legal remedies to obtain payment may avail itself of the procedure set forth in section 15A of said chapter 254, for a summary determination of whether all reasonable legal remedies have been fulfilled with respect to the particular lien claim at issue; provided, however, that the aggrieved party has first made a request in writing that the party seeking to assert the payment provision identify the legal remedies the aggrieved party has pursued and either: (i) has not received a response in writing within 10 days after making the request; or (ii) having received a response, has requested the party to pursue specific additional legal remedies and the party has failed unreasonably to take such actions.

(f) A provision in a contract for construction, including without limitation a payment condition enforceable under subsection (e), purporting to require a person to continue performance of the construction if payment of an approved amount is due under the terms of the contract but is not received, and more than 30 days have elapsed since the date payment was due, shall be void and unenforceable, except for: (i) a dispute regarding the quality or quantity of the construction so furnished; or (ii) a default by the person under the contract for construction after approval of the payment; provided, however, that the person has received (i) a prior written notice of such dispute or default certified as made in good faith; and (ii) all sums due less any amounts attributable to the dispute or default.

(g) A provision in a contract for construction which purports to waive or limit any provisions of this section shall be void and unenforceable.



“I especially might have one or two in mind.”

M.G.L.A. 149 § 29E, MA ST 149 § 29E

Current through Chapter 373, except for Chapter 359, of the 2010 2nd Annual Session.

\*\*\*\*\*

## ON THE LIGHTER SIDE

A lawyer, a doctor and a management consultant were discussing the relative merits of having a wife or a mistress.

The lawyer says: "For sure a mistress is better. If you have a wife and want to divorce, there are a number of complex legal problems to resolve and it will probably be very expensive."

The doctor says: "It's better to have a wife because the sense of security and wellbeing lowers your stress and your blood pressure and is good for your health."

The management consultant says: "You're both wrong. It's best to have both so that when your wife thinks you're with your mistress, and your mistress thinks you're with your wife -- you can go to the office and get some work done."

\*\*\*\*\*

Some men in a pickup truck drove into a lumberyard. One of the men walked in the office and said, "We need some four-by-twos."

The clerk asked, "You mean two-by-fours, don't you?"

The man said, "I'll go check," and went back to the truck. He returned and said, "Yeah, I meant two-by-fours."

"All right. How long do you need them?"

The customer paused for a minute and said, "I'd better go check." After a while, the customer returned to the office and said, "A long time. We're gonna build a house."

\*\*\*\*\*



"Thankfully, our last e-mail version of *Scribbles* didn't have any aliens in it, drunk or otherwise."

Two carpenters were working on a house. The one who was nailing down siding would reach into his nail pouch, pull out a nail and either toss it over his shoulder or nail it in.

The other, figuring this was worth looking into, asked, "Why are you throwing those nails away?"

The first explained, "If I pull a nail out of my pouch and it's pointed toward me, I throw it away 'cause it's defective. If it's pointed toward the house, then I nail it in!"

The second carpenter got completely upset and yelled, "You moron! The nails pointed toward you aren't defective! They're for the other side of the house!"

\*\*\*\*\*

Wife of a local building contractor asks her daughter on Thanksgiving Day, "What do you want for Christmas?" Daughter says, "Mommie, I want a little brother". Wife says, "I'm sorry, dear, but this year we just don't have time". Daughter says, "Mommie, why don't you do what daddy says when he is short of time: "Put more men on the job".

\*\*\*\*\*

An Italian, a Scotsman and a Chinese fellow are hired at a construction site. The foreman points out a huge pile of sand and says to the Italian guy, "You're in charge of sweeping." To the Scotsman he says, "You're in charge of shoveling." And to the Chinese guy, "You're in charge of supplies." He then says, "Now, I have to leave for a little while. I expect you guys to make a dent in that there pile."

The foreman goes away for a couple hours and when he returns, the pile of sand is untouched. He asks the Italian, "Why didn't you sweep any of it?"

The Italian replies, "I no hava no broom. You saida to the Chinese a fella that he a wasa in a charge of supplies, but he hasa disappeared and I no coulda finda him nowhere."

Then the foreman turns to the Scotsman and says, "And you, I thought I told you to shovel this pile." The Scotsman replies, "Aye, ye did lad, boot ah couldnay get meself a shoovel! Ye left th' Chinese gadgie in chairge of supplies, boot ah couldnay fin' him either."



“In the world of *Scribbles*, ‘PC’ only stands for ‘personal computer’.”

The foreman is really angry now and storms off toward the pile of sand to look for the Chinese guy. Just then, the Chinese guy leaps out from behind the pile of sand and yells... "SUPPLIES!!"

\*\*\*\*\*

Three contractors were touring the White House on the same day. One was from New York, another from Missouri, and the third from Florida. At the end of the tour, the guard asked them what they did for a living. When they each replied that they were contractors the guard said "Hey, we need one of the rear fences redone. Why don't you guys look at it and give me a bid?"

So to the back fence they went. First up was the Florida contractor. He took out his tape measure and pencil, did some measuring and said, "Well I figure the job will run about \$900. \$400 for materials, \$400 for my crew, and \$100 profit for me."

Next was the Missouri contractor. He also took out his tape measure and pencil, did some quick figuring and said, "Looks like I can do this job for \$700. \$300 for materials, \$300 for my crew, and \$100 profit for me."

The guard asks the New York contractor how much. Without so much as moving the contractor says, \$2700."

The guard, incredulous, looks at him and says "You didn't even measure like the other guys did. How did you come up with such a high figure?"

"Easy" says the contractor from New York, "\$1,000 for me, \$1,000 for you and we hire the guy from Missouri."



"In my White House, I will have K'nyacker carefully review all of the bids."

\*\*\*\*\*

Definitions:

- Contractor: A gambler who never gets to shuffle, cut or deal!
- Bid Opening: A poker game in which the losing hand wins.
- Low Bidder: A contractor who is wondering what he left out.
- Architect's Estimate: The cost of construction in Heaven.
- Project Manager: The conductor of an orchestra in which every musician is in a different union.
- Critical Path Method: A management technique for losing your shirt under perfect control.
- Delayed Payment: A tourniquet applied at the pockets.
- Completion Date: The point at which liquidated damages begin.
- Liquidated Damages: A penalty for failing to achieve the impossible.

\*\*\*\*\*

A contractor walks into his neighborhood bar and says to the bartender, "Hey Joe, you know how I'm always having to get rid of critters when I do crawl jobs?"

The bartender smiles, “You complain about it all the time, Bob.”

“Well, if I show you something really cool, will you give me a free drink?” The bartender considers it, then agrees. The contractor reaches into his pocket and pulls out a tiny rat. “Check this out!” he says. “I found him last week while I was fixing Missus Jones’ ductwork.” He reaches into his other pocket and pulls out a tiny piano. The rat stretches, cracks his knuckles, and proceeds to play the blues.

The bartender is amazed, and pours Bob a beer. After Bob finishes his drink, he asks the bartender, “If I show you an even cooler trick, will you give me free beers for the rest of the evening?” The bartender agrees, thinking that no trick could possibly be better than the first.

The contractor reaches into his pocket and pulls out the tiny rat again. He reaches into his other pocket and pulls out the tiny piano. The rat stretches, cracks his knuckles, and proceeds to play the blues. The contractor reaches into another pocket and pulls out a small bullfrog, who begins to sing along with the rat’s music.

Number after number, the frog sings his head off. Everyone in the bar is amazed.

While the contractor is enjoying his beers, a stranger walks up to him and offers him \$100,000 for the bullfrog. “Sorry,” the contractor replies, “he’s not for sale.” The stranger increases the offer to \$250,000 cash up front. “No,” he insists, “he’s not for sale.” The stranger again increases the offer, this time to \$500,000 cash. The contractor finally agrees, and turns the frog over to the stranger in exchange for the money.

“Are you insane?” the bartender demanded. “That frog could have been worth millions to you, and you let him go for a mere \$500,000!”

“Don’t worry about it.” the contractor answered. “The frog was really nothing special. You see, the rat’s a ventriloquist.”



“As soon as I get my paint thinner.”

\*\*\*\*\*

# Gastric Bypass Surgery and Obesity: My Story

By Jonathan Sauer

## *Introduction*

I played football and ran track in high school and lifted weights for several years at a very high level while in high school. I was one hundred seventy-five pounds when I left high school and I was in superb physical condition. Here's an example. At one point, for the hell of it, I decided to see how many sit-ups I could do. I did sit-ups on an incline board at a pretty steep angle. I did three hundred sit-ups and quit, just because I was bored. Still plenty in the tank!

Like many others, however, when I stopped all the exercise and met the stress of college (two hours commuting, increased academic work load and homework, part-time jobs to help pay for it all), I gained a lot of weight fairly quickly: about fifty pounds in one year.<sup>1</sup> Isn't it ironic that so many of us with weight problems end up working at fast food restaurants? That was my experience through college. Subsequently, for many years, I averaged two hundred and forty-eight pounds. Then, my "average" weight went to two hundred sixty-five pounds as I got older and then to something in the two hundred eighties after that. My highest weight was a couple of pounds short of three hundred, which is a lot of weight for someone who is slightly under five feet eight inches tall. Like many others, I thought I was "big-boned" and I knew how to look in a mirror only for certain angles and views (if I were to look at one at all).

I was often a pretty good dieter. I lost a great deal of weight several times: in 1986-7, in 1999 and in 2008-2009. Still, as those with this problem know, you don't generally ever lose it all (although I did so in 1987) and it almost always comes back "with interest". As those of us who have had serious weight to lose know, our bodies fight sustained dieting and weight loss on a whole variety of fronts - mental, emotional and physical. With my better diets, I would lose sixty or seventy pounds. Some were "fad-type" diets and some were good diets. I remember that when I did the Dr. Stillman diet - all protein - I would get tremendous urges for Three Musketeer bars, something I wouldn't ordinarily eat when I wasn't calorie-restricted. I had one diet where the focus was eating a 'Healthy Choice' type frozen dinner for dinner with lots of raisins and carrots. Still, after six or seven months on *any* diet, I would get tired: tired of the diet and physically tired from living on restricted calories and from dietary imbalances. After all, our bodies are designed to resist losing weight.

A close friend had a gastric bypass operation in 2008 and lost one hundred pounds or so, seemingly effortlessly. During part of this time period, I was on a fairly successful diet and lost sixty or seventy pounds. Still, following my past history, I began to gain it back. During the summer of 2009, I began thinking of my own possible weight loss surgery. I was approaching sixty years old and forty years of struggling with the weight, on balance, had been unsuccessful and the future didn't look any better. The various 12 step programs define 'insanity' as continuously doing the same thing while expecting a different result. <sup>1</sup>By that definition, my approach to food and dieting and weight loss had been insane. At age 60, I needed to solve this problem before this problem solved (ended) me.

So, I tell my story, as it might benefit someone reading it. I am not a medical doctor and my explanation of the medical/physical parts of it reflect my understanding of these things. In the final analysis, if you decide to go further, your own internet research and contacts with physicians can give you more accurate/detailed medical explanations. Still, this is what I experienced. . . .

## ***My Experience***

My inquiries centered on Newton-Wellesley Hospital (NW) in Newton, MA, as I knew people who had gone through their program, which is a good one. I had my initial meeting with the doctors in August of 2009. At that time, I weighed 258 pounds and I was gaining weight. One of the reasons I had not really seriously considered this operation before this time was that I just assumed that being sixty years old was ‘too old’ for the operation. I learned that they perform the operation for people in their early twenties and operate on people into their seventies. So, virtually wherever you are chronologically, this option is something that might be available to you.

The preparation for getting approved to have the operation includes a detailed physical and attending several nightly meetings that NW has for the weight loss program for people in different stages of the process. This includes a small amount of psychological testing and meeting with a dietician. Quite a few forms have to be filled out, some of which have to be completed by your primary care physician. Much like the attitude that one sees towards weight loss surgery in shows like “The Biggest Loser”, two of my doctors seemed to have a mild antipathy towards this option. In the popular press, people criticize this operation as ‘taking the easy way out’. There is nothing easy about living with a gastric bypass! At this time, one had to have a 40 BMI (body mass index) to qualify for the operation from an insurance standpoint. (You can learn more about BMI by doing an internet search. Most of the BMI sites have a calculator, so you can figure out your own score rather quickly.) However, if one has a variety of co-morbidities (gastric reflux, high cholesterol, high blood pressure and a number of other things), one could get the operation with a BMI of 35 or higher. My BMI was 35 and change. I was definitely a smaller patient. NW has any number of patients who weigh three hundred pounds, four hundred pounds and more. I know of one patient who had her operation when she weighed more than seven hundred pounds.

NW does an operation known as a “roux-en-y gastric bypass”. This is their typical bypass operation. As I understand this, two essential things are done. For one thing, a normal person’s stomach contains forty ounces. With this operation, your stomach is reduced to a ‘pouch’ to hold between one and two ounces. (The pouch will stretch some afterwards). Essentially, a corner is cut off of your existing stomach near the esophagus and this becomes your new stomach, now called a pouch. The rest of the stomach is left in your abdomen and does perform certain physical functions that are useful but does not process food. Secondly, a portion of your intestine is “by-passed” so that your body doesn’t absorb nutrients (and calories) for this portion. As I understand this, the new stomach is hooked up some distance below where the current intestine is attached to the existing stomach so that a portion of the intestine becomes ineffective for absorbing nutrition (and calories). For this and other reasons, part of the bypass

patient's life is taking a fair number of vitamins and supplements daily for the rest of your life. I take about fifteen pills every day, some of which are my wife's additions for good health. Vitamin D seems to be particularly important for bypass patients to take, as bone density seems to be a particular concern. Here's an interesting point. In Europe, this operation is done primarily as a treatment for diabetes. The literature suggests that for people who have diabetes, eighty-five percent of these people have the diabetes disappear after this surgery.

Incidentally, it is my understanding that NW does not do "lap band" surgery (less invasive) where a plastic collar is inserted around your stomach with a port under your skin whereby through injections of sterile water, the band either tightens or loosens the pressure on the stomach (making it smaller or larger). According to my understanding of what I learned at various meetings at NW, ninety percent of these "lap bands" have to be removed in the first ten years after the operation, as they fail for one reason or another. Also, since the lap band will necessarily expand over time, people can eat more and the band becomes less effective. My sense is that since people can eat more, they don't go and have them tightened and they become less effective. After all, part of the reason people get into obesity issues is that they like to eat. So, if a lap band loosens, they can eat more. An essential beauty of the roux-en-y gastric bypass operation – and what makes it in some ways so difficult to live with – is its non-adjustable nature. Once the surgeon does his/her work, your new pouch marches to the beat of its own drummer!

The majority of the gastric bypasses done by NW involve "laparoscopes" (scopes), which look like long wands, which are inserted in your abdomen through "ports" (holes) in your abdomen. Surgery is less invasive with scopes because the operation is accomplished through six one-half inch holes rather than through one four or five inch "open" incision - one large cut - which takes longer to heal and poses greater opportunities for infection and for complications such as hernias. One of the wands has a camera in it and this is how the surgeons see what they need to see. Essentially, the surgeons operate while looking at a tv monitor. Just like in Big Medicine!

## ***Surgery***

I had my operation on October 5, 2009. Things proceeded normally. You are admitted to the hospital on the day of your surgery. This surgery typically takes between one and one-half and two hours. My operation was more than three hours due to some adhesions in my abdomen from previous surgeries, which had to be dealt with. Since you are asleep, whatever the time is that the operation requires passes quickly! When I woke up, I tried to determine how much pain I was in. I decided, rather, that I was simply sore, rather than in pain. At NW, they give you a pain pump that you self-administer, which allows you to give yourself pain medication as frequently as every eight minutes. My operation was on a Monday and I left the hospital that Wednesday: in about two days. The worse part of being in the hospital is that due to their rather enthusiastic (frequent) taking of vital signs throughout the night, sleep other than in short naps is quite simply impossible. The surgeons will tell you that they would like you to take four to six weeks off before returning to work after the surgery, although this is principally because you have to relearn how to eat and drink and this is very hard work and almost a full-time job for quite a period of time. When your name is on the door, as is mine, taking four to six weeks off

of work is simply not realistic. I returned to work in about ten days but I had a number of partial days working in the first two weeks and climbing the several flights of stairs necessary to get to my office was less than fun.

Eating and drinking with a pouch are very different than eating and drinking with a 'normal' stomach. If you won't follow the Program's suggestions for how to eat and drink post-surgery, your chances of an ultimately successful result may be less. It is possible to gain all of your weight back after the surgery, as your pouch can be stretched. My sense is, however, that to do so, one would really have to work at it! At NW, when you begin the process of being considered for surgery, you are given a green notebook that discusses all aspects of the procedure from before the surgery to living with the surgery for the rest of your life. Realistically, if you are unwilling or unable to follow the program laid out in this notebook (the Program) reasonably closely, this operation may not be right for you. I hasten to say, however, that I have been fairly successful and my own compliance with these materials is nowhere near perfect. The surgeons don't refer to the by-pass as a cure but as a 'tool'. And, the tool is only effective if it is used in the manner that substantial experience has demonstrated to be most useful in removing and then keeping off weight.

The first two or three months or so after a gastric bypass are not a lot of fun. For a month or so, one has to pursue a purely liquid diet, which is very boring and hard to follow. This type of diet is limited to various juices, jello, instant breakfast, soup, etc. Some people will take actual meals and then blend them into a liquid, which is acceptable to the dietician but something I didn't do, as it seemed gross and disgusting. Many readers know what a 'Magic Bullet' is and gastric by-pass patients make use of these particularly in that first month or so. As the stomach heals - and while you are re-learning how to eat and drink, which is what you will need to do to be successful - you may have some abdominal discomfort. For example, when your "pouch" doesn't like what you have put into it, you may "foam", which is a kind of gastric by-pass throwing up, which is really more like spitting up. Everyone lives through this and this generally passes in two or three months. Gastric bypass patients, with their modified 'exhaust' systems, tend to pass more gas than they did pre-surgery. Some post-surgical disciplines are completely new and hard to adjust to. For example, one is not supposed to eat and drink at the same time during meals. Basically, one eats, waits at least one-half hour and then drinks and vice versa. This has been very hard for me to adapt to, even seventeen months post-surgery. To be honest, I don't follow this particular rule all that closely.

### ***Complications***

I had some complications. I hasten to point out that I have been to thirty or forty evening meetings of bypass patients at NW and the vast majority of patients report a fairly smooth experience and no significant problems. I am only aware of two or three other individuals who have had significant complications.

I had continuing discomfort after the surgery. This led to one operation about one year after the first operation where the surgeons found that I had a twisted bowel, which they simply repositioned, performing no new surgery. So, in addition to the six holes from the first operation, I had five new holes with this one. (No hole for a drain in the second operation, as

nothing inside was cut.) This problem may have been caused by simple extreme weight loss, which can change the attachment points and position of your bowel inside your body. (I lost eighty-four pounds after the first operation.) My symptoms continued, however, after the second operation. Ultimately, it was determined that notwithstanding my having had my gallbladder removed thirty years ago, I had a gallstone in my common bile duct. This was removed by open incision in late December, 2010 and my case seems to have stabilized. I still have greater problems eating a lot of foods than some other gastric by-pass patients have. For example, many bypass patients have difficulty eating meat after the operation. The literature suggests that some patients may never be able to eat meat again. I can eat some meats, although this can vary from time to time and from day to day. My body seems to prefer fish and vegetarian dishes to meat. Bread is very difficult to eat for any by-pass patient, as it expands quickly inside the pouch, filling you up quickly. Prior to my first surgery, bread and bread-like things (i.e., cake, cookies and pizza) were my favorite things to eat. Reluctantly, I have removed almost all bread from my diet, as my body simply doesn't like it. Also, I have seemed to develop some lactose intolerance after my surgery. The doctors will tell you that they don't want you drinking coffee or alcohol after the surgery. I can drink both, although coffee is pretty harsh on an empty stomach. (Two or three sips of a good cocktail is all that I need to feel *comfortable!*) My wife and I still go out to eat, although I find that four or five bites of nearly anything is all that I really want or need. Can you imagine eating four or five bites of dinner and being satisfied? This is very different from my prior history! 1 The doctors stress that they want your first calories ingested in any meal to be protein. This cuts down dramatically on ordering salads, appetizers and desserts. Particularly, as an athlete, I am taking these suggestions more seriously as time goes on. The closer my adherence to the Program suggestions, the better I feel.

### ***Life As Physically Fit***

I am going on sixty-two years old and haven't been this healthy since high school. I am up about ten pounds over my lowest post-surgical weight. (My low of one hundred seventy-five pounds is currently around one hundred eighty-five pounds.) Also, when one loses weight after the surgery - the weight loss can be quite dramatic and very fast - I lost a lot of upper body muscle. People who go through this process just assume (hope?) that your body loses only fat, not muscle. However, your body will burn whatever it feels like burning and this includes muscle. So, I anticipate that I will ultimately have to add about another ten pounds of muscle to my upper body, as I have lost a fair measure of upper body strength. So, I suspect that I will be going from being 258 pounds pre-surgery (but gaining at the time) to about 195 pounds and stable at that weight post-surgery.

I *had* hoped to retire from the law twenty or thirty years from now and pursue a second career in my dream job as an exotic dancer! However, with eleven holes in the abdomen from the first two surgeries and a five inch incision from the third surgery, this doesn't seem likely! Adding to previous scars from other operations, I like to say that I just need one more good incision and I will have a fairly accurate depiction of the runways at Logan Airport on my abdomen!

My wife and I run two 5k's (3.1 miles) most weekends. We also do a variety of five to seven mile runs. 10k's are popular in Massachusetts and they are 6.2 miles in length. I recently ran

my first half marathon (13 miles) in New Bedford, MA. My most recent five mile race found me accelerating during most of the last mile, which was very exciting and rewarding, particularly where in high school I was a sprinter specializing in short distances. The five mile race before that one I ended the race by sprinting at top speed for the last fifty yards or so to achieve a certain time. I take special pleasure in passing runners, especially younger runners, which increasingly is mostly everyone! Mick Jagger could have been describing what I think of running in “Jumpin’ Jack Flash” when he sang ‘it’s a gas’!

Racing is a new activity for me and I was fairly inactive prior to my first operation. My times for the runs are getting better all the time and I won four or five medals in my age class (60-69 years old) last season. The essential racing season seems to be April or May through about Thanksgiving. However, there are some races during the winter, including club races. We have run in the rain, in the snow and at 25 degrees. I work-out six days per week either through a race (or races) and/or at the gym and I *enjoy* doing so! My resting heart rate is incredibly low. I have gone off all of my prescription medications except for one (and I seriously question whether I even need that one.) I consider myself to be an elite athlete and I *feel* like one and, except for some loose skin, I *look* like one. (Although not for me, a lot of gastric bypass patients end up having plastic surgery to ‘take up the slack’.) At my highest weight, I barely fit into size forty-six inch waist pants and wore 1x and 2x shirts. I now wear medium shirts and size thirty-two inch waist pants. If I had plastic surgery and removed some loose skin around the waist, I could fit into thirty inch waist pants. NW does have an affiliated plastic surgeon who generally leads an evening meeting once or twice a year. Those sessions seem to be especially popular!

The literature would say that I have added a number of healthy years to my life. Note that I described them as ‘healthy’ years. For an obese person, years at my age would most likely be “sick” years with lots of medications and conditions and frequent trips to the doctor. I can’t tell you what that means to me to have extra healthy years. If you are an obese person, the question might be: what would this mean to *you*?

### ***Concluding Remarks***

I’d have the operation again tomorrow, no questions asked, and notwithstanding my having had a number of complications. Most patients say the same thing: they’d certainly do it again and with no reservations! Check out <http://www.nwh.org/clinical-centers/center-for-weight-loss-surgery> for more information. NW has a new patients’ meeting one night per month where you can go and have one of their four surgeons present the whole procedure to you in an entertaining power point presentation and then answer whatever questions you might have. You can get the dates for the meetings off of their website. There is no charge for the meeting and the meetings are generally from 6:30 to 8:00 pm, either on Tuesdays or Thursdays. NW even validates parking for folks attending these events so that the parking is free. You won’t even have to identify yourself, if you don’t wish to. For a post-surgery patient, going to these meetings is a kick (as well as strongly recommended by the doctors, to assist the post-surgery patients in maintaining focus on their new life-style and the demands that it requires.) At these meetings, there are a number of people there who are very over weight, which you would expect seeing. And, there are an equal number of people who just look . . . *average!* If you are reading this and have a

severe weight problem, what would you give to look (and pass for) ‘average’? Here is the brutal question that each of us with a long-term weight problem has to answer: ‘If I have been this heavy for (*fill in the number*) years and nothing I have done to date has worked with lasting results, what realistic chance do I have of *somehow* getting rid of the weight and then *keeping it off!*’ Many folks are never successful in getting all of the weight off. And, the literature says that *keeping it off* is much harder than losing it. In forty years of dieting, I only got to goal weight one time - back in 1987 - and I achieved this on the day I went on a vacation to Maine. I lasted only one entire day on my diet and then discovered a really killer fried wonton place in Wells, Maine. Statistically, one has something between a two percent and a five percent chance of losing long term significant weight and then keeping it off. And, those of us who have done it know that every additional diet one does only makes the next one that much harder and that much less effective.

It is such a kick for me to go to the various 5k and 10k and longer races with a lot of very physically fit people present and to have no one look at me as if I don’t belong. For, after the work I have done, I *do* belong!

One last word. If you have read this and have said to yourself “this is all well and good for this guy but I could never do this”, this is probably what most bariatric surgery patients have said to themselves *before* they started the weight loss surgery journey. This is very doable. The surgeons give you your two tools – the smaller pouch and the bypassed intestine. Then, the two tools help you do the rest of it yourself. Faith in God and/or a positive, cheerful attitude are very helpful in being successful. And, for those of you who suffer from depression, there is significant literature about the close tie-ins between obesity and depression. The more obese one gets, the more one gets depressed. Then, the greater level of depression makes one eat more and the cycle keeps spinning out of control. That same literature says that a reasonable amount of exercise is *more* effective in treating moderate depression than is medication, most of which comes with a lot of side effects. There is very definitely a runner’s high; I have experienced it many times. And, exercising is truly fun when one is losing weight and looking and feeling better.

What do you have to lose? The answer is: your weight. What do you have to gain? The answer is: *your life!*

If you have specific questions about this procedure, please feel free to give me a call or drop me an email: [jonsauer@verizon.net](mailto:jonsauer@verizon.net). I’d be pleased to answer them, if I can. My very best wishes to you with your weight loss journey!

### **CAVEAT (THE LEGAL STUFF)**

*Scribbles* is a publication of Sauer and Sauer, whose mission statement is to educate its readers on matters pertaining to construction law - hopefully, providing a smile or chuckle here and there - but *Scribbles* is not engaged in the business of giving specific legal advice in a general format. Accordingly, in the preceding articles, the information related should be considered as general educational material only and not as specific legal advice. For specific legal advice, consult an attorney of your choosing. (Or, for those of our readers who are also professional estimators, get useful information in the same manner you estimate: consult your *ouija* board!) Sauer and Sauer is a ‘ma and pop’ law firm comprised of Jon and Sally Sauer. Jon is an honors graduate of both Northeastern University and Suffolk University and a member of the Massachusetts bar for thirty-five years. Sally is an honors graduate of both DePaul University and Massachusetts School of Law and a member of the

Massachusetts bar for seven years. Prior to her being an attorney, Sally had an extensive career as a surety claims representative for five insurance companies. Our address is Suite 416, 1410 Providence Hwy., Norwood, MA 02062. Phone is 781-255-0222 and fax (does anyone even use this anymore?) is 781-255-9777. Our emails are [jonsauer@verizon.net](mailto:jonsauer@verizon.net) and [sallysauer@verizon.net](mailto:sallysauer@verizon.net). Lots of neat stuff – including four earlier issues of *Scribbles* – can be found at our website: [www.sauerconstructionlaw.com](http://www.sauerconstructionlaw.com). These days, Jon and Sally are really into running. A picture from a recent road race in which they both came in second place in their age classes follows. We try to practice law as we run: we go like hell until the race is over!

