Scribbles Squibs #34 (May 6, 2015):*

AVOIDING OR MINIMIZING LITIGATION

By Attorney Jonathan Sauer

I. INTRODUCTION.

We have had quite a response to our last *Squib,* a review and analysis of an Appeals Court case involving the issue of adjusting unit price values on a public job where actual quantities were greatly increased over bid document estimates when that item was 'penny bid'. Stay tuned, as we have a number of very important and informative cases we will be reporting on in the very near future in upcoming *Squibs!*

We have on our website articles explaining how the litigation process works: the various steps of a civil court case once it begins. Under our 'Construction Articles' section of the website – www.sauerconstructionlaw.com – we have Article Number 26 – 'The Litigation Process: 2012'.

This particular *Squib* is addressed to **two** specific ideas/issues involved with better protecting and positioning your company's interests *before* litigation commences.

The ***first*** is 'why' litigation may not be desirable for some unless it cannot be avoided. This information may be of more use to those without experience in the courts or in arbitration and tries to address some expectations and misconceptions the inexperienced might have about litigation *before* the first time your company either initiates it (brings a claim) or has to respond to a claim (defends as to someone else's claim.)

The depiction of lawyers and the legal process on TV and in the movies often bear little similarity to what happens in reality. Right now, Sally and I are watching 'The Guardian' on Netflix. For each episode, I notice one dozen or so things in the show that would simply never occur in a litigation and which mischaracterize the legal process. Perry Mason was hardly different. Owen Marshall, similarly, didn't accurately describe the process. John Grisham's *The Firm* – the book, not the movie – *was,* on the other hand, accurate probably because he had been a practicing attorney. However entertaining Paul Newman was in the *Verdict,* he committed at least one felony and would have been disciplined or disbarred for various things he did.

Contract law is not glamorous and is not a process where the innocent only win and the guilty only lose. It's not about broad principles of right or wrong. It's about resolving business disputes where one or both parties have made some serious mistakes and where at least one of the parties may not be acting completely fairly.

Those who have never sued anyone before sometimes approach it with an eagerness that is misplaced. Some seem to think that the sending of a lawyer's letter will immediately produce a check, when it usually doesn't. Or, some think that the process of merely suing someone somehow results in a quick payment. Or, some think that the process is quicker than it is, fairer than it is and less expensive than it is. We wish to address some of these issues in this *Squib*, both for educational purposes and really to underscore why it is *so* important to follow the various procedures described in the second part of the *Squib*. So that I am clear, the second part of this *Squib* is the real meat and potatoes of this *Squib*. The first section is primarily just a set-up for the second section. Following those procedures listed in the second section of this *Squib* is as necessary for the experienced contractor as it is for the guy who just mounted two magnetic signs on his pick-up truck and now thinks that this has made him a contractor.

The ***second*** is 'how' to minimize your chances of avoiding future litigation or, at least, performing your company's business in such a way that experience suggests may have the effect of better positioning your company for a litigation if this proves to be inevitable. Following these procedures equally protects the interests of those more likely to sue (material suppliers, subcontractors) as well as the interests of those who often are sued (general contractors, owners). And, since the last statistics I have seen say that only about 1% of Massachusetts superior court civil cases go through a complete trial, better positioning yourself *before* that litigation may help you get out of one more quickly.

For the purposes of this *Squib*, your contracting party shall be referred to as 'Earl'. That's a nice easy name with only four letters, as compared with 'skunk', which has five letters, and, *whoa*, 'deadbeat', which comes in at a whopping eight letters. Your 'Earl' might be a material supplier, a subcontractor, a general contractor or an owner. There are *a lot* of Earls involved with the construction industry, as the majority of our readers, unfortunately, are aware of. You see, Earl *knows* all of the steps one should take to avoid or minimize litigation. Much as the experienced burglar might avoid a home with a home security system or a home protected by a dog(s), Earl, if given the opportunity, will focus his time and energies on those who neither know nor follow the various strategies discussed in the second party of this *Squib*. More on Earl later!

II. WHY YOU MIGHT WANT TO AVOID OR MINIMIZE LITIGATION.

(Now, remember, the purpose of this section of the *Squib* is primarily to soften you up for the next section.) What's wrong with litigation? Almost nothing, except . . . . .

1. It takes too long. In the Massachusetts Superior Court, construction cases do not come to trial for about five years, longer in some counties.

2. Availability of evidence and witnesses. Five years down the road, no one will remember all that well the particulars of today's dispute. Many of the important emails will have been lost, as your business will be three computers (or computer systems) down the road and almost no one prints out all of the emails sent or received. Some of the key employees – particularly, the project managers – may be long gone, many of whom might actively *hate* you. It is always wise to remember that virtually all employees will, at some point, become ex-employees.

3. Pressure to settle or go elsewhere. The closer you get to trial, the more pressure the court 'system' will put on you to settle. The first attempt – 'go to mediation' – is not a bad idea in many cases, as it is comparatively inexpensive and concludes many cases. Unfortunately, those mediations which are most likely to be effective occur after all of the discovery has taken place, which would be three or four years down the road, the paving of which does not come cheaply. The second attempt is to try to get the parties to agree to arbitration. Arbitration? That is a device some believe was invented by the Devil on a day s/he was in a truly foul mood, feeling especially vindictive. The Devil can be often found during the construction process. He especially likes to spend time in the details.

4. Unpleasantness is the norm. The process can be unpleasant. Litigation is, after all, an *adversarial* process. Litigation is like having two surgeons in the operating room. While one is trying to take out the appendix, the other one is trying to put it back.

5. Forget justice or vindication. Those who participate in the legal process looking for 'justice' or 'vindication' will find that the legal system is a lot more interested in 'process'. In other words, the system seems more concerned with *procedural* justice – that the correct 'Rules' have been more or less followed - rather than with *substantive* justice – that there is a fair and equitable result to your dispute.

6. You can usually make more money elsewhere. You will make more money estimating and practicing effective project management. The amount of actual time you may have to spend with a litigation in activities such as answering interrogatories, preparing for a deposition or preparing for trial can be enormous, a great deal more than one might expect before experiencing it for yourself the first time. One can only be in one place at a time and only doing one thing at a time. And, time is money.

7. Expensive. Did I say that it is very expensive?

8. You can't control the result. The judge who hears your case may not know much about construction issues, particularly with regard to the public bid laws. The jury will be fast asleep within five minutes of your commencing a discussion of how one of the supplementary general conditions modifies a specific provision of the general conditions upon which your whole case is based. Juries work best when they are asked to decide issues of guilt or innocence using their own common sense. The complexities of construction contract law are not often their strong point. Jury consultants say that when a jury gets bored, it may decide the case on the basis of which lawyer or which client it likes best (or likes least). Also, since construction cases other than mere collection cases tend to take many days to try, some say that the longer the case drones on, the more the jury might be interested in punishing someone for taking them away from their usual personal and business lives against their will.

9. For some clients, their worst enemy throughout the process might seem to be their own lawyer. Construction law is *really* a niche specialty. The lawyer who performs very competently your corporate, real estate and estate planning work may be utterly clueless about construction law issues. But, will s/he tell you this? A good construction lawyer specializes in

this practice, working at it daily. A test for you and your lawyer. Ask your lawyer to explain to you how your case might be affected by: scheduling; phasing; the submittal process; the disputes and claims process; how does one protect oneself with regard to changes and differing site conditions; claims on payment bonds; bid disputes; and, issues relating to mechanics' liens. You won't want your everyday lawyer to learn these things on your own dime, especially when you might see evidence of that learning process once a month for the next five years. And, most cases, at some point in the process, will settle. Many lawyers are not that good at settling cases because they find wearing a conciliatory hat more difficult than wearing an adversarial hat. If you are trying to evaluate a lawyer on this point, ask him or her how many cases he/she has tried in the last three years. Some lawyers only try one or two cases per year. Others try a majority of their cases. Those that try more cases often win big. But, they also lose big.

10. <u>What will this cost?</u> For most litigations, your lawyer will not be able to give you even a rough estimate as to what this is going to cost, unless that lawyer is handling the matter on a contingency fee, which is more common for a collection lawyer, less common for a business/construction lawyer. Why not? Well, will the matter resolve itself with the sending of a single letter or the making of a single phone call? (Not common, but it happens once in a while.) Or, will the matter not be resolved until after seven years of litigation in the superior court, a five day trial and a subsequent appeal to the Appeals Court? No one can really predict these things up front. Earl can be very mercurial. Sometimes he might have some slight interest in settling quickly. Usually, he doesn't.

11. <u>Attorneys' fees and court costs.</u> The only attorney's fee you will ever receive as an award for winning your case in Massachusetts in the majority of cases is either $1.25 or $2.50, which are amounts established by the Massachusetts Legislature. (Not a joke and not a misprint. Send me an email if you want a copy of this statute.) In some parts of the United Kingdom, the rule was or is that the loser pays *all* attorneys' fees for both sides, which is something that might cause even a staunch litigation stalwart such as Earl to think twice about participating in cases that are really thin as to liability, damages or both.

12. <u>Interest.</u> In Massachusetts, for a contract action, a party winning his claim in court gets automatically added on to the amount of the award 12% simple interest per year for each year the case was pending. Since the average construction case takes five years to come to trial, the party who will be paying is looking at having to pay a 60% interest factor on top of the award itself.

13. <u>Judges hate construction cases</u>. Most judges seem to hate construction cases. They take too long to try. There are a comparatively high number of exhibits. They can be quite complicated, both factually and legally, and often involve technical issues that only an expert truly understands. Arbitrators, on the other hand, tend to love trying construction cases. What's not to like where they are getting paid somewhere between $250 and $400 per hour to hear the case, a cost split by the parties and payable *in advance*?

14. <u>All that a judgment is is a piece of paper saying someone owes you some money.</u> Getting a judgment is an entirely different thing than actually getting paid if you win. Those litigations having the best chance of ending with a check are those that include within them an attempt to

provide security for such an anticipated judgment, including mechanics' liens, claims against payment bonds and 'reach and apply' actions.

III. HOW TO AVOID OR MINIMIZE LITIGATION.

Assuming you do enough of the following things, Earl might be less interested in litigating with you than he might be with litigating with someone else who is less informed or less disciplined in the use of the following procedures. Knowing what to do *and then doing it* may make the likelihood of litigation less or, at least, may shorten its duration.

If litigation cannot be avoided, the careful observation of the following steps may help you conclude a dispute as quickly and inexpensively as possible:

1. Knowledge is money in your pocket. It really is!. We have a slogan that we put at the end of each of our articles and *Squibs:* "Knowledge is Money in Your Pocket. (It really is.)" The root word of 'contractor' is 'contract' and contracts are legal in nature and either provide you with rights or deprive you of rights. If you look at our website, you will see available to you at no charge any number of construction articles, forms and *Squibs* that will help you get better and better ensure you will get paid for the work that you do. If reading these types of articles is not your thing, you would do well to hook up with a knowledgeable construction lawyer and to frequently discuss with s/he the problems you are facing in the daily pursuit of your business. One of the first seminars I gave for contractors on collection techniques was at Bentley College more than twenty years ago. Forty-two people attended. When I gave the exact same seminar one year later, I noted that someone who had attended the previous seminar also attended this one. When I asked him why he would go to the same seminar twice, he responded: "Doing what I learned last time, I made over $195k last year that I wouldn't otherwise have gotten." Note that we are giving four of our most popular seminars in June, 2015 in a series entitled '***On Your Way Home***', as they are all scheduled from 5:30 to 7:00 pm on weeknights. Information on this free series is attached to the transmittal email for this *Squib.*

2. Only work with a written contract. An enforceable written contract can be as little as two short emails, although more detail is generally a good idea. Your proposal would be one email. Earl's response would be the other. There being only three essential elements to any contract, as long as you have an offer, an acceptance and consideration (generally, a dollar amount to be paid for the performance of a defined scope of work), you not only have a contract but may also have with a *written* contract, a legal requirement in Massachusetts for the filing of a mechanic's lien. And, an absence of a written contract can greatly increase how long it takes the bonding company to settle your claim against a payment bond. (Come to our payment bond seminar and find out why!) Remember, that various legal documents are required to be in writing (i.e. deeds and most wills) to be enforceable, as is provided for by various 'statutes of fraud'.

3. An oral contract is worth the paper it isn't printed on. Every time you sign a significant contract, you may be putting your family's and your company's present and future financial viability at risk. The following statements in our valueless modern times may not make as much sense as they did fifty years ago: "I'm from the old school. In my time, a man's hand shake was all that was necessary. My word is my bond. I have done lots of jobs this way with Earl and

they have always worked out and I have always gotten paid." Nearly forty years of doing this work have taught me that most construction companies will ultimately go out of business for one reason or another. This might occur because of jobs one worked for Earl. People change. Maybe Earl used to be a good guy. But, he may not be that way anymore. If you have a dispute with Earl, can he lie better than you can tell the truth if you go to court? Why put yourself in that position when you don't have to? A writing is a physical, tangible thing. An oral contract is ephemeral, woven from a gossamer thread that may be observable today but non-existent tomorrow.

4. With regard to your usual business practices, don't make special exceptions for family members or friends or 'friends of friends'. These can be the most dangerous contracts and jobs of all. Remember, that, reportedly, some of the most protracted and/or vicious recent litigations have been with regard to DeMoulas Markets and Legal Sea Foods: in other words, litigations within families.

5. Be aware of various statutory forms of contracts that may apply to your contractual endeavor, which may make the form of contract issue easier, safer and less expensive to achieve. If you are a homeowner building an addition to your house, there is a statutory form of contract. There is a statutory form of contract applicable to you if you are a filed subbidder or a trade contractor performing public work. In any of these three situations, if Earl tries to give you a different form of contract, you might be able to argue that doing so constitutes an unfair and deceptive trade practice.

6. Be aware of potential available remedies that may have the effect of either shortening any necessary litigation or at least funding it. The filing of mechanics' liens, particularly with regard to liens filed earlier in the job, have the tendency of accomplishing both of these goals. And, when mechanics' liens are going to work, they typically will work within the first 90 days or so after they are filed, which sometimes might mean that no litigation will be required at all. Understanding and exercising your rights under both common law payment bonds and statutory payment bonds may provide a funding mechanism, particularly on Massachusetts public payment bond claims. In situations where your company has a 'clean claim' (no real defenses to it), knowing what other ongoing jobs Earl has could allow you, with court permission, to attach monies due or to become due to Earl on those jobs. One of the things that helps make reach and apply actions effective is that to get your court order, you have to sue various of Earl's customers. To be involved in a dispute that doesn't really involve them, incurring the notoriety and expense of litigation, can truly piss off his customers to the point that Earl might simply pay you to save his business relationships with these third parties. Earl might not always act in a moral or ethical manner. But, no one will ever be able to accuse Earl of being stupid.

7. Have a contemporaneous writing for each piece of extra work. Notice that I didn't say: 'be sure to get a change order before you do the work'. There may not be time to get a change order. There may not be enough information about the scope or cost of the changed condition to come to a complete, firm agreement as to the work before it is performed. But, always be aware of the fact that Earl might be trying to cheat you. Be aware of the fact that in Massachusetts, there is case law saying that a general's super does not ordinarily have the right to order subcontractors to perform extra work, unless the contract gives him that right, which it usually

doesn't. So, *before* you do any work ordered by Earl's super, send an email to Earl's PM such as follows: "Your super has just directed me to add five extra light fixtures to the cafeteria. Unless otherwise directed by you, three business days from today my company will do this work as an extra, with costing data and the formal paperwork to follow." Folks, this isn't brain surgery and is not complicated to do. It's simple common sense and sending such an email before doing the work has a certain beneficial legal effect for you with regard to this transaction. You *do* have to give Earl's PM a reasonable time to respond: say, two or three business days, if at all possible. No one can control what someone else will do. While it is true that you may not be able to get a change order out of Earl before you do the work, you can certainly send him this email. One of the reasons that Earl is so successful in business is that – present company excepted, I am sure – so many of his subcontractors are *lazy*.

8. Keep good detailed daily reports and take a lot of pictures. In most construction disputes that are not mere collection matters, these are the two most important sources of evidence. Have your supers do this consistently or fire them. Keeping excellent detailed daily reports – they go into evidence as 'business records', which can be an excellent source of evidence that also reduces trial time – and taking a lot of good dated pictures will help you deal with delay, hindrance, interruption, coordination and acceleration claims, both yours and Earl's. Have the super turn into the office each week's daily reports *before* he/she gets paid. You are the boss now, aren't you? Then, act like it.

9. A foreman's log is not a substitute for good daily reports. This is for two reasons. For one thing, a foreman's log does not have the same evidentiary weight as do daily reports because it is not considered to be a business record as to your company. And, practically speaking, when the super leaves your employ, he usually takes that log with him, claiming that it is his personal property. At the bare minimum, have him turn in his logs periodically for each job. They are not as good as business records but they are better than nothing. If nothing else, your lawyer can use them to help prepare your super for his deposition/court testimony. And, for unfriendly witnesses, these logs can be used on the witness stand to 'refresh his recollection'. (A legal term)

10. Before a situation gets hopelessly screwed up, speak with a good construction lawyer. We've all heard that an ounce of prevention is worth a pound of cure. Wise sayings – aphorisms - have staying power because they tend to be true. The best of lawyers can't write a contract for you when the job is over or you are within a claim or litigation situation. S/he can't undo an improvident termination or give a statutorily-required notice after the time for which has now expired. When one waits for a matter of years to consult with a lawyer over a payment bond suit on a public project, one of the first things that lawyer is likely to tell you is that the statute of limitations for such a claim has expired. In many situations, you may only have 90 days to file a mechanic's lien. An ounce is $1/16^{th}$ of a pound. You wouldn't want to pay sixteen times more than something might be worth, assuming everyone correctly does his/her job: now, would you?

11. Put in your proposal and ultimate contract a reasonable attorney's fee provision if you are forced to sue. Such a contractual provision, if written properly, is enforceable in Massachusetts and will usually provide you with more than the $1.25 or $2.50 the court will otherwise give you! Just as importantly, having such a clause in your contract might cause Earl to think twice before he does you wrong because, let's face it. Earl doesn't want to have to pay his own

lawyer, let alone yours, as well, if some judge finds that he did something wrong. The possibilities for your business success are enhanced when you do things that help Earl 'do the right thing'.

12. Have written employment contracts with your key people, especially your PM's and estimators. Depending on how well it is written, a covenant not to compete contained within an employment contract may be enforceable and might keep him or her from leaving your employ late at night with *your* Rolodex and with *your* estimates in progress. Granted, this is more for the sake of protecting your own business than it is for dealing with Earl. By the way, don't keep the signed employment contracts at your office. I had a case where the employee in question took the original, signed contract with him when he took off with the Rolodex and the estimates. Keep the originals of key documents off – site, at an undisclosed location exclusively under your control and under your own lock and key.

13. Any oral or written statements or documents that were said/made before you signed your ultimate contract with Earl generally have no legal significance *at all* to establish scope or price issues once a contract is signed. These are what is known as 'parole evidence'. Courts only enforce the final manifestation of the parties' intent, which is the final, signed contract. A proposal you submit to Earl is not part of the final contract unless the contract says that it is. I had one specialty subcontractor who had a very good business go out of business because he couldn't put this concept into practice. He had a wonderful proposal with all kinds of good and protective anti-Earl provisions. But, he would sign contracts with Earl that didn't mention the proposal or incorporate its terms or identify it as a contract document. From a legal standpoint, such proposals no longer had *any* meaning once the contract was signed. Similarly, there can be enforceable oral change orders *after* a written contract is executed. But, there can't be oral change orders *before* a written contract is executed, unless they are specifically mentioned/included in the written contract.

14. Be sure you know what you are doing before you agree to an arbitration clause in your contract with Earl. If you haven't done so, before you sign your next contract with an arbitration clause, read *Squib*# 13: "Thirteen reasons not to agree to an arbitration clause in your contract." Some say that the number thirteen is an unlucky number. But, not Earl. Earl simply *loves* arbitration. Have I mentioned elsewhere that some think that arbitration is an infernal contraption invented by the Devil himself? Or, uh, herself?

15. Arbitration and mediation are not the same thing. Mediation is a limited, controlled settlement meeting which is non-adversarial and, if it doesn't settle the case, doesn't generally affect any ongoing or future litigation you might have. A mediator does not 'decide the case'. Arbitration, on the other hand, *is* a litigation and is an adversarial process just like court which will directly dictate a substantive result to your dispute. The arbitrator *does* decide your case and one of the thirteen reasons referenced in the paragraph above is that arbitration awards are not generally appealable. (You now need to only learn the other twelve!)

16. Only perform construction contracts for which there are clear plans and specifications. Look, we need to know what we owe Earl and what he owes us. Not following this precept is simply a recipe for disaster. This is especially true for homeowners with home improvement

contracts. With regard to HIC, don't allow the contractor to supply his own plans and specifications. Have someone working for *you* do this.

17. In Massachusetts, only about one percent of all superior court civil cases go through a complete trial. Knowing what *you* are doing, *why* you are doing it and having a construction lawyer who knows what *he/she* is doing are ways of trying to get the matter resolved sooner rather than later. From the Good Book, Matthew 5:25: "Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison. I tell you the truth, you will not get out until you have paid the last penny." As to that last part? One wishes that were true. Especially those who have had the dubious pleasure of experiencing Earl.

18. The last idea. There are a lot of good ideas on good business practices which you can learn rather quickly – and, on *my* nickel - by reading many of the articles in the 'Construction Articles' and *Squib* sections of my website, www.sauerconstructionlaw.com. If you are not sure what you need to look at as to any particular problem, give me a call and I can probably suggest some things that might help you.

IV. CONCLUSION.

Look, I am not telling you something you don't already know when I say that luck plays a big part in what happens to us in life, both as to good things and as to bad things. The Roman Senator Seneca is said to have said in the first century A.D.: "Luck is what happens when preparation meets opportunity." I have heard a modern variant: "The better prepared I am, the better I find my luck to be." Makes sense, doesn't it?

We can't change what we did or didn't do yesterday. But, we *can* change what we do or don't do, both today and tomorrow. My second legal boss, a very interesting man by the name of Vincent Galvin, had a favorite expression: "Good, better, best. Never let it rest. Until your good is better and your better best." Good advice when I worked for him thirty years ago. Good advice for all of us *today*.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and informational purposes only. Questions of your legal rights and obligations under the law are best addressed to legal professionals who have the opportunity to

examine your specific factual and legal situations. Articles and forms are available on a wide number of construction law and surety law subjects at www.sauerconstructionlaw.com. We periodically send out 'Squibs' - short articles, such as this one - on various construction law and surety law subjects. If you are not currently on the emailing list and would like to be, please contact us and we'll add you to the list. Or, if you are receiving these emails and wish to be removed from this list, send us an email and we'll take you off of our list. Both of these things are as simple as that! Do me one favor, though. If you see Earl, be sure to tell him that I said 'hey'. But, please remind him that he owes me a hundred bucks! He's not really *that* bad a guy. Certainly, not a bad guy to have a sandwich and a beer with, although he *does* seems to forget his wallet *a lot*, especially around meal-time. But, if you have a contract with him, ***beware***! He tends to be very good at many of the things discussed above. Use as many of these anti-Earl tools as possible. That is, if you want your business to *flourish.* And, *survive!*

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