

Scribbles Squibs #28 (July 9, 2014):*

Good Things Come In Three Small Packages

By Attorney Jonathan Sauer

Introduction:

In this *Squib*, we are including three short topics, none of which is long enough to be its own *Squib*. We'll discuss: (a) things you can learn from the Massachusetts Secretary of State's Website to help you with your business; (b) the obligation of foreign corporations and foreign limited liability companies (LLC) to register with the Massachusetts Secretary of State's Office in order to be able to legally operate here and to use the courts; (c) how the forced substitution case bid protest from the last *Squib* turned out.

So, this particular *Squib* has a little bit of this, a little bit of that. Kind of what your plate should look like after your first pass through the line at Old Country Buffet. For the *second* pass, one might expect a more focused, discriminating effort. After all, by then you know where the good stuff is. And, that the steamship roast beef is near the end of the line after the numerous salads, breads, starches, macaroni and cheese and fruits and vegetables, all of which management hopes will have already filled you up!

Summertime. The living is easy?! How about, uh, just plain *hot*! So, three short topics so as to not to unduly tax the overheated noggin. Plenty of longer and more complicated things after Labor Day when cooler heads will prevail! For now, more limited choices necessitated by having to deal with the heat. Other key issues to be addressed: Drinks on the fantail? Or, on the main deck? Lobster or chateaubriand? Paper or plastic? Questions we might answer later on.

I. A VARIETY OF THINGS YOU CAN EASILY FIND OUT OR DO THROUGH THE SECRETARY OF STATE'S WEBSITE.

My question if I were tasked to read this: why would I want to read about Secretary Galvin? Presumably, (horrors) a Democrat? Possibly even an Irishman? From the very same country that thinks that fine dining is serving boiled beef and serving beer the color (some might add with the taste) of *motor oil*? Where it rains nearly *all of the time*? Five things you can learn or do from his website, though.

A. Is your potential contracting party a corporation or limited liability company (LLC)?

In my view, this is an important thing to know. Is your potential contracting party a corporation or LLC? Or, rather, is it/he/she something else? John Doe working as John Doe Contracting, a sole proprietorship. You might ask 'why is this important'? In my view it is important because when one does business as a corporation or LLC, one has a certain level of debt protection as to that person's own personal assets. People know they are dealing with 'a

company', not with an individual. So, if the job goes south, usually, the individual behind the company's own assets are safe (provided the individual is not involved with a fraud claim). It's inexpensive to form a corporation or an LLC and this can be either completely done on-line or mostly done on-line. The filing fees are nominal.

So, why wouldn't someone do something that only makes sense? Truthfully, there are probably a lot of answers. From my perspective, here are a few. Someone might not do this because they don't understand the significance and downside of *not* being a corporation or LLC. Or, the person does not want to spend the money to accomplish this result. Or, the person is personally 'judgment-proof' meaning that even if they lose a case there are no personal assets a creditor could get at. Such a person lacks sophistication, not understanding how a failure to be a corporation or LLC might make someone less likely to contract with them simply because they are not a 'company'. A company is presumed to have some assets, some equipment, some administrative framework, some access to a line of credit. But, as to an individual? That individual can only be presumed to have himself or herself.

I often suggest to my clients not using persons who are not companies or LLC's in a lot of circumstances. And, searching the corporation database on the Secretary's website will indicate whether or not the person you are interested in is a corporation or LLC. (Searching the 'corporate' database also indicates the existence or non-existence of an LLC.)

B. If your contracting party is an out-of-state firm, by checking the Secretary's records, you can determine whether or not that party is registered with Massachusetts as a foreign corporation or as a foreign LLC.

As we see below, this will have some consequences for litigation and various fees and fines. I would add here that suing a foreign corporation or a foreign LLC is more complicated than suing a domestic corporation or domestic LLC. It would be hard to imagine that any Massachusetts superior court judge would – or *could* – attach bank accounts being held out of state by a defendant in a Massachusetts court. Also, when one sues a foreign corporation or LLC in Massachusetts and gets a judgment, before that judgment can be enforced by the foreign state's sheriffs, usually a second legal proceeding will have to be brought in the other state to 'domesticate' that judgment, which involves more time and most costs.

In United States history, a **carpetbagger** was a Northerner who moved to the South after the Civil War to try to take advantage of the instability and power vacuum that existed there. The term *carpetbagger* was a pejorative term referencing the 'carpet bags', a form of luggage in vogue at that time. The term came to be associated with opportunism and exploitation by outsiders. The term is still used today to refer to an outsider perceived as using manipulation or fraud to obtain an objective. Now, does that mean that a foreign corporation or foreign LLC domiciled in another state has to be seen in this light? Hardly! Probably there is little basis for such a thought today where business is more national and even international in nature. At the same time, as our Massachusetts readers who have lived here and worked here their entire lives can attest to, it's hard to make a living here (as it is any other place) and this notwithstanding having local roots and connections. For a company coming into Massachusetts to try to take away some of its work without these connections and histories suggests that they think they

know something that we don't know. Or, that they might do business in a different way than they might in the state where they are domiciled.

In addition, with only a minimal physical presence in Massachusetts – in many instances – it is not very difficult to pull up their stakes and move their tent. And, if you work for one of them, to be able to minimize the number of plaintiff's legal cases that have to be filed and in order to maximize possible pre-judgment attachments and remedies, you might have to go to their state to sue them there.

C. You can check someone's name to see what other corporations or LLC's that person has been associated with.

People will organize new corporations or LLC's to avoid debt and to separate their name from the name of a corporation or LLC with a bad reputation or one which has gone out of business. So, when a person's name is familiar - but you can't quite place them - checking the corporate database is a quick and easy reference to see what other corporations and LLC's that person has done business with or as. Other than the fact that this might reveal company names that you recognize - with negative connotations - a person's being involved with a high number of corporations or LLC's is some (not conclusive) evidence of the fact that this guy is a 'player', which might be one negative factor in considering this person for a business relationship. This is all the more so where a person claims to be a contractor but also a real estate investor or a record producer.

D. You can find out about how to become a corporation or LLC.

Other than giving you a lot of information on these subjects, you can actually file a corporation or LLC on-line. Necessary forms included!

E. You can find out how to file a homestead.

Massachusetts allows homeowners to protect up to five hundred thousand dollars (for elderly individuals, one million dollars) of their equity in their home by filling out a fairly simple form and filing it with the registry of deeds containing the real estate records for the town you live in. This for the enormous price of thirty-five dollars! A lot of explanatory information and forms are on the website.

How does this work? Let's say your house is worth six hundred thousand dollars and you have a three hundred thousand dollar mortgage. That means you have three hundred thousand dollars of ostensible equity in the property. But, when taking the amount of the outstanding mortgage in addition to your homestead, there is no ostensible equity that a creditor can reach. (The house would have to be worth more than eight hundred thousand dollars for that to happen.) Other than saving your home when life's darker shadows threaten your door, the fact that there is no ostensible equity in your home that can be reached can give you some negotiating position with your creditors. Experience has taught that many judgment creditors and their lawyers have short memories and a similar amount of patience. Getting something is better than getting

nothing and if the creditor and his counsel can see how well set up you are, better terms can often be negotiated as to outstanding debts.

II. FOREIGN CORPORATIONS AND LLC'S HAVE TO REGISTER IN MASSACHUSETTS TO BE ABLE TO USE THE COURTS AND TO AVOID FINES, PENALTIES AND OTHER NEGATIVE CONSEQUENCES.

A. FOREIGN CORPORATIONS DOING BUSINESS IN MASSACHUSETTS ARE REQUIRED TO REGISTER WITH THE MASSACHUSETTS SECRETARY OF STATE'S OFFICE OR LOSE THEIR RIGHT TO USE THE COURTS AND TO OTHERWISE BE SUBJECT TO CERTAIN FINES AND PENALTIES.

M.G.L.A. 156D § 15.02 CONSEQUENCES OF TRANSACTING BUSINESS WITHOUT AUTHORITY provides:

“(a) A foreign corporation transacting business in the commonwealth without delivering to the secretary of state for filing the certificate required by section 15.03 shall not maintain a proceeding in any court in the commonwealth until the certificate is delivered and filed.

(b) The successor to a foreign corporation that transacted business in the commonwealth without delivering to the secretary of state for filing the certificate required by section 15.03 and the assignee of a cause of action arising out of that business shall not maintain a proceeding based on that cause of action in any court in the commonwealth until the foreign corporation or its successor delivers the certificate and it is filed.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor is required to deliver to the secretary of state for filing the certificate required by section 15.03. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor delivers the certificate and it is filed.

(d) A foreign corporation is liable to the commonwealth for the years or parts of years during which it transacted business in the commonwealth without delivering to the secretary of state for filing the certificate required by section 15.03, in an amount equal to (1) all late fees which would have been imposed by law had it duly delivered the certificate and (2) all interest and penalties imposed by law for failure to pay the fees. A foreign corporation is further liable to the commonwealth, for each month or part thereof during which it transacted business without delivering the certificate, in an amount determined by the secretary of state . . .” (Emphasis Added)

B. FOREIGN LIABILITY COMPANIES DOING BUSINESS IN MASSACHUSETTS ARE REQUIRED TO REGISTER WITH THE MASSACHUSETTS SECRETARY OF STATE'S OFFICE OR LOSE THEIR RIGHT TO USE THE COURTS AND BE SUBJECT TO CERTAIN FINES AND PENALTIES.

M.G.L.A. 156C § 54 Failure to register; penalty; service of process provides:

“(a) A foreign limited liability company doing business in the commonwealth which fails to register with the state **secretary shall, for each year that such failure shall continue, be fined not more than five hundred dollars.** No such failure shall affect the validity of any contract involving the foreign limited liability company, nor is a member or a manager of a foreign limited liability company liable for the obligations of the foreign limited liability company solely by reason of such failure, **but no action shall be maintained or recovery had by the foreign limited liability company in any of the courts of the commonwealth as long as such failure continues.** The failure of a foreign limited liability company to register with the state secretary shall not prevent the foreign limited liability company from defending any action, suit or proceeding in any of the courts of the commonwealth . . .”

Now, at different times, it appears that corporations engaged only in ‘interstate commerce’ were excluded from some of these rules. This is a *very* complex subject. Suffice it to say, though, that a failure to register in Massachusetts as a foreign corporation or foreign limited liability company may deprive one of the opportunity to bring actions in the Commonwealth’s courts and can cost one various fines and penalties.

Do courts check the registration status of a corporation before accepting a suit for filing? My sense would be ‘no’. This is a matter that can be brought up by a defendant in a motion to stay or a motion to dismiss, forcing attorneys’ fees and expenses on foreign corporations and LLC’s which have refused to register.

We, at Sauer & Sauer, do a lot of public bid protest work. Two of the criteria of a bidder for the award of public work is that a bidder be ‘responsible’ and ‘eligible’. Arguments might be made that an unregistered foreign corporation or unregistered limited liability company may not meet either or both of these criteria.

III. MASS ATTORNEY GENERAL (AG) RULES ON FORCED SUBSTITUTION OF FILED SUBBIDDER ISSUE.

We reported in our last *Squib* concerning a bid protest filed by a general bidder with regard to what it considers to be specialty work: masonry repointing, waterproofing and a small amount of work for a variety of other trades with regard to a housing project. By bidding this job as the general contractor, as well as the masonry filed subbidder and as the waterproofing filled subbidder, the bidder was able to come in about five hundred thousand dollars below the owner’s pre-bid estimate. In effect, the general bidder passed on most of the savings to the owner it was

able to achieve through the economies of having essentially one entity build the vast majority of the project with increased efficiencies as to crew movements and scheduling. The awarding authority, a housing authority, wished to force this bidder to substitute down to lower filed subbidders for the masonry and waterproofing trades, which work constituted approximately 68% of the entire job. The general bidder argued that having to use two outside companies for these trades - both of whom could be considered to be competitors - would eliminate most of the economies the general bidder envisioned by keeping most of the work in-house. The general bidder argued that while a public owner does have a right to substitute down to lower filed subbidders against whom it does not have objections as to standing and ability, certainly the statute providing for this didn't contemplate taking away 68% of the job from the general bidder, particularly for a specialty job of this nature where more than fifty percent of the work was masonry repointing. And, argued the protester, as a practical matter, one had to consider such a bid as the sum of three parts: general contractor, masonry subcontractor and waterproofing subcontractor. Since the same company was bidding all three elements of the job, the only number that really mattered was the final number, as a breakdown among these three individual elements was essentially one for convenience in terms of how the gross number was distributed. Moreover, the protester argued that there is case law saying that those bidding public work are supposed to bid it profitably, profit being a goal of the process. And, that being forced to accept the forced substitutions, this job went from being a job with a reasonable rate of return to a job where the bidder potentially stood to lose several hundred thousand dollars. For all of these reasons, this bidder refused to take the job. A more lengthy report on this case is contained in our last *Squib*, contained on our website.

Massachusetts only has two appellate decisions that are consulted with regard to this issue. And, one of these two decisions does not actually deal with a forced substitution issue and the other one, which did, did so only with regard to a preventative maintenance contract, not with regard to an actual construction project. Not much legal authority, when all is said and told.

The AG denied the protest, recognizing the applicability of the two cases referenced in the briefs as controlling this result, holding that the bidder does not have 'veto power' over the awarding authority's ability to force substitutions.

With regard to a bid protest – like, for that matter, *any* trial – half of the parties are happy at the end and the other half aren't. At least one writer on these subjects – that would be *me* – has commented on the fact that with the current group of hearing officers, there seems to be a greater tendency for the AG to side with the awarding authority than might have been the case in years gone by. In any event, a bid protest decision is an advisory opinion only that has no binding effect upon the parties or upon what a court might do with the issue, the court's consideration of the matter to be *de novo*, from the beginning with one small exception which hardly ever comes into play. There are several articles on the website describing and discussing the bid protest procedures, tactics and remedies, including the fact that for some bid protests, it might make sense to go for both an administrative bid protest before the AG and to also file a court action, although the ordering of these two events in terms of which one comes first is critical. Were this awarding authority involved with this bid protest ever to make claim against the low bidder who refused to do the job with the forced substitutions, the owner would have some difficulties with that bidder's bid bond surety. For one thing, the bidder never refused to

enter into a contract on the basis of the bid that it submitted. And, it was only when the public owner attempted to convert its general bid into a kind of Chinese menu – take one from column a and one from column b – that the job could not go through. Also, should that public owner seek to sue the general bidder and its bid bond surety, a counterclaim for lost profits could be anticipated with some chance of success.

It takes many of us years to realize that life isn't about destinations. It's about the journey. And, since the majority of all law cases never get tried to a conclusion, the law business is more about the process and not the result. The process, perhaps, with a sprinkling of tactics and strategy liberally applied. It should be obvious, then, why the two principals of Sauer & Sauer spend most of their time watching The Food Channel. Just as a final dish benefits from having layers of flavor built into it, more successful disputes and resolutions have that strategy and tactics spread in at different times so the whole dish, when complete, has been thoroughly permeated. Seasoned.

CONCLUSIONS:

Now, to answer this *Squib*'s most important questions. Drinks, this evening, should be served on the main deck. (Dodging the seagulls can be such a bother at the fantail!) And, of course, lobster. Probably a lot healthier than chateaubriand if you can keep the butter down. (Ina Garten or Paula Deen need not apply.) Now, as to paper and plastic. It's gotta be paper, man. You see Al Gore and I? We have *this thing* about the environment.

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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."

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