Scribbles Squibs* #65 (August 28, 2018):

AN INTRODUCTION TO THE MASSACHUSETTS FALSE CLAIMS ACT (MGL C. 12, SECTIONS 5A – 5O)

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I. INTRODUCTION.

A 'false claim' is one that meets one or more of the definitions included within this statute, which are contained in Section 5A and which are set forth below.

Forewarned is forearmed. I am *not* a fan of this statute as to how it is applied to contractors in many situations! It is disappointing to me that Massachusetts has found still *another* way to tell its businesses that while it appreciates receiving their tax income and employing its residents from whom it receives additional tax income, notwithstanding, it really doesn't like them very much. Or, at all.

It is conceded that this type of statute nationwide is predominantly concerned with government trying to get money back from those people who have falsely and fraudulently billed governmental bodies such as Medicare and Medicaid in various ways, including for services that were never performed. In my view, there is nothing wrong with a statute such as this one when it is applied to that type of situation. In fact, in my view, this is a correct and appropriate use of governmental power. There is a place for crooks. It is called prison. (Perhaps, another possible place for them – but not yet law - would be to line the very worst of them up against a brick wall, where an end to their criminal career and their drain on public monies for prosecution and housing can be sudden, certain and *inexpensive*.) As it is said, don't do the crime, if you can't do the time.

But, I am looking at this statute solely as to how it applies to my own cabbage patch, the Massachusetts construction industry and, particularly, the Massachusetts public construction subset. And, where this statute is used to punish contractors as to claimed violations having to do with MBE/WBE issues and for performing work not precisely in accordance with plans and specifications, I think it has a lot of problems in many situations.

One of the principal problems is that this is a statute where one of its key provisions provides for paid squealers called whistleblowers. Now, I'm not talking about the brave and courageous men and women who report their employers to some governmental body for conducting themselves in ways that damage society and peoples' health. Those unpaid persons are true American heroes.

This statute is about *paid* whistleblowers, who are nothing but bounty hunters. And, to me, the worst part of this is not that the state condones this. Rather, the worst part is that the state *encourages* this.

This is a complex statute with complex ramifications. This Squib is only intended as being a very brief summary of some key provisions. We may have additional Squibs in the future to more thoroughly go through this statute.

II. STATUTES BASED ON A 'RULE' AS COMPARED WITH STATUTES BASED ON A 'STANDARD'.

Let's talk, for a moment, about the differences between statutes based on a 'rule' as compared with other statutes, such as this one, based on a 'standard'.

A. STATUTES BASED ON 'RULES'.

For some punitive statutes, potential violations of them are sometimes so clear that they are reasonably capable of being predicted before the offending conduct occurs. In other words, there is punishment simply because one does the prohibited act and it is clear in advance of the act's performance that this is a prohibited act.

Such statutes are based on what the law would call 'rules.' Do the prohibited act and you will be punished. And, where what would be a prohibited act can be well understood before it is committed, there is no room for interpretation and, for that matter, no room for concern as to at least understanding what one is not supposed to do. A posted speed limit is an example of a 'rule'. A 'burglary' is also another 'rule' (the act of breaking and entering a dwelling at night to commit a felony). Punitive statutes associated with the consequences of underpaying prevailing wages on a public project (multiple damages, attorneys' fee awards) are also 'rules' (e.g. MGL C. 149 § 27). So, for statutes based on 'rules', there really is only one element necessary to constitute a violation: did you do the prohibited act or didn't you? And, that a certain act or omission will constitute a violation can be reasonably predicted in advance of the performance of the act or omission. There is a reassuring certainty to the violation of statute based upon a 'rule'. You always know where you stand, whether you follow the rule or don't.

B. STATUTES BASED ON 'STANDARDS'.

Other statutes are a little more scary because, while there is *some* kind of a 'standard' to be complied with – such as, unfair and deceptive trade practices – there is an element of uncertainty in its application. This is because a 'standard' necessarily involves some level of judgment and evaluation in the application of the statute to the complained of behavior. Different individuals could reasonably differ over what is 'unfair' and 'deceptive' because there is no clear, real-world definition of what this is as to most particular claimed acts or omissions.

At least, nowhere near as clear as a statute based on a rule, violations of which are such that different individuals considering the behavior have no basis for having differing opinions.

So, with a 'standards' type statute, the same facts presented to one judge could result in a different result from that of another judge dealing with absolutely the same facts. And, with a 'standards' statute there may be different classes of violations. What might be an unfair and deceptive trade practice in the conduct of a business towards a consumer might not be an unfair and deceptive trade practice in the conduct of a business towards another business.

So, for a 'standards' type statute, there are two elements: (1) violation of some prohibited behavior; (2) the judgment by another as to whether or not the complained of behavior rises to the level of a violation of the statute. The 'scary' element is because an individual judge's own thought processes and evaluation can't be predicted in advance, unlike with a 'rule' And, one judge's evaluation of the complained-of behavior might be diametrically opposed to another judge's evaluation of that same behavior. There is an uncertainty associated with a claimed violation of a statute based on a 'standard' that is not there with a claimed violation of a statute based upon a 'rule'..

C. THIS STATUTE IS IN A CLASS OF ITS OWN, BASED ON A 'STANDARD' BUT WITH SEVERAL ADDITIONAL FACTORS NOT ORDINARILY PRESENT IN MASSACHUSETTS STATUTES.

Enter the Massachusetts False Claims Act (MFCA.) This has the two elements in the application of a 'standard.' But, this statute has, potentially, at least three *additional* elements.

Being a 'standards' type statute, we have already discussed the first two elements.

The third element is 'whistleblowers'. This statute not only tolerates paid whistleblowers. It actually *encourages* them. And, since when has this been *alright* in Massachusetts? Colonists came to Massachusetts nearly four hundred years ago to escape tyranny, not to set up a tyranny branch office. In fact, this is the only Massachusetts statute I have become familiar with in my legal travels that even discusses whistleblowers, let alone encourages them. And, it encourages them to the extent of not only providing them with some legal protections as to the whistleblowing but by actually giving them a percentage of the recovery. In the vernacular, they get paid to squeal. They get a share of the loot. Indeed, if you were to google 'Massachusetts whistleblowers', you would find that there are any number of law firms specifically inviting business from Massachusetts whistleblowers. 'Blondie' from 'The Good, the Bad and the Ugly', one of Clint Eastwood's better 'man with no name' characters and movies, was a bounty hunter. And, so are whistleblowers. Some might even say they are even *worse* than the bounty hunters of the Old West.[1] So, added to the uncertainty of a statutory 'standard', a violation of a whistleblower statute adds its own level of uncertainty.

The fourth element is simple chance or bad luck. Will a third party know of a company's claimed false claims? And, will that third party have the inclination to 'turn you in'? This is, in many situations, something that a party contemplating an act or omission which might lead to a prosecution under this statute will have no real idea about before such act or omission occurs.

And, the fifth element of MFCA is that with particularly egregious behavior, violators will not only be subject to civil prosecution (i.e. fines, payment of multiple damages and the claimant's attorney's fees). Under certain circumstances, violators are potentially subject to criminal prosecution. As in possibly going to jail.

This is provided for by M.G.L.A. 266 § 67B, Presentation of false claims

> "Whoever makes or presents to any employee, department, agency or public instrumentality of the commonwealth, or of any political subdivision thereof, any claim upon or against any department, agency, or public instrumentality of the commonwealth, or any political subdivision thereof, knowing such claim to be false, fictitious, or fraudulent, shall be punished by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two and one-half years, or both."

III. KEY PROVISIONS OF THE MFCA STATUTE.

The MFCA was enacted in 2000 with significant amendments passed in 2012. In broad strokes, the MFCA authorizes the Massachusetts Attorney General to investigate false claims involving "state funds or funds from any political subdivision" of the Commonwealth, and to bring an action for civil penalties of up to $11,000 per violation and to recover three times the amount of damages (payments and consequential damages), along with investigation and litigation expenses and expert witness fees and attorneys' fees, all as provided for by MGL C. 12 § 5B. This is really a *long* statute with fifteen sections, some of these sections longer than an average statute.

The Massachusetts False Claims Act is set forth in Massachusetts General Laws, Chapter 12, Secs. 5A - 5O. The Massachusetts False Claims Act contains a whistleblower provision that encourages private citizens to report fraud against the government of Massachusetts - fraud that would likely remain undiscovered without the whistleblower bringing it to light. In order to encourage whistleblowers to come forward, the Massachusetts False Claims Act provides strong financial incentive to do so if the whistleblower's claims are proven to be legitimate. The whistleblower – known as a 'relator' – can recover anywhere between 10% and 30% of any monies recovered, the different percentages based on various elements, discussed below.

Definitions applicable to this law are contained within MGL C. 12, s. 5A[2], which sections are set forth below:

§ 5A. Definitions.

"As used in sections 5A to 5O, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:–

"Claim", a request or demand, whether pursuant to a contract or otherwise, for money or property, whether or not the commonwealth or a political subdivision thereof has title to the money or property, that: (1) is presented to an officer, employee, agent or other representative of the commonwealth or a political subdivision thereof; or (2) is made to a contractor, subcontractor, grantee or other person, if the money or property is to be spent or used on behalf of or to advance a program or interest of the commonwealth or political subdivision thereof and if the commonwealth or any political subdivision thereof: (i) provides or has provided any portion of the money or property which is requested or demanded; or (ii) will reimburse directly or indirectly such contractor, subcontractor, grantee or other person for any portion of the money or property which is requested or demanded. A claim shall not include requests or demands for money or property that the commonwealth or a political subdivision thereof has paid to an individual as compensation for employment with the commonwealth or a political subdivision thereof or as an income subsidy with no restrictions on that individual's use of the money or property.

"False claims action", an action filed by the office of the attorney general or a relator under sections 5A to 5*O*, inclusive.

"False claims law", sections 5A to 5*O*, inclusive.

"Knowing" or "knowingly", possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information[3] or acting in reckless disregard of the truth or falsity of the information; provided, however, that no proof of specific intent to defraud shall be required.

"Material", having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

"Obligation", an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation or from the retention of any overpayment after the deadline for reporting and returning the overpayment under paragraph (10) of section 5B. . . .

"Original source", an individual who: (1) prior to a public disclosure under paragraph (3) of section 5G, has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly- disclosed

allegations or transactions, and who has voluntarily provided the information to the commonwealth or any political subdivision thereof before filing a false claims action.

"Overpayment", any funds that a person receives or retains, including funds received or retained under Title XVIII or XIX of the Social Security Act, to which the person, after applicable reconciliation, is not entitled.

"Person", a natural person, corporation, partnership, association, trust or other business or legal entity.

"Political subdivision", a city, town, county or other governmental entity authorized or created by law, including public corporations and authorities.

"Relator", an individual who brings an action under paragraph (2) of section 5C.

"Relators" are the whistleblowers who are not only tolerated under this statute but actually encouraged under this statute, such encouragement including receiving a percentage of whatever monies are recovered through an action under this statute.

A principal aspect of the MFCA that is different is the "bounty hunter" feature. This legislation authorizes a "relator" – a private individual not necessarily related to the controversy at issue - to bring an MFCA action on behalf of the Commonwealth or its political subdivisions. § 5C(2). Such an action must be filed under seal. § 5C(3).[4] That means that this case is filed in secret and is not something that the public will initially know about. The relator serves the complaint upon the Attorney General and the Attorney General has 120 days to determine whether it will intervene in the litigation and thereby take over control of the prosecution of the action from the relator.

If the Attorney General intervenes, the case is unsealed and the complaint is served on the defendant(s). § 5C(5).

If the case, as is taken over by the Attorney General, is resolved adverse to the defendant, the relator receives a bounty of 15 - 25 percent of any proceeds that are recovered, unless the court finds the action was "based primarily" on information not provided by the relator, in which case the relator still receives a bounty, but no more than 10 percent of any proceeds that are received. §§ 5F(1), (2).

If the Attorney General elects *not* to intervene, the relator may conduct (continue) the MFCA court case. § 5D(6). The Attorney General may thereafter, for good cause, intervene at any time. . If the Attorney General does not intervene, and the suit is either resolved by settlement or the relator prevails, the court determines the amount of the relator's bounty, which is: between 25 - 30 percent of any proceeds recovered, plus reasonable expenses (including attorney and expert witness fees). § 5F(4). Many relator actions in which the attorney general does not intervene are withdrawn or adjudicated in favor of the defendants. If the defendant

prevails, the court may award attorneys' fees and costs if it finds the action was frivolous or pursued in bad faith. § 5I(2).[5]

Section 5B is the "meat" of the statute and defines what actions can subject a person or corporation to liability under the Massachusetts False Claims Act. There are ten specific things that constitute 'false claims' and they are set forth in Section 5B (a). These include, for example, making it unlawful to (1) present a false or fraudulent claim for payment from the Commonwealth or any state agencies; (2) enter into a contract with the Commonwealth knowing that the information in the contract is false; or (3) conspire to defraud the Commonwealth through the payment of a fraudulent claim.

Section 5C provides the mechanism for a whistleblower (referred to as a "relator" in the statute) to bring a *qui tam*[6] civil action on behalf of the whistleblower himself and the Commonwealth for violations of the Massachusetts False Claims Act. The whistleblower, through his attorneys, may file a lawsuit detailing the alleged violations along with any supporting documents or materials.

Once filed, a whistleblower lawsuit remains under seal for at least 120 days while the Attorney General's Office investigates the claim to determine whether or not it wishes to pursue the fraud claim on behalf of the Commonwealth. Filing it 'under seal' means that this is not a discoverable public record, as are most documents associated with civil cases.

Should the Attorney General choose to pursue the matter (described as "intervening" in the statute), the lawsuit is unsealed and the Attorney General assumes control of and primary responsibility for the litigation. According to Section 5D, the Attorney General is given wide discretion once it assumes control of the litigation and many limitations may be placed on the participation of the whistleblower and his attorneys in the case. The Attorney General may even settle a fraud claim over a whistleblower's objection, provided a Court finds that the proposed settlement is "fair, adequate and reasonable under all the circumstances." Should the Attorney General initially decline to pursue the matter, the whistleblower retains the right to have his attorneys pursue the action, but the Attorney General may intervene at a later date.

Section 5B sets forth the monetary liability of any person or corporation who violates the Massachusetts False Claims Act, subjecting wrongdoers to civil penalties between $5,500 and $11,000 for each violation of the statute plus three times the amount of damages that the Commonwealth sustains as a result of the violations, along with an award of litigation expenses, including expert witness fees and attorneys' fees.

And, here is where the 'Relator' (whistleblower) comes in to play.

Section 5F details the proceeds that may be allocated to a whistleblower should a suit be successful and result in the recovery of money from the defendant. In false claim cases where the Attorney General intervenes and is successful in recovering money, a whistleblower is entitled to

between 15 and 25 percent of the recovered proceeds, plus the awarding of the whistleblower's attorney's fees and costs (paid for by the defendant). Should a Court determine that the false claim case and ultimate recovery was based primarily on information other than that provided by the whistleblower, the whistleblower is only entitled to up to 10 percent of the recovered proceeds. In cases where the Attorney General has declined to intervene and the whistleblower and his attorneys successfully recover money from a defendant, the whistleblower is entitled to between 25 and 30 percent of the recovered proceeds.

IV. SOME EXAMPLES OF CIVIL PROSECUTIONS UNDER MFCA.

The False Claims Division was created in 2015 by Attorney General Healey to expand upon the Office's existing false claims initiative. As claimed by an AG website, the False Claims Division works:

> "to safeguard public funds by enforcing high standards of integrity against companies and individuals that make false statements to obtain government contracts or government funds. The False Claims Division aggressively protects taxpayer interests through prosecution and outreach with the ultimate goal of ensuring that Massachusetts contractors are the national model for quality and integrity."

As reported on an Attorney General website, using the Massachusetts False Claims Act, M.G.L. c. 12, §§ 5A-5O, the False Claims Division conducts civil investigations and prosecutions against companies and individuals who mislead or defraud state or municipal entities through the use of false or fraudulent claims, records or statements. The Massachusetts False Claims Act is a powerful law enforcement statute that authorizes triple damages and civil penalties of up to $11,000 per false claim, as well as the AG's attorneys' costs and fees (which seems very unusual because if assistant Attorneys General handle the prosecution, they are on salary.) The Act also allows private individuals known as "relators" to file lawsuits under the Massachusetts False Claims Act and to recover a portion of the proceeds in successful actions, subject to certain limitations.

Again, according to an Attorney General website, the Attorney General has recovered hundreds of millions of dollars in government funds, mainly arising from MassHealth-related false claims enforcement, including relator actions. The AG's False Claims Division will be working with partners in government and whistleblowers to expand upon those successes outside the MassHealth context, recover funds for the Commonwealth and its citizens, and deter misconduct.

A few examples of prosecutions against Massachusetts contractors. For the purposes of this Squib, I'll comment on problems caused by: (1) claimed MBE/WBE violations; (2) not

following the specifications and not confirming in writing oral agreements to change those specifications.

In August of 2015, the Attorney General's Office reported that three construction companies agreed to settle for a total of $1.4 million to resolve allegations that they falsely certified compliance with equal opportunity requirements on multiple public construction contracts.[7]

The complaint alleged that the general contractor falsely claimed minority owned business enterprise (MBE) credits for its subcontracts with a certain minority subcontractor, even though the work was managed and performed by non-MBEs.

Under the terms of the settlements, the general contractor and its principals agreed to pay $1.05 million. The non-MBE who performed the majority of the work agreed to pay $150,000. And, the MBE in question agreed to pay $200,000.

Another suit was filed against a general contractor from the western part of the state, allegedly involved in construction fraud and violating the Massachusetts False Claims Act. The complaint claimed that this general contractor falsely certified compliance with contracts that required the general contractor to use minority- and woman-owned businesses for work equal to a certain value of the contract. Allegedly, the general contractor used non-minority and non-woman contractors instead. The suit claims that between 2004 and 2008, this general contractor filed approximately 184 fraudulent certifications[8] and fell nearly $600,000 short of its commitment to use the percentages applicable to the jobs in question. The whistleblower in this case was the minority contractor who claimed to have lost work by the actions of this general contractor.[9]

For one project I have read about, the contractor was supposed to wrap a certain piece of plumbing equipment with a very inexpensive form of specified insulation. Prior to performing the job, the general contractor had worked out with the Project Engineer to use a better form of insulation, which was actually more expensive to install than that specified. This was never reduced to a written change order, although there is some documentation of this agreement in the files. The system didn't perform up to the public owner's expectations. The Attorney General took the position that since each requisition was a certification that the plans and specifications had been fully followed[10], each requisition was a 'false claim' because the contractor had not used the insulation specified. The Attorney General wanted a ten thousand dollar fine for each requisition. There were in excess of two dozen requisitions.

V. CONCLUSION.

How to bring together what is above so that it will make some sense to one reading this so that such an individual and/or his/her company will be less likely to have to deal with claims

under the MFCA? This will be a much longer than usual Conclusion because this can be a very big problem and a problem that is often caused by incorrect and incomplete thinking.

First, a piece of guardedly good (or less than bad) news. Nationwide, it seems that statutes such as MFCA are principally used to go after individuals/companies who have obtained fraudulent reimbursements for health services from entities such as Medicare and Medicaid.

But, of course, contractors can and *are* targets of such prosecutions in Massachusetts. Three examples are set forth above.

The MFCA has three elements in the uncertainty of its application in addition to the two elements that are contained in every 'standards' statute. These three additional elements are: (a) the possible participation of whistleblowers in the prosecution of the claimed offense; (b) will a contractor have the bad luck to come to the attention of a whistleblower who is brave enough (foolish enough) to 'push it'; (c) under certain circumstances, such behavior not only carries with it the potential for civil sanctions (for damages and fines) but carries with it under the most egregious of circumstances the potential for criminal prosecution.

Having worked as a lawyer for several decades – and, as I have found in just living life – a great deal of trouble or potential trouble can be avoided through the simple exercise of common sense. After all, the common sense of one's peers is the whole idea underpinning the jury system.

To do so doesn't require legal or other training. Simply, one needs to ask this question: Is what I am planning on doing (or not doing) demonstrate good common sense?

Contractors can get into trouble when they believe that they have discovered something new, an angle no one else knows about. As stated in the Old Testament of the Bible, 'There is nothing new under the sun.'[11] Here is the full quotation from Ecclesiastes 1:9 (NIV)

> 9 "What has been will be again,
> what has been done will be done again;
> there is nothing new under the sun."

Look, this is the Big Guy's Book. No one is anywhere near as smart as the Big Guy! Different faiths have, of course, different belief systems. Mine says, very clearly, that on the day of my judgment, I will have to give an accounting for everything I have done. (Anyone behind me should bring a book or many books. I think I am going to be there for awhile.) But, push it too hard, and you might have to give an accounting to the state for claimed violations of the MFCA well before you might have that discussion with the Big Guy. And, it might be very painful.

People seem more likely to get into trouble when they think they have discovered *something new* when, in reality, they are probably mistaken. This is another way of their saying, 'I can do x,y and z, even where you can't because I am smarter than you are'.

I am familiar with several construction companies founded by lawyers or in which lawyers were principals. The thinking of some of these lawyers must have been: 'Since I know the law and am better educated than most contractors and smarter than most contractors and through my representation of contractors have seen where they get into trouble, I'll be successful'. And, what resulted for a number of these companies is that they failed and went out of business. Because, among other things, they thought that they had discovered something new. And, of course, they actually hadn't. You and I both know that I am not smarter than you are. But, it's very important for your personal and business well-being that you don't think you are any smarter than I am.

In fact, lawyers, as a group, are above average in terms of being subjected to scams.

According to ABC News, in a variation of the classic "Nigerian" scam perpetrated against consumers, a pair of foreign nationals stand accused of having duped 70 U.S. lawyers and law firms out of $29 million--and of having tried to make off with another $100 million from 300 additional lawyer-victims.

And, this happens because some lawyers think that because of their intelligence and because of their training and education that *they* can't be scammed. They lose sight of the fact that there is nothing new under the sun and that this applies to *everybody*.

Yogi Bear often said: 'I am smarter than the average bear'. But, was he? After all, he was only a fictional character. And, a character from a *cartoon.* And, to the best of my knowledge, his series is currently off of the air! And, furthermore, whether a sidekick or not, there is a lot of evidence to suggest that Yogi's sidekick, Boo-Boo, a much smaller bear, was actually the smarter bear![12]

The MFCA is *very* serious legislation. Irrespective of what governmental officials have said over the years, I think there will be few readers of these words who will disagree with the statement that Massachusetts, historically, is a lot more anti-business than many states. Democrats tend to be liberals and liberals are frequently more pro-government than Republicans and more anti-business than Republicans. And, Massachusetts is almost as close to being a completely Democratic state as one can be. The fact that periodically there are Republican governors is nothing but a tacit acknowledgement that, periodically, someone has to take the reins who has an inclination to try to correct the financial mess that Democratic legislators and Democratic governors have created.

I think that it's reasonably clear that many people in government have no real understanding of business. Their own existence as government workers is predictable. They will receive so much money every week, whether they work hard or not. They will have clearly-

defined benefits. They will have reasonably predictable career advancement. And, there is almost no chance of their employer ever going out of business. And, whatever pay and benefits they receive are not dependent upon their employer's making a profit because with very few exceptions, government doesn't make any profit and doesn't even *try* to make a profit. Government doesn't go out of business when it doesn't make a profit. But, businesses who don't make a profit will, at some point, cease to be. The essential difference between government and business could not be any clearer.

It's my opinion that many in government are jealous of business. Many in government are *afraid* of business. Some in government will see a general contractor doing a ten million dollar project and have a general sense, not a rational feeling but just a *feeling,* a *sense,* that most of this money is somehow going into the general contractor's pocket in the same way that many people think that all lawyers make tons of money. Neither statement, of course, is true.

In Squib 64, we discussed how anti-insurance company Massachusetts can be seen as being and how punitive Massachusetts can be as to insurance companies. Admittedly, some of this is justified. But, some of this may not be justified. And, while most insurance companies by my experience do not try hard enough, nonetheless, it is nearly impossible for insurance companies to meet *all* of the requirements of MGL C. 176D (3)(9) all at the same time. But, when they don't, they can be liable for multiple damages and the payment of the plaintiff's attorneys' fees.

And, in Squib 62, we discussed a Massachusetts court decision that held that a state agency can cancel a contract through a termination for convenience if it can find a better price elsewhere. Yet, the same doesn't hold true for contractors if they found a better job elsewhere.

Under Massachusetts law, a contractor will have to pay the difference between what it paid an employee on a prevailing wage job and the actual prevailing wage along with multiple damages and the employee's attorneys' fees, which might be astounding in amount when compared with the prevailing wage deficit and recovery.

Having worked for myself for the last twenty-six years, I know something about the pressures of business. And, I know that finding MBE/WBE percentages can be very hard, both as to employees and also as to subcontractors and suppliers. And, all kinds of deals/compromises as to specification requirements are made on a daily basis between an owner's/representative design professional and the general contractor. Some would rightfully argue that if this didn't happen with some degree of regularity, construction would take a lot longer and be more expensive. And, some things simply couldn't be completely built because of flaws in the original design that contractors and architects and engineers working cooperatively after the fact and in an adult manner can resolve, often with little or no drama.

What am I trying to say? Use good common sense. Many public job bid books I have seen state that MBE/WBE requirements are *goals* not absolute *requirements*. Some of the books have procedures where a contractor making an honest effort to meet these requirements but being

unable to meet these requirements can apply for a waiver. And, as to the third example I gave of installing materials different from those specified by agreement with an owner's representative/design professional, get this in writing.

Let's say that a job requires the contractor to supply blueberries. But, the contractor believes that supplying strawberries would improve the job. And, perhaps, the owner's representative/design professional agrees with him/her. What is to keep the contractor from sending an email to the owner's representative/design professional such as follows:

> "This will confirm that on August 27, 2018, you and I agreed that we will be supplying strawberries, not blueberries, for this job."

Obviously, you'd like an email back saying 'Yes, we did agree to this.' That representative/design professional might not want to go out on a limb and may not want to confirm that agreement. That individual might suffer from a severe medical condition that may make this impossible. *Insufficiently-sized huevos.* If it is important enough, the contractor should tell the owner's representative/design professional that nothing further is going to get done until that individual confirms in writing that the parties have agreed to substitute strawberries for blueberries. After all, this is a change order and might prove to be a major change order.

But, here's something. Maybe that individual refuses to confirm the agreement. Maybe you are not willing to hold the job up until you get something in writing. Just by sending this individual the statement described above, this has some evidentiary effect of its own. While not conclusive, when a statement like that is made, a failure to deny it is some evidence of the other party's not denying it and/or of the other party's accepting it.

IN CONCLUSION. Three suggestions, then. These reflecting 42 years of experience as an attorney, having handled thousands of matters. And, they bear on the three examples of prosecutions given in an earlier section of this Squib.

(1) **Don't get too cute**. You haven't discovered anything new in the vast majority of cases because there *isn't* anything new to discover. Try as hard as you can to comply with contractual requirements and in many circumstances, advise your contracting party in writing if through honest efforts (such as with MBE/WBE issues) you have been unable to comply with these requirements, particularly where your contract provides for this in terms of recognizing that you might be entitled to a waiver. Of course, verifying your ability to meet these requirements might be a significant factor involved with a decision to bid or not bid a particular job *before* a bid is submitted. In my experience, some municipalities can be very tough, even ridiculous, on MBE/WBE issues, such as Cambridge, Fall River and New Bedford. The problem with playing games is that sometimes you win. But, sometimes you lose and with a statute such as MFCA, you can lose *big*. And, essentially, this is what happens in court cases

anyways. Half the parties win. Half the parties lose. It's important not to lose. Especially, when this can be avoided.

(2) **Put more things in writing**. I know contractors are often paperwork-averse. But, in the substitution of strawberries for blueberries in our previous example, this could be confirmed in writing by a very short email with possibly as little as one line. In my basic construction contract law course, which will be given twice in October, 2018, I demonstrate how it is possible to have a very simple, enforceable construction contract with as little as *one sentence*. I know that I'm a bit old-fashioned because I don't hold text messages in the same regard as emails. I don't think they have the permanence that emails have. What happens when you go to another phone or lose your existing phone? Today it seems that most computers, one way or another, back-up to the Cloud (even though I don't really know what this means or how to do it!) And, in many different matters I have had, they are hard to print out. Also, emails have built into them confirmations of receipt as part of the email process/program.

(3) **Use common sense**. I don't think King Solomon benefitted by having 700 wives and 300 concubines. That didn't reflect good sense. 1 Kings 11:3 said: "He had seven hundred wives of royal birth and three hundred concubines, **and his wives led him astray**." (Emphasis added) He bucked the system and he suffered for doing so.

So, my last paragraph. In the conduct of your construction business, don't let yourself go too far astray. This should decrease the possibility of your receiving a very unhappy letter from the Attorney General's Office claiming you have violated MFAC. And, following a conscious pattern of behavior that will result in this might make you as smart as King Solomon, whom some say was the wisest man in the entire Old Testament. As to some things, you'll be smarter, actually. (Most married folk have trouble enough affording the one spouse they have.)

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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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Endnotes 1-10 and the first part of Endnote 14 deal with the subject matter of this Squib and offer additional information supplementing the text. Endnote 11 may be of interest to those curious about how King Solomon, often referred to as the wisest person in the Old Testament, got along with seven hundred wives and three hundred concubines (First Kings 11:3) and how this impacted his getting out of the house in the morning, especially when he was in a hurry. Endnote 12 may be of interest to fans of Yogi Bear. Endnote 13 deals with personnel matters at our publishing house and our summer intern program. (It takes a lot of people to put out ***Scribbles,*** Squibs and related publications. Maybe not as many as Hillary's village, where a lot of the inhabitants are likely to be criminal defense lawyers specializing in conflicts of interest and, generally, staying out of jail. But, certainly as many as might live in a good-sized hamlet.) Endnote 14 includes a discussion of the inter-generational differences between Baby Boomers and Millennials. We must acknowledge that there is some material in the text and in some of the footnotes that was not there when the Squib went to our digital printer (particularly with regard to Endnote 14). In fact, when this Squib went to the printer, we didn't even have an Endnote 14. So, if you read anything that seems a bit weird or out of place in a lawyer's newsletter, that, in all likelihood, was inserted by Bulgarian or Nigerian hackers, the latter doubtlessly angered by certain critical comments concerning their scam that were made in the text, including remarks as to how lawyers, especially, tend to fall for it. Insertion of uninvited and non-editor approved materials in this Squib should be a crime but doesn't seem to be currently recognized as such in the United States. It *is* recognized in Russia, however, as being one example of the felony of 'hooliganism'. One possible venue in which to seek redress might be the World Court. Inasmuch as I ride a Russian motorcycle manufactured in Siberia at the base of the Ural Mountains, which motorcycle, appropriately, is called a 'Ural', I am also thinking of seeking some intervention by President Putin. I think there is some chance of getting his assistance, as the bike is still under warranty and I'm sure he would like me to buy some more accessories to keep everyone working in Siberia. Physical work makes a body warmer, a paramount concern in Siberia which has a climate colder than the other side of the Moon. (That's the part that we never can see.) As this goes to digital press, Scribbles Squibs has been unable to conclusively verify that certain songs and styles attributed to Bing Crosby and to Doris Day in Endnote 14 are accurate. While ***Scribbles*** Publishing Company International, Inc., our parent company, is an equal opportunity employer, we don't hire hooligans. At least, not *knowingly*. And, since we are incorporated in the Cayman Islands, there aren't all that many restrictions upon what we can do or can't do. *Mon!*

[1] Isn't this one of the indicia of a repressive Communist regime? That its citizens are encouraged to report on one another to the authorities for *money*? Should "1984" be re-issued as "2018"? At least in Massachusetts? In my view, this kind of thing shouldn't be *tolerated*. For, if the government can have paid squealers for 'false claims', then why can't it have them for any number of other groups and situations and claimed violations? Certainly, not for this reason alone, but the government does less work with more workers, while the rest of us increasingly have to do more work with fewer workers. Here's a quick test for businesses and for their employees. How many times have you heard on the radio or on the television that non-essential state workers were excused from showing up for work on the day of snowstorms? Now, for those very same snowstorms, on how many of *those* days were *you* closed for business and were your employees excused from showing up? A question. Why the disparity? As more than a few of such prosecutions under MFCA appear to be not much more than thinly-disguised witch hunts, then, they should at least be accomplished only with government-paid witches. We know that Massachusetts is open for business for higher education. We know that Massachusetts is open for business for health care and health care facilities. But, is Massachusetts actually open for business for *business?*

[2] We try to avoid having long quotes from statutes and from court cases in our Squibs. But, sometimes these statutes and cases are so complicated that it's more accurate - and, most likely shorter - to just include them as is, rather than to try to summarize them. This is particularly so when dealing with a very difficult, punitive statute such as this one where knowing the actual *exact* verbiage and definitions used for key concepts may be of greater important than in other kinds of statutes. It is for this reason that we have included the actual wording from the statute as to the various definitions contained in this statute.

[3] How does one prove 'deliberate ignorance'? Isn't that basically an oxymoron? And, wouldn't it take a real moron to actually admit to this?

[4] Almost all civil court actions and papers filed in them are public records, which anyone can see who wants to go to the clerk's office to review them. Documents filed under seal may not be seen in such a manner. They are secret.

[5] Massachusetts already has a statute that provides for this, which is MGL C. 231, s. 6F. Namely, when a party brings a claim that is frivolous or a defense asserted by a defendant is frivolous, attorneys' fees may be awarded against the offending party. My sense is that under MGL C. 231, s. 6F awards are only very sparingly made. So, MFCA does not add to rights for awards of counsel fees to Defendants for frivolous cases brought by relators because this right already exists under the above-referenced statute. In other words, while this may look as if the Legislature is throwing defendants a bone, no new substantive right is created because such a right is already Massachusetts law.

[6] '*Qui tam'* is an abbreviation of the Latin phrase *"qui tam pro domino rege quam pro se ipso in hac parte sequitir*", meaning, "who as well for the king as for himself sues in this matter." An individual who brings a *qui tam* action on behalf of the government is known as a "relator." Such legal action is brought as a complaint filed by a private individual who assists the Commonwealth in the prosecution of false claims and who will receive a significant percentage of any penalty imposed that is actually collected. Participation in the recovery by a relator is specifically provided for in the MFCA and will generally be an amount somewhere between 10% and 30% of what is recovered.

[7] Information concerning what companies have been pursued and punished under the MFCA are public records and are often listed on one Massachusetts Attorney General website or another. Thus, there is no reason why their names could not be listed here. But, we are more concerned with what knowledge can be gleaned from these cases and we feel that an identification of what contractors are involved is unnecessary. As we all know, for each contractor pursued under this statute, there are probably dozens, if not hundreds, of contractors doing precisely the same or similar things who escape prosecution under this statute. And, let's be *real* here. How can 'low bidders' be 'low' while at the same time being required to hire certain percentages of veterans, certain percentages of local residents and certain percentages of MBE's/WBE's? And, based on the filed subbid laws, a general contractor is not in a position to try to force filed subbidders to contribute to meet these percentages to the same extent it can try to force its Item 1 subcontractors to do this. This probably is even harder for union contractors, who have to comply with collective bargaining agreements. At least in the early days, there were not enough legitimate MBE's/WBE's to go around. So, the government is taking something that is really not much more than attempted social engineering which when combined with other bid requirements becomes very difficult from a business standpoint and then somehow converts the whole thing into some form of moral turpitude? And, people are still wondering how The Donald got elected?

[8] I don't know this for a fact but I suspect that each of these 'certifications' was simply a monthly requisition.

[9] My general present sense is that the unions are not being as aggressive in going after non-union contractors at present for different potential violations of this statute as well as for other things because there is nearly full employment for union members. It is not hard to imagine, however, that such could change in a big hurry with any kind of a recession that sends workers back to the hall. President Trump warned just last week that his impeachment would be very damaging to the stock market. As his election caused the Dow Jones Average to almost skyrocket upwards several thousand points, his comments should be taken seriously.

[10]Contractors involved with performing public buildings or public works projects should be aware of the following statute, M.G.L.A. 30 § 39I**.** Deviations from plans and specifications:

"Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to, any public building or public works for the commonwealth, or of any political subdivision thereof, shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No wilful

and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations. . . ."

[11] The book of the Bible from which the quotation is taken, Ecclesiastes**,** is claimed by many to have been written by King Solomon, who many writers claim was the wisest man in the Old Testament. Here's a famous example of his wisdom. In 1 Kings 3:25, when an issue arose before him between two women as to who was the mother of a certain baby, it was his suggested solution that the baby be cut in half, with each woman getting half of a baby. He knew that the true mother would reveal herself as the one not willing to do this, as she loved her child and placed its welfare above her own needs as a mother. Like most of us, however, he did have his dumb moments. It is stated in the Bible that he had 700 wives and 300 concubines. (1 Kings 11:3) Imagine the many moments of bliss he had having that many mothers-in-law! Even though Solomon was the king, nonetheless, it surely must have been very hard for him to find an empty bathroom in the morning in which to shave that was not already in use, each such bathroom having a very long waiting line. (Perhaps, this was why so many Old Testament figures had beards.)

[12] It must be hard to go through life with a name like 'Boo-Boo'! Almost as hard, as we learned from Johnny Cash, as for a boy named Sue.

[13] As the summer wends its way to its sad but inevitable end, we want to acknowledge and give best wishes to two summer interns. Louis is a *magna cum laude* graduate of Massasoit Community College, where he majored in business administration. He will be entering Wentworth Institute of Technology in the fall. He is looking forward to a career in urban planning. Clinton is also a Massasoit graduate, with a double major in English and Ancient Eastern Languages. He will be entering Curry College in the fall and hopes, ultimately, to teach high school English and Latin and coach junior varsity football. Both of these fine young men are *aficionados* of motorcycles. Louis rides a partially-restored 1968 Dnepr MT9, which is a Ukranian motorcycle that looks a lot like a BMW Boxster. Clinton rides a 1982 Honda MB5, a powerful European sportbike. We wish them both well! And, as one bikee says to another: 'Keep the dirty side down!'

[14] Check out our new website, which is at the same address as the old one, www.sauerconstructionlaw.com. It's still a work in progress and it is still being edited. But, it is up and running right now. Do you like it? Do you have any suggestions as to how it might be improved? Would you actually read a blog if we had one? Or, would you be interested in podcasts or webinars on construction topics? On what subjects? For better or worse, it is now **'mobile friendly'**. But, I'm not really sure that it was worth the investment. Having checked my Rolodex, it seems that I don't even *know* anyone who lives in Alabama. I know that in this day and age *they* say that I am not supposed to even have a Rolodex. Well, I proudly display this right behind my abacus, keeping them both safe in the back of my closet. Right next to a brand new eight track player, which I intend on installing in my car myself. That is, once I figure out how to fully close the vent windows I put in. Otherwise, the rain might come in, which could short out the eight track player. They tell me, although it's hard to believe, that they stopped making eight track players. Just last year. Having studied the matter, I am convinced that a reel to reel tape player would not be feasible in an automotive application. It simply won't fit into the dash, unless we take out the ten inch screen, the HVAC controls, the radio buttons and dials, the back-up camera, the glove compartment door and the cigarette lighter. (Why couldn't someone invent something like an eight track tape but a great deal *smaller?* If they did, I'm sure that one of them would be installed in every car made today.) While I could do without most of those things that would have to be removed, I *do* need the cigarette lighter, as otherwise I would have nothing to plug my Garmin into and I have been known to get lost in one car funerals and, especially, in Milford, which seems to be a confusing place to even those who think they know it. I must say that we Boomers get more than a little tired of Millenials, who seem to think modern civilization – or, even, *life* - only really began sometime around 1980 with their advent. Other than with technology, things back in the day were not *all* that different from today. For example, just like today, back in the 60's we had our own exciting musical vocalists, too. Believe me when I say that you simply haven't *lived* until

you've heard Bing Crosby sing the Theme from Shaft. Or, listen to and watch Doris Day sing and bust a move her way through Funkytown. Ever so *slightly* before my time there was a real hit with 'Don't Sit Under the Apple Tree' by the Andrews Sisters. Hot stuff! But, in a kind of clean-cut way. Kind of like the way Doris Day *used* to be thought of, that assuming she actually *did* record Funkytown. Not all of the available evidence is consistent as to that issue, however. As even Millenials will eventually find out, aging is not a pleasant experience. Calling one's later years 'Golden Years' might be Mother Nature's idea of a cruel joke, unless the reference to 'Golden' is to increased fees to be paid out of greatly reduced income to doctors, pharmacists, hospitals, funeral homes, plot farms (where the only crop is *stiffs*), etc. Notwithstanding, many of the musical groups from the sixties are *still* around, such as (a modified form of) the Beach Boys and the Rolling Stones. Some geriatrics say that The Beach Boys might do well to re-record some of their hits to make them more age-appropriate and relevant, especially for their contemporaries. For example: 'I Get Around (On My Walker)', 'In My Room (At The Nursing Home)', 'Surfer Great Grandma', 'God Only Knows (Where I Left My Glasses)', etc. The Stones' song catalogue may not require *quite* as much modification, their music always having been more on the edgy side. But, a song such as "I Can't Get No Satisfaction" undoubtedly has a different meaning today for Mick and the Boys than it did fifty plus years ago. Maybe 'Mother's Little Helper' might be re-recorded with slight lyric changes as 'Daddy's Little Blue Pill'. After all, it's always been the case that there is nothing like a Stones' song to get the blood flowing! (Thankfully!) But, unfortunately, that may only work for some of us up to a certain point (or age).