What Counsel Should Know about the Risk to Clients of Choosing an Individual Registered Agent

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Choosing a registered agent is a critical issue for newly forming and qualifying companies. Counsel, in advising their clients whether to appoint an individual or a corporate registered agent, should take into consideration certain risks inherent in choosing an individual.
Introduction

Nearly every corporation, LLC and LP is required to appoint and continuously maintain a registered agent in its state of formation and in every state in which it is qualified to do business as a foreign entity. This is an agent upon whom a summons and complaint and other initial litigation documents can be served.

A plaintiff does not, in general, have to serve the registered agent. The service of process rules typically also allow service on an officer, managing agent, general agent, or certain other persons authorized by the company or law. However, plaintiffs often prefer to serve registered agents for, among other reasons:

- A registered agent is easier to locate. The plaintiff need only check the Secretary of State’s records to find the name and address. Locating an in-state officer, managing, general or other agent can be much more difficult.

- Serving a person other than the registered agent can result in costly and time consuming disputes over whether the person served was authorized by the defendant to receive process on its behalf.

CT Tip

In general, a person may be considered a “managing agent” or “general agent” for service of process purposes if that person’s position, rank and duties make it reasonably certain that the defendant will be apprised that service of process occurred. This determination is within the court’s discretion, is decided on a case-by-case basis, and the outcome can be hard to predict.
The Appointment of a Registered Agent

A corporation’s, LLC’s or LP’s initial registered agent is set forth in its formation document. When it qualifies in a foreign state, the name and address of its registered agent is set forth in its application for authority.

The choice of registered agent, like the choice of entity type, formation state and name, is one of the earliest and most important decisions that will be made. Unfortunately, choice of registered agent is not always given the same level of attention – which can end up being a costly mistake.

Individual vs. Corporate Registered Agents

In general, a corporation, LLC or LP will make one of the following choices:

- It will appoint an individual such as its attorney, owner, member, partner, or manager, or
- It will appoint a corporation in the business of providing registered agent services – which is sometimes known as a “professional registered agent”.

There are a number of factors to consider in deciding whether to appoint an individual or a professional registered agent. Counsel will often advise their business entity clients on this issue. Therefore, it is important that counsel be aware of some of the risks involved in appointing an individual registered agent.
The Risks Involved In Appointing An Individual Registered Agent

The Risk That an Individual Will Not Be in the Office

One of the risks is that an individual may not be at the office location registered with the state when process is delivered. This can result in a couple of problems. One is that in some states an unsuccessful attempt at serving the registered agent allows a court to order “substituted service” such as by serving the Secretary of State, or by posting or publishing the process documents. Substituted service is not as reliable in providing actual notice of litigation as direct service (such as in person delivery or certified mail, return receipt requested). This in turn can result in the company failing to respond in time, which can result in a default judgment. The following case illustrates this point:

- The plaintiff’s process server went to a corporation’s headquarters to serve its registered agent. The individual named as registered agent was not there at the time and the receptionist in the building’s lobby was unable to reach him so the process server left the summons and complaint with the receptionist. The court held that service of process was valid under California law and that a plaintiff does not have to use reasonable diligence to personally serve a corporation before resorting to substituted service such as by leaving the summons and complaint at the registered agent’s address with a person who is apparently in charge. Zond, LLC v. Fujitsu Semiconductor Ltd., 2014 U.S. Dist. LEXIS 144368.
Another risk is that an individual may move his or her office, or may leave the company’s employ, be transferred to another state, or for another reason need to be replaced. In those cases the registered agent’s name and/or address on file with the Secretary of State will have to be updated. If there is a gap in time before the records are updated the company may not receive notice of litigation. The following cases provide examples:

- Plaintiff filed a breach of contract suit against an LLC. The summons was mailed to the individual listed on the Ohio Secretary of State’s website as its registered agent, at the listed address. However, the individual listed as registered agent had died three weeks before. Someone at the registered agent’s address signed for the summons. No one responded on the LLC’s behalf and the plaintiff obtained a default judgment which was upheld by the appellate court. The court pointed out that it was incumbent upon the LLC to appoint a new registered agent. The court stated “[the LLC’s] failure to comply with its statutory duty cannot be used as a means to evade the [plaintiff’s] attempt to perfect service of the complaint.” S&S Quality Remodeling v. Phoenix Remediation, 2014 Ohio App. LEXIS 4508

- An insurance company filed a suit against a corporation and tried to serve process on the registered agent. However, the individual listed as registered agent no longer worked for the corporation and both the registered agent and registered office information was out of date. The insurance company then served the Kentucky Secretary of State. A default judgment was entered, which was upheld by the appellate court. The court pointed out that a foreign entity is required to maintain a registered agent and registered office and keep the information on the Secretary of State’s records current. The corporation’s conduct that resulted in its lack of knowledge of the lawsuit was not only inexcusable neglect but considered criminal, and grounds for revoking the corporation’s certificate of authority. Bradford White Corp. v. Kentucky Farm Bureau Mutual Insurance Co., 2014 Ky. App. Unpub. LEXIS 598
Another risk is that an individual registered agent may mishandle or ignore the documents because of a lack of training, or because he or she was busy with his or her own regular work, or was distracted by personal issues. Unfortunately there are a number of examples of this risk, including the following:

- An LLC appointed a member-manager as its registered agent. Process was hand delivered to one of the registered agent’s assistants who placed it in the registered agent’s in-box. The registered agent testified that he failed to check his in-box because of the volume of paper in it. This led to a default judgment. The judgment was upheld upon appeal, with the court stating that “a reasonably careful registered agent would not have neglected to find the process papers”. Goodman Associates, LLC v. WP Mountain Properties, LLC, 222 P.3d 310 (Colo. 2010)

- The plaintiff fell in a restaurant owned by an LLC. The complaint named the restaurant, which was an assumed name the LLC was operating under. Process was received by the LLC’s registered agent. He took no action because he incorrectly believed it was not necessary to because the LLC was not the named defendant. The appellate court, in upholding the default judgment, noted that a company can be sued under its assumed name and that the registered agent’s actions in purposefully ignoring the litigation rather than contacting a lawyer was not excusable neglect. Danny’s Sports Bar Chicago Style Pizza v. Schuman, 2015 Ind. App. Unpub. LEXIS 1.

- A class action suit was filed against a corporation. Process was served on the corporation’s registered agent, who was also its in-house counsel and an officer. The registered agent did not send a copy of the pleadings to any other officer, director, manager, or employee of the company, and never talked to, or otherwise let on to anyone else at the company that it had been sued. “The litigation was his little secret”, according to the court. It was only after a $4 million default judgment was issued that the suit was brought to the CEO’s attention and the corporation began its defense. Gutierrez v. G&M Oil Company, Inc., 2010 Cal. App. LEXIS 640.
Choosing an Individual Registered Agent

It is ultimately up to the client to decide if it wants an individual as its registered agent or a corporation that provides professional registered agent services. Often, counsel will advise the client on this decision. In doing so counsel should be aware of some of the problems associated with the use of an individual as registered agent.

CT Tip

The default judgment in Gutierrez was later set aside by the state Supreme Court based upon a provision of state law that provides mandatory relief from default judgments when caused by an attorney’s mistake, inadvertence, surprise or neglect. But despite this “success” the company still had to expend a significant amount of time, money and resources in litigating the issue. And not every state has a similar provision providing for such relief.

Conclusion

It is ultimately up to the client to decide if it wants an individual as its registered agent or a corporation that provides professional registered agent services. Often, counsel will advise the client on this decision. In doing so counsel should be aware of some of the problems associated with the use of an individual as registered agent.
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