THE RISKS OF USING AN INDIVIDUAL AS YOUR REGISTERED AGENT

Choosing a registered agent is a critical issue for newly forming and qualifying companies. In choosing whether to appoint an individual or a corporate registered agent, businesses 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 to whom a summons, complaint or other initial litigation document can be served.

A plaintiff does not, in general, have to serve the registered agent. The service of process rules typically allow an officer, managing agent, general agent, or certain other persons authorized by the company or law to receive process documents. However, plaintiffs often prefer to serve registered agents for two main 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 and is decided on a case-by-case basis. The outcome can be hard to predict.

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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 a company qualifies in a foreign state, the name and address of its registered agent located in that foreign state is set forth in its application for authority.

The choice of registered agent, like the choice of entity type, formation state, and entity name, is one of the earliest and most important decisions that a business or organization can make. Unfortunately, the choosing of a registered agent is not always given the appropriate level of attention that’s needed – 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.
- It will appoint a company 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 as registered agent.

RISK 1: AN INDIVIDUAL WILL NOT BE IN THE OFFICE

There is the risk 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 attempted to serve a Georgia limited partnership (LP) through its registered agent – its lawyer – at the registered office address listed on the Georgia Secretary of State’s records. The listed address was a “virtual” office for mail handling and telephone answering services. It was not the registered agent’s place of business. The receptionist told the process server that no one was authorized to receive service of process. The plaintiff then made substituted service on the Secretary of State, who forwarded a copy to the LP at the virtual registered office.

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The LP failed to answer. A default judgment was issued and then set aside. The Georgia Court of Appeals held that the default should not have been set aside. The court noted that Georgia law requires that the registered agent’s business office must be the same as the registered office. Because that was not the case here and because the registered agent was not present to receive service of process, the plaintiff could serve the Secretary of State.

Furthermore, the law only requires that the Secretary of State forward a copy to the registered office – which it did. The law does not require that the defendant actually receive notice. Hooks v. McCondichie Properties 1, LP, 767 S.E.2d 517 (Ga. App. 2015)

Another problem with the registered agent not being in the office when the process server or mail carrier arrives is that the documents may be left with another person at the office. This sometimes results in neither the registered agent nor counsel receiving notice of the lawsuit in time to respond. Take for example the following case:

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. 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

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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., 53 F. Supp.3d 394 (D. Mass. 2014).

RISK 2: REGISTERED AGENT INFORMATION IS NOT UPDATED IN A TIMELY MANNER

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:

Case 1: 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

Case 2: The plaintiff sent the summons and complaint by certified mail to the address of the defendant LLC’s registered agent listed on the state’s records. It was marked unclaimed and returned. An alias summons was left at the address. The LLC failed to respond, and the trial court granted the plaintiff a default judgment, noting that the defendant had never changed its registered agent information on file with the Secretary of State and that its failure to comply prevented service by certified mail. The appellate court affirmed, noting 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, 26 N.E.3d 686 (Ind. App. 2015).

Something else for counsel to consider is that sometimes the registered agent intentionally tries to evade the process server. Take the following case:

The plaintiff filed suit against a corporation based on its failure to comply with an order to garnish an employee's wages. The process server testified that he tried to arrange a time to meet with the corporation’s registered agent but that the registered agent stopped responding to his phone calls. He went to the registered agent’s address four times, but no one answered the door. The plaintiff received a default judgment based on the court’s finding that the registered agent “appears to have intentionally evaded

RISK 3: MISHANDLING OR IGNORING PROCESS

Another risk is that an individual registered agent may mishandle or ignore the documents because of a lack of training. Or he or she may have been 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:

Example 1: 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)

Example 2: The plaintiff fell in a restaurant owned by an LLC. The complaint named the restaurant, which was an assumed name under which the LLC was operating. Process was received by the LLC’s registered agent. He took no action because he incorrectly believed it was not necessary 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, 26 N.E.3d 686 (Ind. App. 2015).

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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.