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, the company’s owners, as well as business lawyers who advise the owners on this issue, should take into consideration certain risks inherent in choosing an individual.

Nearly every corporation, LLC, and LP are 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 documents 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.

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 entity’s owners 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.

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INDIVIDUAL VS. CORPORATE REGISTERED AGENTS

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

- They will appoint an individual such as an attorney, owner, member, partner or manager.
- They 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. One of which is that there are risks involved in appointing an individual. Below are some of the risks to be aware of before deciding to appoint 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.

The LP failed to answer. A default judgment was issued and then set aside. The Georgia Court of Appeals upheld the default, finding it could not be vacated based on excusable neglect. The LP did not receive notice of the lawsuit because of its own negligence in choosing its statutory agent and failing to implement internal procedures to ensure that documents served at the statutory address were directed to the proper person. John W. Judge Co. v. USA Freight, LLC, 2018 Ohio App. LEXIS 2880

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

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:

Plaintiff served an LLC via certified mail at the address listed for its statutory agent. The documents were signed for by the LLC owner’s mother, who spoke little English and was not affiliated with the company. The LLC failed to respond and a default judgment was entered. The Ohio Court of Appeals upheld the default, finding it could not be vacated based on excusable neglect. The LLC did not receive notice of the lawsuit because of its own negligence in choosing its statutory agent and failing to implement internal procedures to ensure that documents served at the statutory address were directed to the proper person. John W. Judge Co. v. USA Freight, LLC, 2018 Ohio App. LEXIS 2880

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at the listed address. However, the individual listed as the 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: An LLC designated an individual member as its registered agent and his residence as its registered office. The process server went to the registered office and served an individual with the same name as the registered agent. However, the person served was actually the registered agent’s father who was not associated with the LLC. The registered agent no longer lived there. However, he failed to tell the LLC he had moved and the registered office was never changed on the state’s records. The LLC failed to respond and a default judgment was issued. The Illinois Appellate Court upheld the judgment, noting that it might have decided differently if the father was served at any other location. However, the LLC had absolute control over the identification and location of its registered agent and cannot escape the consequences where, as here, the summons was served in accordance with its own directions. Pickens v. Aahmes, 104 N.E. 3d 507 (Ill. App. 2019)

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: A corporation named an attorney as its registered agent. A complaint was served on a secretary at the registered agent’s workplace – which was proper substituted service under California law. The registered agent immediately received the complaint but never forwarded it, or the notice of default judgment, to anyone at the corporation. He explained that he believed, erroneously, that service not proper because he was not personally served. Although the trial court granted the corporation relief on the grounds the default was caused by legal error, the California Court of Appeal reversed – holding that the registered agent was not acting as the corporation’s lawyer when acting as its registered agent and therefore his failure to inform the corporation of service was not legal error. Sadr v. NCL (Bahamas) Ltd., 2018 Cal. App. Unpub. LEXIS 4492

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).

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

An LLC named its manager as registered agent. The registered agent’s address it provided was a location where the LLC did no business and where the registered agent admitted he rarely visited or asked anyone at the location if documents had been delivered for him. Plaintiff filed suit against the LLC and the manager. A default judgment was entered, which the LLC did not appeal. In upholding the default judgment against the manager the court noted among other things the use of the “bogus” address could be viewed as an attempt to avoid process servers and could not be attributed to excusable neglect. Left Coast Wrestling LLC v. Dearborn Int’l. LLC, 2019 U.S. Dist. LEXIS 35255

CONCLUSION

No business owner or business lawyer should underestimate the importance of choosing the right registered agent. The registered agent must be responsible and competent or the consequences can be disastrous. For that reason, the appointment of a professional registered agent rather than an individual should be given serious consideration.