SCRIBBLES SQUIBS #38 (August 17, 2015)*

INDEPENDENT CONTRACTOR OR EMPLOYEE (OR) WHEN THE MOONSHINE FLOWS OVER THE MOUNTAIN (PART ONE)

By Attorney Jonathan Sauer

I. INTRODUCTION.

While most of Eastern Massachusetts is urban or suburban with a smattering of rural out towards Cape Cod, some miles southwest from Boston, there is a vast, wild and mostly uncharted part of Massachusetts known as East Walpole. These fearful and desolate lands extend for mile after square mile, not unlike the Scottish Moors, except more so. One local historian claims that Emily Bronte actually, for a time, was an East Walpole resident and that when she was writing "Wuthering Heights" she was really thinking of East Walpole, not Scotland, just as Brian Wilson said that when he wrote "Marcella" he was thinking of how he would write a Rolling Stones song, if he were, uh, a Rolling Stone.

Our friend Earl operates "Earl's Condensed Liquids Limited" (ECLL), the limitation only being how much shine Earl could sell as produced by his still. After all, there is no point in making more than one can sell. Storage only increases his costs and gives his factory a larger physical footprint, making it more likely that his still will be found by 'Revenooers' (government taxmen not opposed to shine at all but who insist, nevertheless, on getting for Uncle Sam, his rightful share of the proceeds).

One of his businesses, you see, is in making moonshine or shine, which involves significant, large pressure vessels or tanks and a very complicated and myriad series of copper pipes, used for condensing or inducing condensation. The whole premise of a still is the fact that water and alcohol boil at different temperatures. More on this later.

To minimize the interference of and business interruption by Revenooers, Earl likes to run his equipment mostly in the deep evening hours when most folks are either asleep or in their beds for other purposes. The nocturnal nature of Earl's work has become so famous, some musical group actually wrote a song about it. Something to the effect of in the still, of the night.

This writer first met Earl at a regular meeting of the East Walpole Anti-Revenooer Association (EWARA). Principally, this organization allows all of these very small independent distillers to share in the common costs of providing security and in keeping the roads open so their trucks could go to market with alacrity and without government interference.

A couple of years back, Earl sort of shot a Revenooer a few times and the crybaby actually made a civil claim against ECLL for money damages. Earl asked me to represent him. Since I had just closed another file, I figured I could take this on. (Otherwise, I would be down to only 117 active files, which I would consider as being only working part-time.) In time, I became Earl's general counsel. And, good friend. Which has its difficulties. He frequently gets into disputes with several of the subcontractors I represent. And, I always know what he will be giving me at Christmas time.

But, the whole point of this *Squib* is to detail and explain a workers' compensation claim brought against ECLL by Earl's nephew, Billy Buck Boogers, sometimes called Triple. Because, you see, Earl's still unfortunately broke apart with great violence. More on *that* later.

Inasmuch as many of you might not have much experience with stills, before we go deeper into the story, you should know how a still works. Down south, this is literally taught at a mother's breast. Down south, milk that is served at anything less than twenty proof is not really *milk*. Although on its surface counter-intuitive, this enriched milk benefits babies in many ways. For one thing, southern babies are much less prone to colic. (Sure, their little tummies ache. But, do they really *care?*) Southern babies have a lot less teething pain. (Liberally applied to their little gums, they'll come to think that they really *enjoy* their little teeth coming in.) And, southern babies tend to sleep through the night from the very first night for a period of about twelve to fourteen hours or longer, whichever suits their parents' fancy and needs. Also, southern children make much better sailors than most, and, that much earlier in life, their being used to crawling on their little hands and knees, leaning first in *this* direction and then leaning then in the *other* direction. What happens when they fall over? Tomorrow, they won't even *remember* that. Some northern folk say that southerners tend to speak more slowly than they do. This is because many of them are under the influence of . . . . milk.

So, this is what you have to know about a still. Understanding how a still is constructed and then operated is absolutely essential to your understanding this *Squib*. And, because many of you are probably northerners, I'll try to make this very simple. And . . . try . . . to . . . . write . . . this . . . very . . . slowly.

II. HOW A STILL OPERATES.

Before getting started on this, I think that having and operating one's own still might be frowned upon by some New England states. It might even be illegal. So, I had one of my summer interns research this and we think that this might an ok business in Belize. You might have to become a naturalized alien first, however. True, it's a bit of a hike to Central America. But, those of our readers who like to watch Food Network know that Bobby Flay likes to cook with Chimichurri sauce. Argentina, where it comes from, is a lot closer to Belize than it is to Boston. And, think of all the frequent flier points you'll rack up! Until all the airlines merge to form just one airline. Then, you'll have to pay just to sit on an airplane. The Soviet Union had just one airline. Some felt that this was endemic to communism.

So, that we're clear. We're all *assuming* that this mythical kitchen I'm going to be describing is in Belize. It's in a house. A very nice house. My being an obsessive-compulsive watcher of 'House Hunters', this house will have four bedrooms, six bathrooms with separate jetted tub and shower, a large backyard, unfettered access to the beach and the kitchen will have granite counters (but not the pukey yellow color), all stainless steel appliances and be completely updated. Also, there should be no tile outside of the bathrooms, no carpets outside of the bedrooms, no manufactured wood used in the floors and the house, overall, should have favorable *feng shui*.

The house will be on the ocean. That would be the Caribbean Sea. To be there would be really nice in the middle of a New England winter, particularly an extra hard one such as last season's. I wonder when in the world am I going to find the time to make shine if I live there full-time? After all, for one living in Paradise, who needs it?

Assuming that I will *find* the time, though, the first thing I will say about this is DON'T TRY THIS AT HOME. I am only going through this process, as it is essential for you to generally understand still construction and operation to understand the causation and severity of Triple's injuries. Production of alcohol, including, but not limited to, through a still should be left to ALCOHOL CREATION PROFESSIONALS. Much as what happens when people try to deep fry turkeys indoors for the holidays, an untrained person's attempting to make alcohol right out of the gate is likely to accomplish only the burning down of one's house or suffering alcohol poison. And, see you are already in trouble. For, what does a gate have to do with making shine? LEAVE THIS TO THE PROFESSIONALS! I, myself, hold a Master's Still license in six states, half of the District of Columbia and in a variety of foreign countries, including New Jersey and six counties in China. I shouldn't forget, uh, that I also hold such a license in Belize. Where I have a summer home. Which is a lot nicer than my winter home.

Once it is safe for you to operate your home still – having attended our school, Still University, or having bought on-line our DVD course - one other thing is necessary if you live in a multi-story house. One must have a DESIGNATED CLIMBER to help you ascend the stairs to go to bed. Because the still process involves your frequently testing the product coming out of the still. (It's an unpleasant job but someone has to do it.) Thus, if you don't have a designated climber, YOU ARE LIKELY TO FALL DOWNSTAIRS AND BREAK YOUR INEBRIATED NECK. Only problem is that even if you have something like Mobile Help, by this point it wouldn't occur to you to press the button.

So, I am only going to go into some very limited concepts. To protect my readers' safety, if a reader were so foolish as to attempt to build a still in accordance with these general comments, it would be very likely to self-destruct and leak a whole lot. As annoying as that would be, you would need a new supply of mash for your next run. And, worse, before you conduct the next run, you will have to clean out all of the copper tubing with white vinegar, which is a dirty, smelly job. This is necessary to bleed out all of that blue stuff from inside the copper tubing.

There are several basic things to know about stills.

First, what makes a still work is that its two component liquids – water and alcohol - boil at different temperatures, which means that they form condensate at different times. The alcohol that moonshiners are after is called ethanol. It is able to be separated from water in a mash because ethanol boils at a lower temperature than does water at about 172 degrees Fahrenheit, while water does not boil below 212 degrees.

In a nutshell, mash is heated up in a still to a temperature above 172 degrees but below 212 degrees. Ethanol starts to boil and turns into a vapor. The vapor is then condensed (turned back into a liquid) through the copper coils and drips out of the tube enclosure (defined later) into a mason jar or some other collection vessel. It's this difference in temperature of the two liquids which is fundamental to the process. For, once the internal temperature of the mash reaches 172 degrees, the alcohol portion of the mash condenses out through the tube enclosure because it is boiling, a definition of which is when a liquid turns into a gas or vapor. At that temperature, nothing else within the mash – e.g. corn, sugar or water – is boiling so that the alcohol condensate is pure and undiluted by any of these substances. The process of 'distillation', you see, does not produce alcohol *per se.* It only concentrates the alcohol that is already present in the mash.

Secondly, other than the construction of the still – discussed next - there are various initial steps to follow to get ready to make shine. One has to make a mash using grains (such as corn) or sugar. Then, the mash has to be fermented by the adding of yeast. Next, one has to 'distill' the fermented mash. A still will heat the mash to a point where the alcohol produced by it will vaporize. The vapors from the still will then be condensed back into a liquid form by a condenser. Most condensers are copper tubes that are cooled by water, the copper tubes sitting inside of some water-tight vessel. For the purposes of this *Squib,* we will refer to this as a tube enclosure.

Third, you need, obviously, to have a still. So, I'll describe the basic idea of still construction and then we can go on from there. This won't at all be like the set-up of Earl's still, because that produces alcohol at a commercial level in a commercial volume, is quite expensive to construct, takes a lot of space and is probably covered by any number of copyrights and patents if Earl cared enough to look them up. (He doesn't.)

We'll be discussing, rather, the construction of a typical home still. Something that one could build were one of a mind to do so, provided that such still is constructed and operated legally, such as in Belize. Or, in New Jersey. Except that what will be described hereafter won't *quite* be a working still. This is because of a sternly-worded memo we received from legal telling us that since some might consider making shine vaguely illegal, our still description can't result in a workable still for some legal reasons no one will understand but the lawyers, and they're not talking. They do *write,* however, at a prodigious rate, such rate doubtlessly influenced by their hourly charge of one thousand dollars an hour, which is, they tell me, more than even a union plumber earns. But, not by much.

So, the following has *some* of the steps which are necessary in the construction of a still but also has a number of steps that won't lead to shine but merely to your putting together a very expensive contraption that will do nothing but leak, break up and make an awful mess. In your kitchen. Which is located in Belize. Not in, say, Quincy (although Quincy is getting near ready to accept this, provided it has a beneficial effect on its mayoral races.)

If you absolutely *insist* on trying to build a still, there are plenty of sites on the web that tell you how to do it. And, a number of sites on the web will sell you the various parts so that you could assemble it. Like some kind of LEGO structure. And, for our site, we take Visa and MasterCard. But, never American Express. ** You'll only need to know this if you can find our site, which usually doesn't show up until somewhere between the seventeenth page and the fiftieth page on Google. (And, you wonder why we hate *spiders!)* Our IT people tell us that this is because we aren't willing to pay the buck a click to go into the yellow area. If you don't understand these internet references, how can you *hope* to be successful in safely producing spirits?

To build a still, you start by getting some kind of a pressure vessel (the'vessel'). For the home still, any pot with a well-fitting lid usually works alright. This is because to have a still, one has to have a sealed unit and a unit that can withstand some pressure. The control of pressure is very important, particularly if you won't be wanting to replace a lot of drywall on your kitchen ceiling, the paint that covers it and possible damage to any number of body parts which get in the way should the still decide, at some point, to go vertical. At a rapid rate.

For a proper vessel, a typical installation will have a copper fitting bolted onto the vessel's lid, which will connect the vessel to the tube enclosure. The function of the vessel is to apply heat to the mash. But not so much heat that will cause the water in the tube enclosure to boil.

Other than the vessel, the next element of the simple still is some copper tubing, used for the condensation process. This will consist of a coiled piece of copper that kind of looks like the spring in a ball point pen or like the spring surrounding a suspension strut on a car. ('Struts' used to be found only in high end sports cars and in foreign cars. But, now that almost all domestically-produced American cars are made in China, these distinctions seem to be less important.)

Inside the coil, the copper tubing must spiral down, not up, as the distillation process requires the use of gravity and liquids don't flow uphill unless they are pumped. This wouldn't happen with a simple still, which has absolutely no moving parts. That is one of the absolute *beauties* of a home still: not having any moving parts. There is nothing to break! As such, if properly taken care of, your home still should last practically forever, as there is nothing to replace. A properly-constructed home still is something that you can bequeath to your heirs. That is, providing they live in Belize. Or, in New Jersey.

Legal tells us that, under some circumstances, living part-time in Belize may satisfy the residency requirements. For more on this, contact us and we'll put you in touch with our

lawyers. Who charge one thousand dollars per hour. They themselves don't need to be in the still business, their seeming to be able to achieve an more than adequate income doing their lawyer-thing. Strictly speaking, then, they don't have to either live or work in Belize. But, most of them have at least a second or third residence there. And, why not? They certainly can afford it. And, Belize has such pretty sunsets.

As to the copper coil. One end of this has a length of copper tube with a copper fitting at its end, which will attach to the copper fitting on the lid of the vessel, which you will attach with a wrench. The length of this piece will usually be about eighteen inches, which size will either increase or decrease depending on the size of your still.

The other end of the coiled copper tubing will be a very short piece of copper which will penetrate that portion of the tube enclosure which holds water. This will have an opening called the spout, which occurs at the bottom of the tube enclosure.

The copper tubing sits in a kind of container that essentially looks like a large plastic mayonnaise jar with the top one-third of the container cut off, leaving us with something that will contain liquid. The spout is attached low on the outside of this tube enclosure using some kind of a super glue-type material. It bears repeating that the tube enclosure should be able to contain water without leaking, which water will get hot during the distillation process, heated by the alcohol passing through the copper tubing as part of the distillation process.

Another way to visualize the water collection part of the tube enclosure is to picture a five gallon bottle of water such as one you would put in your office water cooler. Stand this on its bottom – the wide base – with the narrow part that would actually go into a water cooler (the bottle's neck) on the top. In other words, place it in the same position it would be in if you were storing it. Then cut the top third of this bottle off. The idea is that while the copper tubing sits in this plastic vessel, the plastic vessel itself will be absolutely water tight. For, in the still process, the tube enclosure will be filled with water, the water playing an important part in keeping the copper tubing from getting too hot. The idea is that even though the liquid in the copper tubing will be boiling (vaporizing), the water in the tube enclosure will never boil because to do so would require a temperature of in excess of 212 degrees or about another 40 degrees more than is necessary to get the alcohol to condense out.

Now, before we actually turn the still on, the tube enclosure has to be sitting on a flat surface that is higher than the top of the vessel, which vessel, of course, sits on a stove burner where it gets heated. Often, this is accomplished by simply placing the tube enclosure on something like an upside down coffee can or on an upside down paint can.

There are various potential corrosive elements involved with the making of shine, principally related to the copper tubing. Therefore, before you start to fill up the vessel with mash to make shine, it's important to run a cup or two of white vinegar through your system to clean it out. Pour the vinegar into the vessel, apply heat and the white vinegar will distill out through the tube enclosure. This will produce an unpleasant smell and to avoid that some folks

attach a length of tubing to the spout and vent this outside the building where it will only annoy squirrels, birds and neighborhood children but hardly anyone else.

Now, I'll explain a bit about the distillation process. The first thing to keep in mind is that distilled fluids can be sent through the still several times for a variety of reasons, including increasing the strength of the shine.

To demonstrate how this works, get a bottle of a mid-grade wine and pour it into the vessel, the whole bottle. (This fluid would have about the same alcohol content as a typical mash.) Pour cold water into the tube enclosure. Turning the heat up high under the vessel starts the distillation process. Be sure to place something like a Pyrex two cup under the spout. As soon as liquid begins condensing out, turn down the heat some. Once distillation begins, the idea is to keep the heat under the vessel as low as you can get that will still allow for distillation. Among other things, a lower heat tends to smooth out the taste of the shine.

Sometimes, those new to making moonshine ask what is the purpose of the water. For, there is no water in the mash being heated in the vessel that will end up in the final product. Except in really cheap dive bars. And, since by the time the alcohol comes through the tube enclosure, it is already a vapor.

The water serves an important purpose. The tube enclosure has the copper tubing sitting in basically a bowl of water. The alcohol is in a vapor or gas form and the water is in a solid form. But, one cannot drink vapor! The water is necessary to cool the alcohol in the copper tubing so that it converts into a liquid. In other words, the alcohol in the copper tubing is at 172 degrees or hotter. It is necessary to have the water in the copper tubing to bring the vapor below 172 degrees at which point the gas converts into a liquid.

Copper is a tremendous heat extraction material. For those with forced hot water heating in modern houses have convector registers, usually sitting on the floor. And, it is the hot water being circulated through the copper coils which heat the fins surrounding the copper tubing, the fins being the medium that actually radiates the heat.

If there were no water, eventually, the vapor would turn into a liquid itself once it was sufficiently distanced from the heat source. But, that would require a significantly larger still with a significantly larger coil of copper tubing. This would increase costs and a larger still would be easier to locate from helicopters, the favorite search vehicle of Revenoores.

The first thing to condense out of the system will be alcohol that shouldn't be drunk because it is toxic, the so-called "heads". This will taste quite bitter. Taste a drop or two periodically that comes out the spout but spit each taste out. When the taste begins to mellow, substitute a larger glass container in place of the Pyrex cup under the spout, which cup was only there to assist in the first step of collecting the heads.

A gallon of mash might only result in about twelve ounces of product. Keep testing the temperature of the coils by touching the outer surface of the tube enclosure. When you begin

feeling that the coils seem to be uniformly hot, you have to replace the hotter water with cold water.

During the distillation process, periodically taste the product. Turning down the heat some, as I mentioned above, will actually improve the taste. At some point, the product will begin tasting bitter again and have a reduced alcohol content. This time, substitute out an empty glass for the half full glass you currently have under the spout so that you can begin to collect the "tails" of the liquid. At such point in time as what is coming out of the spout is essentially water, turn off the heat.

Now, you cannot and should not drink the 'heads'. This is toxic – poisonous - but can be used to start up your charcoal grills instead of something like lighter fluid. Now, the drinkable alcohol – that collected in the second of your three containers - is called the "hearts". This is the product of distillation after the heads and before the tails. The last thing coming out of the distillation process – the tails – is too weak to drink. However, this can be mixed with future mash for distilling future runs of shine. The use of the tails assists in getting more alcohol out of your next run of mash.

Make sure you have all of your "heads", "hearts" and "tails" clearly labelled and outside of the reach of children and other incompetents, such as lunatics and left of center liberals.

Before the "hearts" can be safely drunk, this liquid must be filtered, such as poured through a coffee filter to clean the product from impurities in the copper tubing, which are increased by the use of first cold, then hot, then cold water contained within the tube enclosure. Adding wood chips to this filtered mixture tends to make the liquor smoother. (This is why some whiskey manufacturers store their whiskey for years in oak or other wooden barrels. To make their whiskey smoother - tasting.)

One might be curious how someone such as myself, who has never been further south than South Norwood, knows so much about stills. Well, when you go to a co-op school such as Northeastern University and major in something as stupid as political science, there isn't a lot of choice as to co-op jobs. At a co-op school, one alternates semesters at working 'in the real world' with the alternate academic semesters.

One semester, I faced having to choose between two rather disagreeable alternatives: to either slop pigs or work at a still. Initially, a terrible dilemma. But, after having given the matter a great deal of thought, I decided to go with working at the still. Besides, it wasn't really that hard of a decision to arrive at because I had already worked the three previous co-op periods slopping pigs and felt that I had this job skill more or less down pat. Besides, if I did it wrong, do you think the pigs would be in any position to complain? I think that another word for pig malpractice is bacon. I felt that the experience with the still would make me more well-rounded and I had read somewhere that a liberal arts education was intended to broaden you. Which this with the addition of law school ***and then real world legal practice did for a lot of subsequent years until I had my gastric bypass surgery five or six years ago, which one can read about in an

article in the construction articles section of the website, should one care to. This an operation that I liked so much, I had it *three* times. But, I digress.

III. THE STORY.

You see, Earl hired one of his nephews, Billy Buck Boogers, a Tennessee native, who said he had considerable experience in the condensed liquids business, who was to come up and construct and then start up the still. His supernumerous half-brothers, sisters, nieces, nephews and cousins - sometimes a few times removed - simply referred to him as 'BBB' or as 'Triple'. This because an alliterative name such as this one is hard to remember, let alone pronounce, after one's been doing his job testing, for a spell, some shine. Besides, a few of them, mostly the girls, said they were grossed out by 'Boogers' and, therefore, would use a substitute name.****

Earl's not much on written employment contracts. He doesn't like situations where everything is so *fixed.* He likes to keep all of his options open. The terms of Triple's business engagement were not 100% clear. Earl's not much for paying employment taxes, social security taxes, unemployment taxes and things of like nature. The way he sees it, he hires a man to do a job, the man does it, Earl pays him (as little as possible) and they both go on to different things. He *does* have social security for his office staff. (Some say this is principally because he has this *thing* for the office manager, Big Bertha.) But, basically, Earl likes to write a guy a check and let him do with it as he wishes. Kind of like Survivor in its first season with the guy from Rhode Island who seemed more interested in not wearing any clothes than in taking care of his governmental obligations. Until it was too late.

Taxes? Benefits? These are anathema to the condensed liquid business, which is most assuredly a *cash* business and for which there is little need for paper records. Insurance? For Earl, a four letter word. One has to understand that essentially a moonshiner is a biker without a bike. Which can get kind of complicated when a moonshiner is also a biker, such as Triple. When a guy like that does both, how does he introduce himself, telling somebody what he does? He's basically gotta' pick one or the other, making him half wrong.

And, a good thing about Triple is that he came all prepared to work. He had his own truck and all the tools he needed to do his job.

Triple was willing to work pretty cheap, provided he got a 'piece' of the action. Namely, he would oversee the construction of the still and then do what was necessary to bring this still online and operate it for one year for a fixed price of only ten grand. But, if Earl's net operating profit during the first year was more than two hundred and fifty grand, Triple would be paid ten percent of the overage. Earl accepted this both because he likes guys who are willing to work cheap and because Triple knew what he was doing. He wouldn't need any real supervision. In fact, Triple knows a lot more about the mechanics of the construction and operation of a still than Earl does.

In any event, Triple performed his duties with alacrity and great success. However, one of Earl's more or less sort of illegitimate sons, Jethro, improperly set up one of the vessels for a

run. And, just as Triple was walking past the boiler, the boiler self-destructed. Flying metal pieces everywhere.

Triple was seriously injured. While not completely trusting 'northern Justice', Triple was convinced (by eight of his common law wives) to make a workers' compensation claim in front of the Industrial Accident Board of Massachusetts (IAB). This was because, other than needing the money to support his Duggar-like number of children, they were accustomed to having Triple dig ditches and trenches to deal with their various mobile home effluents, they not being all that keen to pay utility rates for either what flowed in and, especially, for what flowed out. They're not dumb (except possibly about men). To them, the MWRA was and is a four letter word. (Which, I guess, it actually is. For all of us.)

If Triple couldn't keep digging these ditches and trenches, the common law wives would have to hire someone who would. And, that takes money.

Triple tried to file for workers' compensation. After a very short investigation – just to lunch on the day the claim was received - his claim was denied by Earl, who through another company, self-insured all of his companies. (He also wasn't much on paying insurance premiums.) That company denied the claim, claiming that Triple was an independent contractor, not an employee. And, as an independent contractor, he was not entitled to file for 'comp'. Earl's self-insurer company lawyer, Skull (he also rides), made some compelling arguments in favor of defending its decision that Triple wasn't an employee. The IAB bought those arguments and denied Triple's claims.

This commenced various litigation much in the way of an appeal to the superior court, principally being Triple's claims for workers compensation benefits, including claims for permanent and total disability, double workers compensation benefits for the self-insurer's egregious acts in denying workers' compensation benefits, for scars and disfigurement and for loss of consortium. The last because after the explosion, Triple claimed that some of his southern equipment didn't work so good or so often, not referencing the tools he kept in his truck. Most of the common law wives didn't have any particular interest necessarily as to *that* particular aspect of the case, although a few of them did make such claims. After all, it did a gal good to have some peace and quiet when she needed some peace and quiet. Particularly after four am when Triple usually made his evening appearance, bellowing out – for some reason – 'Lucy, I'm home'.

He'd come home, you see, when the bars finally closed or when his motorcycle ran out of gas, whichever came first. Sometimes, some of his beer-drinking buddies would sort of do something to the gas tank in those situations to kind of try to help Triple along. But, that only made the Harley run rougher than usual, misfire and then it would put out this very strange smell.

It ultimately came out in evidence that two of the common law wives *liked* the visits after four am, provided they didn't have to make breakfast. After. One of them was Emily, one of Big Bertha's great-grandchildren. Big Bertha was only forty-one years old, which, some say

was pretty young for great-grandchildren. Big Bertha, it seemed, liked visits after four am herself, more than most. A lot of visits, apparently.

All of Triple's claims, one way or another, were based on his contention that he was one of Earl's employees and not an independent contractor and that he was entitled to workers' compensation benefits.

The trial in the superior court – his appeal - got off to a rocky start. In the courtroom, Earl had his boys. Triple had his boys. So far, no problems. After all, most of these boys drank together and took shots at Revenooers together. Most of them liked to steal 'rice rockets' like Hondas and Yamahas and then set them on fire so they could have bonfires and cook hot dogs, maybe melt some marshmallows and sing Kumbaya, this only when they had a real load on.

For some reason, the judge seemed to have a real problem with the fact that most of the boys were armed. And, *all* of the boys came with at least one jug. Bad enough a man has to sit around *indoors* in store-bought clothes with shoes that pinched being bored out of his cotton-picking mind. But, to have to endure a long trial and be thirsty also? Simply wasn't going to happen. Ever. Judge, *hello?* You *do* know what business we are all employed in? Right?

Eventually, the judge heard the evidence. When the witnesses had concluded their testimony, the parties made their final closing arguments to the judge. He asked for legal briefs to be submitted, saying that he would issue a decision in twenty or so days, depending on how sunny the weather was and whether or not the judge's newly-ordered custom golf clubs got delivered before he had concluded with his deliberations. (He signed up with Amazon Prime and good things were supposed to happen, although he wasn't entirely clear on what they might be.) The judge asked the parties to comprehensively brief the issue as to what made an employee different from an independent contractor.

Skull argued that based on the following legal points, Triple was clearly an independent contractor and not an employee. As such, Triple had no viable workers compensation claims available to him inasmuch as he was not one of Earl's employees. Triple's attorneys, the Boston law firm of Dewey, Cheatem & Howe, mostly talked about how many hours they had into this case. They talked about this *a lot.* Some said it was more like whining than talking, but who are we to say?

IV. THE LEGAL FACTORS.

The following sections – A and B - are from Skull's legal brief on the factors in Massachusetts which determine whether or not a person is an 'employee' or an 'independent contractor'. Section C did not prove to be an issue in Triple's case. However, the authorities discussed in this section may have application and importance for many of our readers.

An important thing to get from this is that there is not a 'one size fits all' definition of 'employee'. There will be one definition for Workmen's Compensation. There will be another definition for the unlawful discrimination statutes. There will be another definition for the

Internal Revenue Code. For Massachusetts, the department of Labor and Industries has another definition. Perhaps curiously, many statutes make numerous references to "employees" for the purpose of that statute without defining what an 'employee' actually is. And, many of the definitions appear incomplete and limited. Some of the definitions tell one only what an employee *isn't.*

Perhaps the best explanation and advice for the finding the definition of 'employee' in any particular case is to carefully consider the subject matter that such a definition might apply to. (In the sixth part of this *Squib,* we will summarize what the various factors are that a reviewing agency will look at when considering this issue.) Assuming there is a presumption that any one individual working for a company is probably an employee – not an independent contractor – then the employer or hiring party has to be on the right side of as many of these issues as possible.

Fortunately, judge-made (decisional) law sets forth the various criteria that distinguish an employee from an independent contractor. But, let's look first at various statutes and regulations. (It's time to get your jug ready.)

A. STATUTORY AND REGULATORY LAW.

1. Massachusetts Workers' Compensation:

Initially, we will look at the workers' compensation law, which is highly statutory. There is no definition of employee that is completely useful to look at for those in the construction industry. However, the following statute *does* discuss some of the indicia of employment that the courts consider in determining whether one is an employee or an independent contractor. From MGL C. 152, s. 1 (4):

"(4) **"Employee", every person in the service of another under any contract of hire, express or implied, oral or written** **excepting** . . ., (c) **a salesperson** affiliated with a real estate broker **pursuant to an agreement which specifically provides for compensation only in the form of commissions . . .** (d) a salesperson who is a direct seller of consumer products on a buy-sell or deposit-commission basis other than in a retail establishment, **all of whose remuneration is directly related to sales rather than amount of time worked and whose services are performed pursuant to a written contract** providing . . . (g) **a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer**, but not excepting a person conclusively presumed to be an employee under section twenty-six." (Emphasis added)

So, these are the nuggets gleaned from that statutory provision. An employee is:

1. Every person in the service of another under any contract of hire, express or implied, oral or written. (That would seem to apply to almost anyone.)
2. One who is paid a fixed salary tied into working a certain number of hours, as compared with someone who only gets paid out of commissions, which are only paid after achieving certain

goals and accomplishments. (This provision seems to provide just as to salespersons. This is broadened elsewhere in other authorities.)
3. A person whose employment is in the usual course of the trade, business, profession or occupation of his employer.

2. Massachusetts Unlawful Discrimination:

The statute prohibiting unlawful discrimination, M.G.L.A. C. 151B § 1 Definitions, provides as the definition of "employee" only what it isn't:

"6. The term "employee" does not include any individual employed by his parents, spouse or child."

3. The Internal Revenue Code:

The definition of "employee" as contained within the statutes applying to the Internal Revenue Code is extraordinarily underwhelming in terms of providing real information. 26 U.S.C.A. § 3401. Definitions, defines 'employee' as:

"(c) Employee.--For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation."

However, a quite expansive definition of 'employee' can be found in the Code of Federal Regulations in 26 CFR Ch.1 (4-1-12 edition), s. 31.3401(c) - 1 Employee. As is so often the case in federal statutory and regulatory provisions, the definition is quite lengthy. We'll try to parse it down to what might be applicable within the construction industry:

"(a) The term *employee* includes every individual performing service if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee . . .

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. . .

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. . ."

4. Massachusetts Labor and Industries:

M.G.L.A. C. 149 § 1. Definitions, defines 'employee' as follows:

" "Employee", as used in sections one hundred and five A to one hundred and five C, inclusive, shall mean any person employed for hire by an employer in any lawful employment . . ."

However, later in this same chapter at M.G.L.A. 149 § 148B is a more meaty definition:

§ 148B. Persons performing service not authorized under this chapter deemed employees; exception

"(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--
(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
(2) the service is performed outside the usual course of the business of the employer; and,
(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."

5. Massachusetts statutes applying to withholding taxes.

M.G.L.A. C. 62B § 1. Definitions, defines 'employee' as:

" "Employee", employee as defined in section thirty-four hundred and one (c)2 of the Internal Revenue Code, except full time students engaged in seasonal, temporary or part-time employment whose estimated annual income would not exceed two thousand dollars."

B. DECISIONAL (JUDGE-MADE) LAW DISTINGUISHING BETWEEN AN EMPLOYEE AND AN INDEPENDENT CONTRACTOR.

An older decision having to deal with a workmen's compensation case which has been cited hundreds of times is the case of McDERMOTT'S CASE, 283 Mass. 74, 186 N.E. 231 (1933). Note that while 'employer' and 'employee' are the terms that would be used outside of the law, since employment arises under the law of agency, sometimes the terms that are used are 'master' and 'servant', which correlate to the terms of 'employer' and 'employee'. The following are some of the 'tests' or distinguishing factors between an employee and an independent contractor:

"The exact point at issue is whether the claimant was a servant or employee, or an independent contractor. The essence of the distinction is the right of control. If the person doing the work is responsible only for the performance of what he agrees to do, in the way in which he agrees to do it, and is not subject to direction and control as to every detail of the work, he is an independent contractor. On the other hand, if at every moment, with respect to every detail, he is

bound to obedience and subject to direction and control, as distinguished from a right of inspection and insistence that the contract be performed (see cases cited) or a right to designate the work to be done under the contract (see cases cited), then he is a servant or employee (see cases cited). Other considerations and tests are important only as they bear upon the right of control. (see cases cited). If payment for the work is made, the method of payment, whether by the job, the piece, cost plus a percentage, commission, day, hour, or not expressly determined, is not controlling, although it may be important. (see cases cited) One may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control rather than the exercise of it that is the test. It has been held that one may be a servant though he furnish the labor of others whom he hires. (see cases cited). While engaged in the same general work, one may be at certain times and for certain purposes the servant of a party, and at other times or for other purposes an independent contractor or the servant of another. (see cases cited)"

A much more recent Massachusetts case is a federal age discrimination case (with other claims) from the United States Court of Appeals, First Circuit SPEEN v. CROWN CLOTHING CORPORATION *et al*, 102 F.3d 625 (1997). For our present limited purposes, the facts of the matter are not important. What follows are selected portions of the Court's decision in this matter bearing on the differentiation of an employee from an independent contractor. At trial, the Plaintiff lost on his age discrimination claim, which judgment was affirmed on appeal. As stated by the Court:

"Both federal and Massachusetts courts have found that the federal and Massachusetts statutes prohibiting age discrimination in employment do not reach independent contractors. . . In interpreting the Commonwealth's employment discrimination law, Mass.Gen.L. ch. 151B, Massachusetts courts use a common law test to distinguish employees who are covered by the statute from independent contractors who are not. . .lower Massachusetts courts have proceeded on the view that [i]n the employment context, a master-servant relationship is determined by a number of factors, including the right of the employer to control the details of the work done by the employee, the method of payment, the skill required in the particular occupation, whether the employer supplies the tools, instrumentalities and place of work, as well as the parties' own belief as to whether they are creating a master-servant relationship. . . Contrary to Speen's assertion that the district court found that "subordinate" factors might outweigh the existence of a right of control, the state cases tell us that Massachusetts courts make the employee determination in this way only when a right of control is not conclusively established and other factors need to be examined. Given how Massachusetts precedent discusses "right of control" in its technical sense, this would seem to mean the multi-factored test is triggered when employer control does not encompass the person hired "at every moment, with respect to every detail" . . . . We first call attention to the substantial number of factors that, as the district court rightly noted, weigh in favor of a finding that Speen's relationship with Crown was that of an independent contractor. The evidence reveals that Speen himself decided where he went and how long he worked on any particular day. How and in what order he covered his territory was something he determined. Speen was not required to report to a Crown place of business on a daily basis; in fact, he appeared at a Crown location infrequently during the year. . . The fact that Speen was paid on a commission basis also weighs in favor of a finding of independent contractor status, as

does the fact that he received Form 1099s rather than W–2s for federal tax purposes.. . . Thus, although Speen was required to phone Crown daily and report his sales and the calls he had made, typically by leaving information on an answering machine, this arrangement is equally compatible with the status of either an independent contractor or employee. . .”

C. SOME ADDITIONAL THINGS FOR THOSE OF OUR READERS WHO ARE A BIT ON THE FENCE OR UNSURE AS TO THIS ISSUE.

It’s important to remember that loyalty is an often infrequently-found commodity in this world. For example, a definition of a ‘business partner’ should include ‘someone whom you are likely to sue or who is likely to sue you within the next five to ten years’. ‘Spouses’, initially, promise to ‘love, honor’ and a bunch of other verbs and really good stuff. But, about 52% of the time, at some later point they change their minds. (If there are children, I would argue that Massachusetts is as much of a community property state as is California.) ‘Employee’ is often defined as ‘someone who used to work for you but who no longer does, who now actually hates your guts and hopes that the Wicked Witch of the West’s house falls on *you.*’

In other words, much as you wish and hope that you can control certain results, you actually can’t always do so.

A few examples.

I. PREVAILING WAGE JOBS.

You hire someone and tell them that they are an independent contractor. Or, whatever. What happens if you should have paid them prevailing wages and didn’t?

This is provided for by M.G.L.A. 149 § 27, which provides, in pertinent part:

> “An employee claiming to be aggrieved by a violation of this section may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.”

What does *that* mean?

Well, let’s say, for the sake of argument, that you had an employee work for one hundred hours on a prevailing wage job which provided that this type of employee should be paid fifty dollars an hour. So, you should have paid this guy five grand. But, you actually ultimately only

paid him ten dollars an hour or only one grand. You wrote out the check for the required five grand but you made the employee pay back the four grand extra to you.

So, you owe the guy four grand, at least legally speaking.

Under this statute, once the employee introduces into evidence what he was paid (easy enough) and what he should have been paid (easy enough), rather than owing this employee four grand, you now owe this employee twelve grand. He gets an eight grand bonus over what you should have actually paid him. *Ouch!*

But, he's also entitled to a reasonable attorney's fee. So, he sues you and you don't immediately pay this thing and you have two years of litigation (thinking, just before trial, you can settle this for four to six grand, which might be the case if this statute didn't exist). You take his deposition. He takes your deposition. You both answer interrogatories and produce your documents for the other. There are a couple of motion hearings at court. You both prepare for and attend a pretrial conference. You still don't settle. You go to trial and he puts in his case: how many hours he worked, what you paid him, what was the difference. You argue that he's not an employee but an independent contractor. But what if the judge thinks you are wrong? Or, what happens if you actually *are* wrong?

His lawyer asks for an attorney's fee award of thirty thousand dollars. The judge finds that he is entitled to the twelve grand, some interest and you now have to pay his attorney's fee of thirty thousand dollars. So, this 'mistake' you made is going to cost you an additional forty-two thousand dollars plus interest and costs. In addition, you have to pay your own attorney. So, now you have spent or will spend more than seventy thousand dollars on this.

II. MONIES DUE UNDER MGL C. 149, 148B.

We discussed this statute above. Here's another provision of that statute:
"(d) **Whoever fails to properly classify an individual as an employee** according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be **subject to all of the criminal and civil remedies, including debarment**, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. **Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section**." (Emphasis added)

Now, an influential trade association is working to make changes in this law. But, this is the law the way it reads *today*.

III. PENALTIES PROVIDED FOR BY MGL C. 152.

MGL C. 152, s. 14 (workers' compensation law) provides, in part:

"(3) Notwithstanding any provision of section one hundred and eleven A of chapter two hundred and sixty-six to the contrary, **any person who knowingly makes any false or misleading statement,** representation or submission or knowingly assists, abets, solicits or conspires in the making of any false or misleading statement, representation or submission, or knowingly conceals or fails to disclose knowledge of the occurrence of any event affecting the payment, coverage or other benefit for the purpose of obtaining or denying any payment, coverage, or other benefit under this chapter; **and any person or employer who knowingly misclassifies employees or engages in deceptive employee leasing practices for the purpose of avoiding full payment of insurance premiums**; and any law firm, healthcare establishment or agent thereof that employs or contracts persons or firms to personally coerce or encourage individuals to file compensation claims, **shall be punished by imprisonment in the state prison for not more than five years or by imprisonment in jail for not less than six months nor more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment."** (Emphasis added)

Whoa! There are some potentially significant penalties here, including debarment and potential jail time. Also, some of the above doesn't apply just to the corporation. For some of the above, it's 'any officer or agent having the management of the corporation or entity.' For some of the above it is 'any person', which seems to suggest responsibility beyond just the employer.

Your company closes its doors? For some of the above, it looks like the officers, maybe even a payroll clerk, might have some liability here.

Improper compliance with wage and hour and prevailing wage provisions of the Massachusetts General Laws can be painful to your company and to some officers and agents.

Look, no one is a 'goody two-shoes' trying to induce anyone to comply with these laws because these are legal requirements. Compliance with these laws may make a lot of sense from a dollar and cents standpoint because the penalties and ramifications otherwise might prove to be very severe and, for some companies, fatal.

V. THE DECISION.

The judge made the following findings. There was no clear employment agreement between Triple and ECLL. There was no evidence that ECLL paid any employers' taxes or made any social security contributions or obtained any insurances with relation to Triple's work. ECLL paid Triple that one guaranteed check with any additional future checks strictly dependent

on ECLL's profitability. From his first day, Triple turned up on the jobsite in his own truck, which he used to haul materials and equipment. And, he had his own tools.

Triple was willing to work pretty cheap, provided he got a 'piece'. Namely, he would do what was necessary to bring this still online for a fixed price of only ten grand plus materials and equipment with a ten percent mark-up. If Earl made more than two hundred and fifty grand his first year, he had to pay Triple ten percent of the overage. Earl *did* have a net operating profit for ECLL's first year of over six million dollars. Since Triple would receive ten percent of the net operating profit, the judge found that this was akin to a salesman's receiving a commission, being conditional compensation, that not common for an employee. Triple and ECLL arrived at this agreement based on Triple's writing something up on the back of one of the summonses he had in his pocket on a certain day. (Triple held a certain disdain for complaints and summonses and the entire court process.) Because of the facts that Earl, himself, had little knowledge as to the construction and operation of a still and Triple did, the court found that this meant that Triple's knowledge and skills concerning stills was greatly superior to Earl's knowledge and skills, a factor applicable generally to an independent contractor. The court found it telling that Triple worked without any supervision or control by ECLL or by Earl.

The judge affirmed the action of the IAB, dismissing all of Triple's claims. He found that Triple was not an employee but was an independent contractor.

Earl was so happy with this decision that he went out and got himself a *much* larger shredder, a piece of equipment vital to his way of doing business. He's talking about building a second still and he is thinking of asking Triple to give him a price to build it and operate it. In other words, let bygones be bygones. Earl was not one to hold grudges. Especially when he had an opportunity to make some money.

He even gave Skull a substantial bonus, which allowed Skull to go buy a new Harley bagger *and* an Indian touring bike, as well, no rice burner *ever* to be found in *his* garage. With what was left, Skull said he was going to get another half dozen or so tattoos. And, since his main squeeze and Chain Breaker had a birthday coming up, he wanted to buy her something really special, something really personal, an expression of his love and affection.

What did he get her? He got her a new Dyson. And not just some basic model. He bought her the biggest and most expensive model with all of the attachments. He even got her an extended warranty! Ain't love grand!

Is the case over? Of course not! (*Where would be the fun in <u>that</u>?)*

An employer generally cannot be sued by an employee for damages resulting from a personal injury. Since the Industrial Accident Board and this reviewing court had found that Triple was not an employee, Triple now could sue Earl's company for negligence. Workers' compensation benefits are generally lower than what one could recover in a lawsuit with good liability and good damages. It's a serious matter when a guy's junk is junk. Especially when some ditches and trenches need to be dug.

VI. CONCLUSION.

Let's summarize some of the elements from the above legal authorities that distinguish an individual as being an employee or an independent contractor.

(A) Whether or not the individual is under the control of the hiring party as to how that individual is to perform his/her work on a regular basis.

(B) Whether or not the individual is in the same business as the hiring party.

(C) Whether or not there is a provable (usually, written) contractual agreement between the parties, with some written evidence (back and forth) between the parties as to the terms of the engagement.

(D) Whether or not the individual submitted a written proposal.

(E) Whether or not the individual provides certificates of insurance.

(F) Generally speaking - but not always - whether or not the individual is paid more frequently than the hiring party is.

(G) Whether or not the individual gets benefits such as vacation time, sick time, health insurance, retirement plans, a truck.

(H) Whether or not the individual works for the hiring party continuously throughout the year and not just on isolated or sporadic jobs.

(I) Whether or not the individual receives a 1099 or receives a W-2.

(J) Whether or not that individual's remuneration is directly related to sales and commissions rather than just as to the amount of time worked without achieving any particular result.

(K) Whether or not the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(L) Whether or not the individual supplies his own tools or equipment.

(M) Whether or not the individual is treated as an employee on private jobs but as an independent contractor on public jobs, performing the same kind of work as to both.

Now, my sense is that a governmental unit in Massachusetts looking at whether or not any particular individual is an employee rather than an independent contractor will probably

begin with the premise that most likely the individual is an employee. This would particularly be true as to any agency enforcing prevailing wages in Massachusetts and for any agency enforcing the tax laws, state or federal.

Following or not following the points above (and others), usually seals the deal in one direction or the other.

A comment taken from the Good Book in Ecclesiastes 1:9 NIV, which book is attributed by many to have been written by one of the wisest men who has ever lived, King Solomon:

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

For some of our readers, here's the unvarnished truth. You are not smarter than 'they' are, whoever 'they' may be. 'They' make these evaluations on a regular basis and know what they are looking for, where to find it and then what they are looking at. If you want to hire someone as an independent contractor – not as an employee – consider carefully the factors in section VI of this *Squib* and come down on the right side of as many of those factors as possible. A lot of the statutes and regulations are quite obtuse. These issues seem better defined in the case law. And, keep in mind that in any particular situation, there might be several different laws defining 'employee' and 'independent contractor', including federal statutes and Massachusetts state statutes. And, be sure to look at any relevant regulations. In Massachusetts, this could be the Code of Massachusetts Regulations (CMR). In the federal scheme, these would be the Code of Federal Regulations (CFR).

Capisce? *****

****

* 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." **We are hoping that by the time you read this, we can offer one of those on-line payment services. ***Continuing on with my making truly outstanding educational choices, after political science, I decided to study law. Had I just continued on with my third and most successful co-op job, by now I would have made some really big money. Perhaps unlucky in education, but lucky in love. Which I have been, more or less, being now on my sixth wife. What's that you say? What was that job? Hint: show me a mirrored stage with a vertical, chromed floor to ceiling pole and crank the stereo up really high with songs with a really good bass beat. Exotic dancer, you say? Well, then you would be ****We are advised by a distaff staffer that girls also make boogers but probably less frequently and less offensively than do boys. Of this we have no independent knowledge or opinion. Because, we are, like, boys.*****Was it really necessary for me to explain to you how a still works in order for you to understand the differences between an

employee and an independent contractor? Absolutely not! This was just me showing off. And, kinda' just messin' with ya'! Besides, this may be the only legitimate job skill I actually have.

IMOUTTAHERE.

****

Jonathan P. Sauer
Sally E. Sauer
Sauer & Sauer

Main Office
15 Adrienne Rd.
E. Walpole, MA 02032

Conference Facility
284 Main Street (Route 1A)
Walpole, MA 02081

All correspondence should be sent to the Main Office only.

Phone: 508-668-6020
Fax: 508-668-6021
jonsauer@verizon.net
sallysauer@verizon.net
www.sauerconstructionlaw.com

****

"Knowledge is Money in Your Pocket!" (It really is!)

(I don't feel so good. Is the room, like, spinning for you, too? At least I was smart enough to arrange for a Dedicated Climber. Come to think of it, though, I think my bedroom is on the first floor. How do I arrange getting to there? Could someone get me, like, a big bowl? I mean a really big bowl? Really quickly?)

(ADVERTISEMENT)