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# Wilson & Orcutt, P.C.

## Business Law Newsletter

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Wilson & Orcutt, P.C.  
201 Great Road  
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## Not All Bank Accounts Are The Same

- **How To Protect Your Payroll Funds From Attachment By Creditors**

You probably do not want to share the experience of a client of the firm who recently was served with papers by a sheriff in connection with a business dispute. A vendor who was carrying a disputed balance due brought suit and successfully obtained an attachment (known as Trustee Process) of the client's operating checking account. Unfortunately, the client had just deposited a large amount into the account in preparation for writing its weekly payroll checks, and the client had to do some quick juggling of funds to avoid having those payroll checks bounce.

This potentially disastrous event could have been avoided had the client maintained a separate bank account solely to be used for payroll, since such bank accounts are specifically exempt from attachment by statute. See Massachusetts General Laws Chapter 246 §20.

The moral of the story is simple. Even if you use the services of a payroll service, you should maintain a separate checking account with the title "ABC, Inc. Payroll Account" and keep all funds to be used for that purpose (and no other funds) in that account until the checks are cut.

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- **What Do You Do With A Check Endorsed "Payment In Full"?**

You have an account with a customer who disputes the amount due. The customer sends you a check in an amount less than the full balance on which the customer has written "Accepted In Full Satisfaction" or "Payment In Full" or similar words. What should you do?

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Prior to 1957, the answer was clear. Massachusetts law, up to that date, included the doctrine of accord and satisfaction, which provides that acceptance of an offer in compromise (i.e. cashing or depositing a check marked "Payment in Full") serves to fully satisfy the underlying debt. However, in 1957, Massachusetts adopted the Uniform Commercial Code which some states have held overruled that doctrine (See Massachusetts General Law, Uniform Commercial Code, Chapter 106 §1-207). Those states have ruled that, by adding a restrictive endorsement to the check with the words "Accepted Under Protest", you could avoid application of the doctrine of accord and satisfaction, deposit the check, and then pursue your claim for the remaining balance due.

Unfortunately, the Massachusetts Courts have not yet ruled on the question, and it is difficult to predict which way they would go. Until there is a ruling, you are taking a risk if you deposit such a check, and you should do so only after adding the restrictive endorsement "Accepted Under Protest".

In the meantime, we recommend adding the following language to your contracts:

*The parties to this contract expressly agree that, if any dispute arises about the amount due Seller from Buyer, the Massachusetts Doctrine of Accord and Satisfaction will not apply.*

Although it is not a guarantee, having such language in the contract increases the likelihood of the restrictive endorsement working.

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- **When Is A Demand Loan Due?**
  - **Would You Believe Now?**

One of the most common forms of business borrowing is a revolving line of credit with a borrowing limit set by the terms of a Demand Note.

Since lenders generally allow such loans to remain outstanding indefinitely, so long as interest is paid on a current basis, many people have come to believe that a bank can not call such a loan without a good reason. This is particularly true when, as is often the case, the Note contains a list of acts of

default. However, in 1993 the Massachusetts Supreme Judicial Court ruled otherwise. In the case of Shawmut Bank v. Miller Furs, the Court ruled that a demand note containing enumerated acts of default could nonetheless be declared due and payable even if there had not been an act of default. The bank does not even have to act in good faith. It may call the loan for any reason.

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If your business can not operate with the uncertainties of a true demand loan, you might consider negotiating for a term loan with a flexible draw-down schedule.

In the current lending environment, banks are anxious to put their money out on the street, and are willing to discuss a wide range of possibilities.

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- **A New Way Of Doing Business Is Coming**

In years past, clients starting new businesses have asked for a form of entity (e.g. corporation, partnership or trust) which would provide the best of both worlds; limited liability so that the owner's personal assets are not at risk, and a "flow-through" vehicle so that there are not two levels of income taxation. Lawyers have gotten used to explaining that you can not have your cake and eat it too, and that no such entity was possible. You can get close with a so called Subchapter S Corporation or a Limited Partnership, but in many cases the restrictions on those vehicles make them impractical to use. The result is that business owners have often made do with a corporation, sacrificing some tax advantages in order to obtain limited liability, or have settled for a general partnership with personal liability exposure in order to obtain favorable tax treatment.

Good news. Massachusetts is on the verge of adopting a statute allowing for the use of Limited Liability Companies (LCC's), joining the 47 other states which have already done so. LCC's will no doubt replace virtually all general partnerships, since they provide 100% limited liability (only the assets of the LCC can be reached to satisfy its debts) while the IRS has already ruled that, properly set up, they are to be taxed as partnerships.

While there are tax problems in converting existing corporations to an LCC, when the statute is finally adopted, all general partnerships should consider conversion.

In any case, a LCC will always have to be considered for new business formations.

Stay tuned for further developments.

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Thank you for taking the time to read the inaugural issue of the Wilson & Orcutt, P.C. Business Law Newsletter. We hope to periodically inform you about legal issues of interest to the business community. Please let us know of any specific topics you would like to see covered. If this issue is not addressed to you, and you would like to be on our mailing list, please call (508)264-4770 and ask to be included in our next mailing or fax your request to (508)263-7142.

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## ***In House News***

The firm is proud to announce that

**Jacob C. Diemert, Esq.**

formerly of Sherburne, Powers & Needham, P.C.

has joined the firm as a partner

and that the firm has resumed its former name of

**Wilson & Orcutt, P.C.**

## **The Wilson & Orcutt, P.C. Business Law Newsletter**

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