



Legal news & views

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Dear Patty,

Thank you for reading news & views from Kenney & Sams, P.C. We value your time and promise to keep the content brief, educational and direct. If you would like to discontinue receiving this type of communication, please unsubscribe below.

Around the Firm



Kenney Elected Vice President of Massachusetts Bar Association

The Massachusetts Bar Association's Nominating Committee, led by MBA Immediate Past President Robert L. Holloway Jr., nominated Chris Kenney as Vice President for 2014-15 year.



MBA

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NOTEWORTHY CASES AND MATTERS



Mike Sams and Ed Prisby

won an appeal before the Massachusetts Appellate Division sitting in Plymouth, concerning the case of *Aquacultural Research Corporation v. Old King's Highway Regional Historic Commission et al.* This is a case Mike and Ed won at trial last year. The Court found in ARC's favor that one of the defendants, Rosemarie Austin, had no standing from which to have appealed an earlier Old King's Highway decision that



Frank Sally Addresses Legislature

On March 5, 2014, Frank Sally, who serves as the President of The Arc of Massachusetts, addressed members of the State Legislature and the executive branch at the 36th Annual Legislative Reception sponsored by The Arc, a state wide organization that advocates for the needs and rights of individuals with developmental and intellectual disabilities. The reception was held in the Great Hall of the State House and attended by the Speaker of the House of Representatives, Robert DeLeo, and the President of the Senate, Theresa Murray, both of whom participated in the presentation of awards to the legislators of the year, Representative Brian Dempsey and Senator Jen Flanagan. The reception is an annual event that encourages representatives and senators to support legislative priorities that make a difference in the lives of persons with intellectual and developmental disabilities.

Chris Kenney Contributing Author to LEXIS-NEXIS Trial Book

Chris Kenney recently served as a contributing author to the LEXIS-NEXIS practice guide: Massachusetts Civil Trial Practice (2014 edition). The lead author of this trial practice manual is Raymond P. Ausrotas, Esq. Chris was chief author of the chapter on closing arguments at trial.

Ross Wecker Speaks at Annual Steel Design Conference

Ross Wecker recently presented at the 33rd Annual Steel Design Conference. The focus of his presentation was on educating contractors, fabricators, and design professionals about the current BIM contract forms and potential legal issues associated with producing a project using a BIM process.

New Associates

Kenney & Sams, P.C. Welcomes Ross Wecker

Kenney & Sams, P.C. welcomes Ross Wecker to the firm. Ross is a civil trial lawyer with a focus in business litigation, construction law and risk management, and real estate related litigation. Before becoming a lawyer, Ross obtained a Civil Engineering/Construction Management degree and worked as a Project Engineer for a large general contractor.



Ross Wecker

led to the 2013 trial in Orleans District Court. Accordingly, unless the defendants successfully seek further appellate review, this decision affirms the victory Kenney & Sams achieved for ARC, allowing it to erect a wind turbine on its property in Dennis, Massachusetts. For a more detailed review of this Kenney & Sams victory, please see: [Massachusetts Lawyers Weekly Article](#)

Chris Kenney recently represented a maritime contracting company in a complex lawsuit that started in Superior Court, was transferred to arbitration, and after five day of evidentiary hearing, was moved back to court to enter judgment in the amount of \$410,000 for his client and the dismissal of all counterclaims against it.

The client/contractor, was hired by a town in Eastern Massachusetts to deepen and realign a river that ran through the center of town. This project was necessitated by decades of erosion and sediment buildup that caused frequent flooding and millions of dollars in property damage to the town.

The construction work required the contractor to pile drive cofferdams into the riverbed to divert the water and create "dry" work sites. The contractor encountered numerous latent subsurface conditions that interfered with the work, caused delays, and cost overruns. Before the client contractor retained Kenney & Sams, the town had asserted a claim for liquidated damages and rejected the contractor's requests for an extension of the contract deadline and for compensation for the extra work.

Adam Ponte successfully

Before joining Kenney & Sams, Mr. Wecker was a Senior Associate at Donovan Hatem and a Partner at Nash & Wecker.

Mr. Wecker attended Montana State University and Suffolk University School of Law.

Articles of Interest

The Fluidity of Liquidated Damages: Are They Enforceable In Your Jurisdiction?

By: Michael P. Sams, Esq.
Jared A. Fiore, Esq.

Often, unexcused delays and breaches of contract for construction projects present difficult calculations of an aggrieved party's actual damages. Liquidated damages can provide a solution as a predetermined sum or formula that contracting parties agree shall be paid when delays or breaches occur. Liquidated damages allow both parties to avoid some uncertainty, predict potential loss, and plan accordingly. In construction practice, liquidated damages are typically a specified amount assessed to a contractor on a daily basis for every unexcused day that a project remains non-compliant beyond a contracted "substantial completion" date. Although the daily assessment varies from contract to contract, \$2,000 or more per day is a common figure.

Liquidated damages provisions are regularly included in both private and public construction project contracts. Both AIA A201-2007 General Conditions and ConsensusDOCS 200 provide that the waiver of consequential damages as specified in those documents does not preclude recovery of liquidated damages. Accordingly, it is important to understand what a liquidated damages provision is, how to assess its validity, and the defenses that can be raised to enforcement even if the provision is valid on its face.

[Click Here for Full Article: Fluidity of Liquidated Damages](#)

Proposed Changes Could Ban Non-Compete Agreements in Employment Contracts

By: Amanda Cox, Esq.

In April, Governor Patrick introduced legislation that would ban non-compete agreements in the Commonwealth. Later that month, the Joint Committee on Labor and Workforce Development backed a bill that mirrors his proposal.

defeated an all-alcohol retail liquor license application in Belmont on behalf of the Henry Frost Children's Program, a private, developmental preschool in Belmont, Massachusetts. The license applicant sought to construct a retail liquor store within 500 feet of a preschool. Attorney Ponte filed formal oppositions to the application, preventing the applicant from building its liquor store in the proposed location due to safety issues related to proximity of the proposed store location to school.

Mike Sams achieved a victory before the Massachusetts Appeals Court in the case of *National Lumber Company v. Ridgewood Partners, LLC*. National Lumber was appealing from Kenney & Sams trial victory for Ridgewood. In that case, the court held that although National Lumber timely and properly liened Ridgewood's project, it could not recover because of the "no amount due or to become due" defense. We established that Ridgewood had properly and fully paid its general contractor and that contractor had defaulted at the time National liened the project.



Construction Law Committee

Mike Sams, as Co-Chair of The Boston Bar Association's Construction Law Committee, moderated a program entitled, *Bankruptcy Issues That Affect Construction Projects* and

As the law pertaining to non-compete agreements currently stands, employers and employees generally are free to enter into non-competition agreements as a condition of employment. Such agreements typically prohibit employees from working for another employer in the same field for anywhere from several months to a few years following the employee's departure. The agreements also prohibit competition in the form of solicitation of a former employer's customers. In addition to prohibiting competition, such agreements often prohibit employees from disclosing customer lists, trade secrets, and other confidential material owned or generated by or on behalf of the company.

Employee covenants not to compete generally are enforceable in Massachusetts to the extent that they are necessary to protect the legitimate business interests of the employer. Massachusetts courts, therefore, enforce such agreements only in so far as they are reasonable. Covenants in the non-compete agreement must be reasonable in time, subject matter, space and scope. Reasonableness depends on the facts of each case, and there are no bright line rules. In determining the validity and enforceability of such an agreement, courts in Massachusetts weigh the competing policies of employee mobility on the one hand, and protection of legitimate employer interests on the other. Due to the vast variety of employer-employee relationships and non-compete agreements, it can be difficult to predict which agreements will be upheld and which will be struck down as unreasonable restraints on trade. Governor Patrick's proposed legislation seeks a more uniform approach.

See Full Article Here: [Non-Compete](#)

served as a panelist on another BBA program entitled *Mechanic's Lien Law Update*.

Law Day Initiative

Mike Sams Co-Chaired and Jared Fiore participated in, the MBA Law Day program. Law Day is a national day of celebration focusing on the United States' heritage of liberty under law and recognizing its role in our daily lives. President Dwight D. Eisenhower gave Law Day its name by declaration in 1958.

Each May, in celebration of Law Day, the Massachusetts Bar Association sends attorneys and judges to various high school classes to engage students on a specific legal topic.

This year's Law Day topic concerned 1st Amendment Rights.

