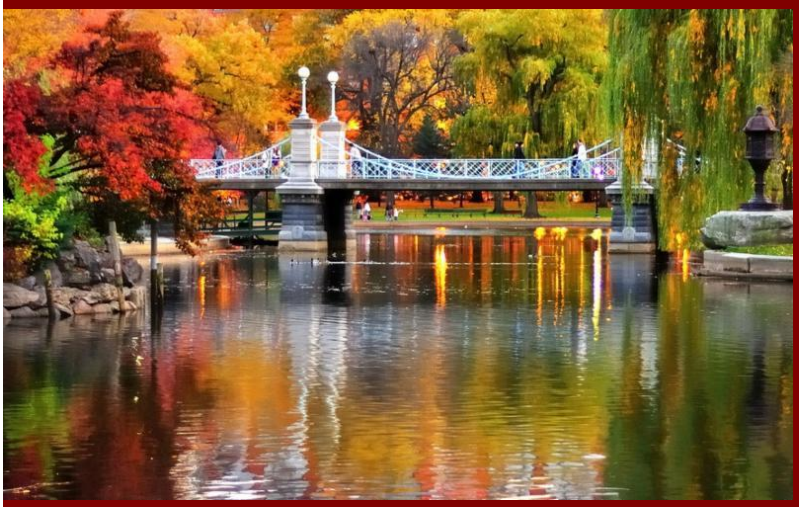
Legal news & views

Issue: XI September 2014



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

Chris Kenney & Michael Sams Selected in *The Best Lawyers in America© 2015*

Best Lawyers is the oldest and most respected peer-review publication in the legal profession.

Best Lawyers®

David Kerrigan, a director at Kenney & Sams, P.C., has been appointed as the 2014-2015 President of the Boston Inn of Court. David is the fourth lawyer from the Firm to serve as President.

The Mission of the American Inns of Court is to foster excellence in professionalism, ethics, civility and skills in the legal community.

David Kerrigan

In This Issue

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Jared Fiore Receives the 2014 Young Alumni Leadership Award from the College of the Holy Cross

The Young Alumni Leadership Award is presented to an alumnus/a who has graduated within the past ten years and has demonstrated outstanding service to their alma mater through the Alumni Association's committees, activities, regional club or class.

We are delighted that Jared was recognized for this award.

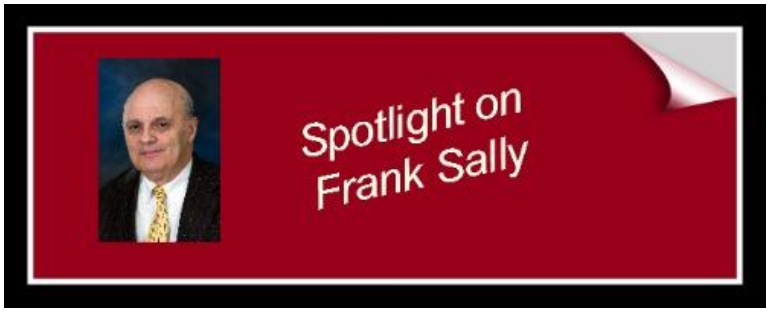
Adam Ponte Featured In Holy Cross Magazine

Adam was recognized as a leading young alumnus, and discusses how The College of the Holy Cross contributed to his personal and professional success.

Full Article: The Power of One

AMERICAN INNS of COURT

Fostering Excellence in Professionalism, Ethics, Civility and Legal Skills



Frank joined Kenney & Sams P.C. this year after a distinguished career with Sally & Fitch, LLP, a firm that he co-founded in 1984, after fourteen years as a trial lawyer with Bingham, Dana & Gould (now Bingham McCutchen), and led for thirty years. Frank has more than forty years experience in business, banking, construction, real estate and business litigation, products liability, including toxic tort and asbestos matters, and general liability and insurance coverage litigation. Over the course of his career, Frank has tried numerous cases to verdict. His clients have included many leading regional, national and international corporations, utilities, insurers, banks, and other financial institutions. He has also argued numerous appeals before Massachusetts and Federal Appellate Courts. Frank has been named as a Massachusetts Super Lawyer since 2005. At Kenney & Sams, P.C., he is continuing to maintain an active practice, servicing both existing and new clients. In addition to managing an active case load, Frank has also served as a valuable and seasoned mentor to our attorneys, sharing his vast knowledge and experience.

During his career, Frank has held leadership roles in many civic and charitable organizations, including a term as President of the Boston Inn of Court. He also served as Chairman of the Board of Directors of the ARC of Massachusetts, a statewide organization that oversees providing services to individuals with developmental and intellectual disabilities. His thirty five years of experience with special needs issues also includes a term of thirteen years as Chairman of the Board of Directors of the ARC of South Norfolk County located in Westwood, MA.

Frank is a graduate of Boston College and Suffolk University Law School. He is admitted to practice in Massachusetts and Rhode Island, the U.S. District Courts for the Districts of Massachusetts and Rhode Island and before the U.S. Court of Appeals for the First Circuit.

New Associates

Kenney & Sams, P.C. Welcomes Emily LaCroix

Emily LaCroix

Emily LaCroix has joined Kenney & Sams, P.C. as an associate attorney with experience in business and contract disputes, tort litigation, product liability, and general civil litigation.

Before coming to Kenney & Sams, Emily was an associate at Craig & MacCauley, P.C. in Boston where she served as counsel to various businesses in commercial and tort litigation. Before entering private practice, Emily was a Law

NOTEWORTHY CASES AND MATTERS

Federal Court Win

Chris Kenney achieved a significant employment law victory in the U.S. District Court of Massachusetts in August. Our client, who is unable to work due to a mental disability, filed a complaint against his former employer and disability insurer at the Massachusetts Commission Against Discrimination (MCAD), because the insurer's long term disability plan illegally discriminates against individuals with mental disabilities, compared with greater benefits offered to people with physical disabilities. The employer and insurer filed suit in Federal court arguing that Federal law preempts the MCAD (state) from deciding whether the plan is discriminatory under Massachusetts law. We responded that the Federal court should abstain from interfering with the state proceeding. Our arguments were made in the shadow of a recent U.S. Supreme Court rule that significantly narrowed the abstention rule. In a written brief and after a lively oral argument, the Federal court dismissed the insurer's suit and allowed the state law claim to go forward. This case marks the first time the District of Massachusetts has interpreted the U.S. Supreme Court's newly narrowed abstention doctrine. Most importantly, our client is now able to proceed with his discrimination case at the MCAD.

Appeals Court Victory

The Kenney & Sams team, led by Mike Sams, won an appeal before the Massachusetts Appeals Court wherein the Appeals court affirmed Kenney

Clerk for the Massachusetts Superior Court, where she assisted judges in all phases of civil and criminal litigation. Her background also includes working as a legal clerk at the State Office of Minority and Women Business Assistance, and as a student attorney the Legal Services Center affiliated with Harvard Law School.

Emily is a graduate of Wellesley College and the University of Michigan Law School.

Articles of Interest

Proposed Changes Could Ban Non-Compete Agreements In Employment Contracts

By: Amanda Cox

In April, Governor Deval 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.

As the law pertaining to non-compete agreements currently stands, employers and employees are free to enter into non-competition agreements as a condition of employment. These 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. They can also prohibit competition in the form of solicitation of a former employer's customers, in 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. Restrictions must be reasonable in time, subject matter, space and scope. Due to the vast variety of employer-employee relationships and non-compete agreements, it is often difficult to predict which agreements will be upheld and which will be struck down as unreasonable restraints on trade. Consequently, Gov. Patrick is seeking a more uniform approach.

Gov. Patrick modeled his proposal after a California law that automatically voids non-competition clauses used in employment agreements. Massachusetts already prohibits non-compete agreements for physicians, nurses, lawyers, social workers, and those in the broadcasting industry. Gov. Patrick's proposal would ban non-compete agreements across the board. Ostensibly, this move will allow employees in technology, science, biometrics, and other industries to transition from job to job easier.

It is his thought that this will spur growth in these industries, boost the economy, and attract new companies to Massachusetts. While an outright ban on non-compete agreements may be good for employees, it does not purport to protect the legitimate business interests of the employer. To do that, Gov. Patrick proposes that Massachusetts adopt the Uniform Trade Secrets Act (UTSA). The UTSA is a uniform federal act that prevents workers from taking companies' intellectual property to other businesses. As of May 2013, 47 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands adopted the act. Massachusetts H.B. 27 proposes that Massachusetts adopt the UTSA as well.

It is unclear whether adopting the UTSA and banning non-compete agreements will strike the correct balance between the interests of employees and employers, or whether this combination will bring more certainty to associated litigation. One

& Sams's defense verdict for its property owner client against National Lumber. National Lumber had placed a lien on the client's property arising from a third party general contractor's failure to pay National Lumber. Kenney & Sams successfully defended the case on the grounds that where the general contractor defaulted on its obligations to the owner, and it cost the owner more to complete the project than the contractor's contract balance at the time National liened the property, National's lien was prohibited.

Kenney & Sams Trial Victory

Chris Kenney and Adam Ponte achieved a directed verdict in a Superior Court trial for our client, an industry leading national restaurant chain. The case alleged certain building code ADA violations that caused a personal injury accident. This was a "test-case" for a threatened class action. After our cross examinations of the Plaintiff, a retired architect, and the local building inspector, the trial judge directed a verdict in favor of our client.

Appellate Victory

Kenney & Sams secured a victory on behalf of its client, Aquacultural Research Corporation, before the Massachusetts Appellate Division. Kenney & Sams won the case at trial, which concerned whether Aquacultural Research Corporation could install a wind turbine where the Old King's Highway Historic District Commission had determined that it was inappropriate to do so. On appeal, the Massachusetts Appellate Division held that the neighbor who originally had brought the matter before the Commission, fighting against the installation of the turbine, had no standing to do so. As such, the Appellate Division held that the Old King's Highway District Commission had no basis to even contest the turbine's installation.

thing is clear - this proposal will be hotly debated by the legislature, the state's business community, free market backers, attorneys and others with a vested interest in the outcome of Gov. Patrick's proposition.

Economic Loss Doctrine What Does It Mean for You?

By: David Kerrigan

The Supreme Judicial Court recently decided a case which reduces the protections afforded to contractors, subcontractors and suppliers involved in building construction under the legal principle known as the economic loss doctrine. That doctrine, created by courts to limit damages available to plaintiffs, prohibits parties from recovering damages under negligence theories in certain kinds of cases. When a defendant is sued for supplying a defective product, the economic loss doctrine prohibits plaintiffs from recovering damages in the absence of personal injury or physical damage beyond the defective product itself. In other words, the supplier of a defective product is not ordinarily liable in tort for simple economic loss- there must be other damage to persons or property. This doctrine has been applied to limit claims against a variety of defendants in the construction industries.

The recent case, known as Wyman v. Ayer Properties LLC, involved claims for defective construction brought by a condominium association against the contractor who developed the property. The association sought to recover damages after the window frames suffered damage; the exterior brick façade was deteriorating; and the roof leaked.

The trial court agreed with the plaintiffs and found that the developer, Ayer Properties, had negligently constructed the window frames, exterior masonry, and the roof, but awarded damages for only the window frames and leaky roof. Because the defective masonry did not harm other condominium property, the judge applied the economic loss doctrine and declined to award any damages to repair the masonry.

When the Supreme Judicial Court issued its decision in the Wyman Properties case in July, it specifically noted that the doctrine had been applied to limit damages in negligence actions arising from condominium construction. The Court then discussed the history of the economic loss doctrine and reviewed the purpose of the rule which comes from the different goals behind contract and tort law. On the one hand, tort law traditionally awards damages arising from harm to a person or property; contract law, on the other hand, traditionally awards damages and protects the interests of parties in having their promises enforced. Another reason behind the economic loss doctrine is that it protects defendants from uncertain and potentially large consequential damages which can be awarded under negligence claims.

The Court in Wyman Properties recognized that the trial court found that the defective masonry did not cause damage to other parts of the condominium, but nevertheless found that the doctrine should not prevent recovery for the defective work performed to that condominium common area. The Court noted that the condominium association had no contract with the builder and only the association is entitled to bring a lawsuit for defects in the common areas. As a result, the association would be without a remedy if it could not recover damages under the negligence claim. In addition, the Court noted that the damages for the defective masonry were a fixed amount with no consequential damages. As a result, the Court found that the economic loss doctrine should not apply to prevent recovery for the defective masonry work under the negligence theory.
While this decision makes sense considering the purposes behind the rule, the opinion fails to limit its reasoning to other situations where the doctrine has traditionally been applied to prevent liability under tort claims. For example, a

Mike Sams Moderates Presentation At DRI's Annual Construction Law Seminar

Mike serves as Vice Chair of DRI"s Construction Law Committee. Recently, he moderated a construction law program update with ACG's and NAHB's General Counsels in the law presentation at DRI's annual Construction Law Seminar in San Diego.

Chris Kenney Moderates Judges Panel Discussion for the National Foundation for Judicial Excellence

The 2014 NFJE Symposium explored how jurists engage in the Art of Judging.Topics included psychological and other influences on judicial decision-making; the hard work and drafting choices that lead to cogent, persuasive opinions that shape the law for future jurists and litigants; the nuances of judicial finance and the impact financial pressures impose on the judiciary; the role of and right to judicial Free Speech; and the fight to preserve the independence of our judiciary.

This year's Symposium featured leading judges from state and federal appellate courts across the country, as well as noted scholars in areas as diverse as constitutional law, public finance, political science and the psychology of decision-making.

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Chris Kenney Appointed Vice Chair of ABA TIPS Trial Techniques Committee

The American Bar Association's Tort and Trial Insurance section's cover matters relating

building owner does not contract with subcontractors or suppliers, and damages to repair defective work are frequently for a fixed amount. Does this mean the doctrine no longer protects those parties from negligence claims for defective products when there is no allegation of damage to other property or to persons? Only time will tell, but for now, suppliers of products and services traditionally offered some protections against negligence claims could face expanded liability under this recent decision.

to the preparation and trial of legal actions involving issues of tort or insurance law, including, but not limited to, the study, criticism and evaluation of techniques, tactics, stratagems and methods currently used, or recommended or suggested for use at trial.

AMERICAN BAR ASSOCIATION

Adam Ponte Participates in Lawyers Have Heart

Since its creation in 1991, Lawyers Have Heart has raised more than $9 million to benefit the American Heart Association, whose mission is to build healthier lives, free of cardiovascular diseases and stroke.

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