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ADVERTISEMENT

2008 CHANGES TO THE RHODE ISLAND MECHANICS' LIEN STATUTE

The Rhode Island Legislature has made two significant changes to the Rhode Island Mechanics' Lien Statute. The first change is procedural and involves the 200-day lien period. Section 4 of the Mechanics' Lien Statute now states that the 200-day lien period is determined from the date of the filing of the Notice of Intention and not the mailing. Thus, mechanics' liens are no longer effective upon the mailing of the Notice of Intention to the owner by certified mail. Instead, a lien will cover all work performed in the two hundred (200) days prior to the date that it is filed at the appropriate city/town hall.

The second change is more substantive and discusses "retainage". The recovery of retainage has always been a "gray area" under the Mechanics' Lien Statute. Section 9 of the statute now states the following:

> A notice of lien shall be effective as to any retainage earned but not paid, for work furnished pursuant to section 34-28-1 et. seq., and said notice of lien shall be effective from commencement of said work. Retainage is a percentage of the total contract amount that is withheld by the owner from the general contractor and by the general contractor from the subcontractor until the entire job is completed and the project is accepted by the owner and by the general contractor, at which time the retainage due is paid.

This means that all retainage earned dating back to the beginning of the job (even prior to the 200-day period) can be included and is covered by a mechanics' lien.

Firm Profile:

The practice of Heald & LeBoeuf, Ltd. is concentrated in the area of construction law. The firm is dedicated to the delivery of the highest level of legal services to construction related business concerns.

Heald & LeBoeuf, Ltd. practice areas include:

- Construction Law and Litigation
- Arbitration and Mediation
- Public Bidding
- Public Contract Law
- Mechanics' Lien Law
- Surety and Bond Law

Rhode Island does not have a procedure for certification or recognition of specialization by lawyers.

10 WAYS TO GET PAID FASTER IN TOUGH ECONOMIC TIMES IN MASSACHUSETTS AND RHODE ISLAND

Subcontractors and General Contractors are under increased pressure to collect past due receivables in these tough economic times. They are often forced to file suit against contractors and owners who have declining financial wherewithal to fulfill their payment obligations. Time is indeed money in these cases. Unfortunately, the legal system does not move at the same speed as the business world. An "average" lawsuit can take at least three years to reach trial in state court. There are numerous cases that for one reason or another can take five to ten years before they are finally resolved. Many contractors cannot afford to remain out of pocket for this length of time. Interest will usually accrue on the unpaid claim at the rate of 12% or more. That is, however, hollow consolation to the contractor who may not be around to see the day when he or she is finally able to collect on their money. There are several potential ways in which prudent contractors and their counsel can move these cases along so that money is collected in days and months, rather than years. The following is a list of ten (10) ways that contractors and their counsel can get paid faster. We are always evaluating each of these potential methods to see if we can recover money faster on behalf of our clients.

1. FILE A TIMELY MECHANICS' LIEN

Rhode Island and Massachusetts law provide that certain contractors, subcontractors and suppliers of materials that perform work or supply material have a right to file a lien against the owner's property to secure the value of the labor and materials they have provided. There are two primary benefits of a mechanics' lien. The first benefit, as discussed in prior issues of the Construction Law Bulletin is that if the party that owes the contractor the money is insolvent, the subcontractor filing the lien may still get paid because its claim is also secured against the property it improved.

The deadlines for filing mechanics' liens are set forth in the Mechanics' Lien & Bond Claim Deadline Summary inserted in this edition of the Construction Law Bulletin.

The second benefit to asserting your mechanics' lien rights is that the plaintiff in a mechanics' lien case can accelerate the case ahead of other pending civil cases. Rhode Island

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General Laws § 9-2-18.1 states that, "[u]pon motion of any party in an action to enforce a mechanics' lien, . . ., the court may grant that the hearing on the petition shall be given priority on the calendar." Similarly, in Massachusetts, mechanics' lien cases are typically placed on the fastest of three possible tracks. Mechanics' liens will typically reach trial in one-third to one-half the time it takes for an ordinary case to reach trial.

2. FILE A TIMELY BOND CLAIM

A bond is a form of guaranty. When an insurance company (surety) issues a bond, it promises to pay a third-party (subcontractor, supplier or owner) if the company that obtained the bond (typically a general contractor) fails to meet its obligations for a particular project. The most commonly used bond on a construction project is a labor and material payment bond. A labor and material payment bond is a guaranty to subcontractors and suppliers of a contractor that if the contractor does not pay them, the bonding company will. Labor and material payment bonds are most typically used on public works projects. They are required on most public works project above a certain size. They are sometimes required on larger private projects.

Like the mechanics' lien, the two primary benefits of a bond claim are security and speed. First, if the contractor is insolvent or otherwise unable to pay the bond claim, the surety must pay the subcontractor. Bond claims can also move faster than other civil cases, particularly if the project is a Massachusetts public works construction project. The Massachusetts public works bond claim statute states that, "[u]pon motion of any party, the court shall advance for speedy trial a petition to enforce a claim pursuant to this section." The party filing the Motion To Accelerate can have their case heard in one-third to one-half the time that it would take for an ordinary civil case to go to trial.

The filing of a bond claim suit may also compel the surety to pay when the claim is undisputed or the contractor is insolvent. Sureties can be held liable under certain bad faith statutes when they refuse to pay a claim for frivolous reasons. Sureties are also reluctant to incur legal expense when their liability is clear. Thus, sureties will often pay an undisputed bond claim soon after it is filed.

The same, unfortunately, cannot be said as to disputed claims. The surety will generally defend the claim if the general contractor advises the surety that it has a defense to the subcontractor's claim. The deadlines for filing bond claims are set forth in the attached insert to this newsletter, Mechanics' Lien & Bond Claim Deadline Summary.

3. SEND A COLLECTION LETTER AT THE START OF LITIGATION

The quickest and easiest method to secure payment is to send a collection letter prior to filing suit. The collection letter states that the law firm is representing the contractor, demands payment of the outstanding balance by a certain date - such as five or seven days, and threatens legal action if payment is not made in that time period. The advantages to the collection letter are that it tells the defendant that you have placed this matter with an attorney and that you are serious about proceeding with this matter. There is little legal expense involved in preparing and sending one of these letters. The disadvantage to this approach is that defendants still ignore these letters in the majority of cases. Nevertheless, the collection letter is a worthwhile means to seek quick payment at minimal legal expense. The initial collection letter is particularly important when the dollar amount sought is relatively small.

4. SEND A "CHAPTER 93A DEMAND LETTER"

One powerful means of collection in Massachusetts is to send a "Chapter 93A Demand letter." Chapter 93A is the Massachusetts bad faith statute. "Unfair or deceptive acts and practices" are unlawful. Unfair or deceptive acts and practices may include an intention refusal to pay, or wrongfully withholding monies admittedly owed on one project because of a dispute on another project. Parties who commit "unfair or deceptive acts and practices" are liable for double or triple damages, and attorney's fees. Violations of certain statutes such as the Massachusetts Home Improvement Act are automatic violations of Chapter 93A.

Chapter 93A states that Plaintiffs in many cases have to send a "Chapter 93A Demand Letter" before they can file suit under that statute. The plaintiff must identify the unfair or deceptive acts or practices. The defendant then has 30 days to respond with a meaningful settlement offer. The defendant can eventually be found liable for double or triple damages and attorney's fees if he or she committed an unfair or deceptive act or practice, and failed to respond to the letter with a meaningful settlement offer. Thus, although it is difficult to prove a Chapter 93A claim, most defendants take the Chapter 93A letter seriously.

The advantage to sending this letter, like the collection letter, is the minimal legal expense. Unfortunately, this option is only available on Massachusetts collections and in cases in which the defendant's actions on the project are at least arguably an unfair or deceptive act or practice in violation of Chapter 93A. The Chapter 93A letter is one effective tool in the right case.

5. FILE A MOTION FOR PREJUDGMENT ATTACHMENT AGAINST THE DEFENDANT'S ASSETS

One of the more effective means to expedite payment is to file a Motion For Prejudgment Attachment against the defendant's assets. The Motion For Prejudgment Attachment is typically filed with the initial lawsuit. The plaintiff seeks to immediately attach the defendant's bank accounts, property, or other assets while the case remains pending. The attachment will be in the full amount that plaintiff is seeking. If granted, the plaintiff will have a lien on the property while the case remains pending. At the conclusion of the case, the plaintiff can then secure payment on that asset.

To succeed on a motion for prejudgment attachment, the plaintiff must satisfy two elements: (1) they are likely to succeed at trial and (2) need for security - the defendant may not have sufficient assets to pay a judgment at the end of the case, and the plaintiff therefore needs immediate security. The advantage of filing a motion for prejudgment attachment is that it is the "nuclear bomb" of all collection options. If granted, the court will swiftly freeze the defendant's assets. The attachment should get the defendant's attention and may result in a prompt resolution of the matter.

Similarly, one of the disadvantages of filing the motion for prejudgment attachment is that it is the "nuclear bomb" of all collection options. The attachment of a financially distressed defendant's key asset could cause the defendant to file for bankruptcy. Also, the plaintiff will usually incur significant legal expense to develop the evidence, submit memoranda and affidavits, and attend the hearings necessary to secure the prejudgment attachment. Nevertheless, a motion for prejudgment attachment can be very effective in the appropriate case.

6. RESOLVE THE CASE THROUGH MEDIATION

A growing number of construction disputes are being resolved through mediation. Mediation is submission of a dispute to a disinterested person, typically an attorney or a retired judge. The mediator's job is to listen to each side's version of the dispute and then try to facilitate a settlement. Unlike a judge or arbitrator who can issue a binding decision, the mediator cannot bind the parties.

A growing number of contracts require the parties to mediate prior to arbitration or litigation in court. Mediation is now required in the AIA contracts. Even when not included in the contract, the parties can voluntarily agree to mediate a pending case.

Mediation is a low-risk, high reward proposition. If successful, the parties can quickly settle their case in a one-day mediation session at a fraction of what it would have cost them to proceed to arbitration or trial. Even when the mediation is unsuccessful, the parties often learn something about each other's positions that will allow them to resolve the case at a latter date. The only downside of mediation is the cost for the mediator's time and the risk that the case could be delayed for some time while the parties try to schedule mediation. Nevertheless, mediation is a potentially cost-effective solution that is well worth pursuing. Contractors should use the mediation procedures called for in their contract. When not in their contract, they should consider proposing that the opposing party agree to resolve their dispute through mediation.

7. RESOLVE THE CASE THROUGH ARBITRATION

If the parties cannot resolve their case through mediation, the next best way may be to have the case resolved through final and binding arbitration. Arbitration has become an accepted means of resolving construction disputes. Many standard construction forms such as the AIA contracts require binding arbitration. Binding arbitration is required on most Rhode Island public works projects.

Arbitration is the submission of a dispute to a disinterested person or persons for final determination. The arbitrator acts as a judge and enters a final award.

The advantage to arbitration is that arbitration hearings often take place within a few months. The litigation expenses are usually lower than they are in court proceedings. Finally, construction lawyers and other industry professionals with knowledge of the construction industry often decide the cases.

There is one primary disadvantage to arbitration that parties should be aware of. Unlike appeals from trial court decisions, there are few grounds for setting aside an arbitration award. Courts will usually refuse to overturn the arbitrator's decision even when the arbitrator admittedly applied the wrong law. Parties who agree to arbitrate have to accept the risk that they could be aggrieved by a bad arbitration decision, with little additional recourse. Nevertheless, when parties are comfortable with the arbitrator who is presiding over their case, arbitration is a means in which the parties can quickly litigate their dispute in a cost-effective manner.

8. RESOLVE THE CASE THROUGH COURT-ANNEXED ARBITRATION

In most Rhode Island civil cases under $100,000, either party can force the case into "court-annexed" arbitration. Court annexed arbitration is non-binding arbitration. The entire process generally does not take more than a few months. There is a four-hour time limit on the arbitration hearing. The arbitrator will issue an Award. If either party is dissatisfied with the Award, they can file a written rejection of the Award within 20 days. If the Award is rejected, the case will proceed to trial and the results of the arbitration will be inadmissible at that trial. If both parties accept the award, the Award will become the final judgment of the court.

Court-annexed arbitration can be effective when one party has an unrealistic view of the merits of the case. Going through the hearing may convince that party that they have problems with the case they were not aware of and that they should consider settling the matter on reasonable terms. Many court-annexed arbitrations will settle before or during the hearing.

Unfortunately, court-annexed arbitration is sometimes a waste of legal expense. In some cases, the parties will spend a significant amount of time preparing their case for the arbitration hearing only to have one party reject the award. Court-annexed arbitration is a means to get paid faster in certain, but not all cases.

9. ACCELERATE THE CASE BY HAVING IT HEARD ON THE "BUSINESS CALENDAR"

In response to concerns raised by the business community, the courts in Rhode Island and Massachusetts are now setting aside court sessions dedicated to the timely resolution of business disputes. The Providence County Superior Court has established a "Business Calendar" for certain business disputes, including many construction cases. Judge Michael Silverstein has primarily presided over this calendar since its formation in 2001. Either party can assign a construction case to the Business Calendar. The parties can generally get the case to trial faster than other disputes pending in the Superior Court. Judge Silverstein is also vested with the power to require all parties to submit their case to mediation.

There is a similar Business Calendar in place in the Massachusetts Superior Court. The cases that are being placed on that calendar are typically limited to those pending in Suffolk County Superior Court.

Business calendar cases typically move faster than other civil cases pending before the court. The judges who preside over the cases pending on the business calendar have extensive experience in presiding over complex business matters.

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10. SEEK JUDGMENT THROUGH A MOTION FOR SUMMARY JUDGMENT

One of the most frequently used means to accelerate a case to final decision is a Motion For Summary Judgment. A motion for summary judgment is essentially an accelerated mini-trial based on the papers submitted. The party filing the motion will submit documents, facts supported by affidavits, and legal arguments showing that they are entitled to judgment in a certain amount. The court will usually schedule a short hearing on the motion for summary judgment within a few months of filing (or shorter in some courts). At the hearing, the lawyers will make arguments based on the papers submitted. Witnesses do not testify at the summary judgment hearing. If the court agrees that the party is entitled to judgment, the court will enter final judgment in that party's favor.

Parties can resolve a Motion For Summary Judgment in a few months rather than waiting for a trial that could be years away. Motions for summary judgment require some preparation, but usually pale in comparison to the time that it takes to carefully prepare the same case for trial.

Motions for summary judgment are only appropriate in certain cases. The party filing a motion for summary judgment must show: (1) that there are no material (important) facts in dispute and (2) they are entitled to judgment as a matter of law. The first element is the greatest obstacle. Summary judgment is not appropriate where the parties disagree on key facts such as whether the contractor's work was defective. Summary judgment is more appropriate in cases where the parties simply disagree on what the law is in their case.

In these tough economic times, contractors do not have to sit idly by and allow their collection claims to linger indefinitely. They have options. With some creativity and persistence they can push their case quickly to final resolution.

MECHANICS' LIEN & BOND CLAIM DEADLINE SUMMARY

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RHODE ISLAND

- Mechanics' Lien –Must record/file Notice of Intention within 200 days of first unpaid day of work – i.e. a Notice of Intention filed today only covers labor and materials provided to job in last 200 days (retainage covered back to job start). Cannot lien public works jobs (some exceptions). Must also mail to owner. Contractors (not material suppliers) that have a contract with the owner/lessee/tenant of the property must mail a "Notice of Possible Mechanic's Lien" to the owner/lessee/tenant within ten (10) days after they start work on a project unless the contract contains such a provision..

- Bond Claims
  - Private Jobs
    - Direct Sub/Supplier – Must act according to conditions in bond – usually give notice to general contractor, bonding company and owner and file suit within one year of your or the general contractor's last day of work.
    - Second/Third Tier Sub/Supplier – Must act according to conditions in bond – usually give notice to owner and general contractor within ninety (90) days of your last day of work and file suit within one year of your or the general contractor's last day of work.
  - Public Jobs (State, City, Town)
    - Direct Sub/Supplier – Must file suit within two years of your last day of work.
    - Second/Third Tier Sub/Supplier – Must give notice to general contractor within ninety (90) days of your last day of work (not mandatory in many cases) and file suit within two years of your last day of work.
  - Public Jobs (Federal)
    - Direct Sub/Supplier – Must file suit within one year of your last day of work.
    - Second/Third Tier Sub Supplier – Must give notice to general contractor within ninety (90) days of your last day of work and file suit within one year of your last day of work.

MASSACHUSETTS

- Mechanics' Lien
  - General Contractor/Direct Sub/Supplier – Must record Notice of Contract within ninety (90) days of general contractor's last day of work (some exceptions). Sub/Supplier must serve owner with copy of Notice of Contract.
  - Second/Third Tier Subs/Supplier – Must serve general contractor with Notice of Identification within thirty (30) days of commencement of work on project (failure to serve Notice of Identification may not be fatal) and must record Notice of Contract within ninety (90) days of general contractor's last day of work (some exceptions) and must serve owner with copy of Notice of Contract. Cannot lien public works jobs.

- Bond Claims
  - Private Jobs
    - Direct Sub/Supplier – Must act according to conditions in bond – usually give notice to general contractor, bonding company and owner and file suit within one year of your or the general contractor's last day of work.
    - Second/Third Tier Sub/Supplier – Must act according to conditions in bond – usually give notice to owner and general contractor within ninety (90) days of your last day of work and file suit within one year of your or the general contractor's last day of work.
  - Public Jobs (State, City, Town)
    - Direct Subs/Supplier – Must file suit on bond within one year of your last day of work.
    - Second Tier Subs/Supplier – Must give notice to general contractor within sixty five (65) days of your last day of work and must file suit within one year of your last day of work.
  - Public Jobs (Federal)
    - See Rhode Island above.

Notes: All notices to be served or given by certified mail return receipt requested. The purpose of this summary is to provide general information to clients and other persons in determining the validity of lien or bond claims and calendaring when they should seek legal assistance. It is not intended to be a comprehensive outline of the legal process related to mechanics' liens and bond claims. It is not intended to provide specific legal advice or address fact specific issues or circumstances.

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