

December 2017

**In this issue...**

- Upcoming Industry Events
- Articles:
  - A Subcontractor Just Filed A Mechanic's Lien On My New Restaurant. What Now?
  - Choosing a Brand: Key Trademark Issues
- Marketing Corner
- Industry Trends
- Client News
- Events & Participation

## Upcoming Industry Events

### AMSCPA 2018 State Tax Conference

January 18, 2018

RIW attorney Adam Barnosky is a featured speaker and will discuss the new MA cannabis regulations.

### New England Food Show

February 26-28, 2018

### Eat Your Words Charity Food Tasting Event

March 26, 2018

## A Subcontractor Just Filed A Mechanic's Lien On My New Restaurant. What Now?

You are the owner of a fine dining establishment located in the heart of the financial district. Business has been great – so great, in fact, that you recently decided to relocate to a new, larger location. In the process, you have spent tens of thousands of dollars to fit out the new space, including the installation of state-of-the-art equipment in the back of the house. Now, with the work almost finished and the grand opening right around the corner, you find out that one of your contractor's subcontractors has filed a lien on the new space. What does it all mean?

A mechanic's lien is a tool to both get a proprietor's attention, and an effort to enforce rights that a subcontractor may have. This article explains the basics of the mechanic's lien process and describes a few ways in which the lien can be removed.



Kirk J. McCormick  
kjm@riw.com

## **Mechanic's Lien in a Nutshell**

A mechanic's lien is a method for securing payment for certain parties involved in construction. Essentially, a perfected mechanic's lien – one that complies with all statutory requirements for enforcement – acts as a mortgage on the property and provides the claimant with significant leverage by encumbering the property. In the context of a lease, the lien may apply to the leasehold interest of the restaurateur, and, in certain situations, may even apply to the fee interest of the owner of the underlying property.

In order to acquire this leverage, however, the claimant must strictly comply with the Massachusetts mechanic's lien statute (M.G.L. c. 254). Failing to do so will invalidate the lien and potentially leave the claimant without recourse.

## **Potential Claimants**

Nearly anyone involved in the construction process may file a mechanic's lien, provided the party claiming the lien (1) provided some "improvement" to the real property at issue, and (2) has a written contract. This includes as potential claimants not only the general contractor, subcontractors and suppliers, but also architects, engineers, and construction managers. It also includes those who provide rental equipment and tools.

## **Timing Requirements**

### **Notice of Contract**

The mechanic's lien claimant must file a Notice of Contract with the Registry of Deeds where the project is located within 90 days of the last date that services or materials were provided to the project, although there are certain exceptions (such as when a Notice of Substantial Completion or Notice of Termination is filed). Importantly, unless the claimant is the general contractor, the 90 days is calculated based on the date that anyone – including other subcontractors – last provided materials or services to the project. The Notice of Contract must contain certain information about the project, including a description of the land where the project is located. For subcontractors, the Notice of Contract also must include specific information regarding the subcontract, such as the subcontract price, change order amounts, and payment history, and a copy must be served on the owner.

### **Notice of Identification**

For a second- or lower-tier subcontractor (i.e., a claimant that does not have a contract with the general contractor), a Notice of Identification may be – but is not required to be – sent to the general contractor within 30 days of beginning performance. The Notice of Identification informs the general contractor that the lower-tier subcontractor is performing and also preserves the amount for which the claimant may recover. Sending the Notice of Identification also potentially means the lien has greater value. This step is in addition to filing a Notice of Contract.

### **Statement of Account**

The next step for the lien claimant is filing a Statement of Account. As with the Notice of Contract, the Statement of Account must be recorded with the Registry of Deeds. The Statement of Account must usually be recorded within 120 days of the last work at the project, although there are exceptions (such as when a Notice of Substantial Completion or Notice of Termination is filed). The statement of Account must include the property description, the amount claimed, and the name of the property owner.

# New Massachusetts DOR Enforcement Effort (cont.)

## **Lawsuit**

No more than 90 days after recording the Statement of Account, the claimant then must file suit to enforce the lien. Failure to commence the lawsuit timely will result in the automatic dissolution of the lien.

## **Record at Registry of Deeds**

The claimant must record a certified copy of the complaint with the Registry of Deeds within 30 days of filing the lawsuit or else the lien will be dissolved.

## **“Amount Due”**

A key factor to consider regarding mechanic’s lien claimants’ rights is what is sometimes called the “amount due” requirement. As a general rule, no lien claimant is entitled to a lien greater than the amount owed to the party immediately above the claimant. For example, a subcontractor’s lien cannot be greater than the “amount due” the general contractor under the general contractor’s contract with the owner. Similarly, unless a second-tier subcontractor or supplier files a Notice of Identification, that party cannot obtain a lien greater than the “amount due” the subcontractor with which it contracted. The “amount due” is calculated as of the date the recorded Notice of Contract is provided to the Owner. If nothing is due the general contractor at the time the Notice of Contract is filed, the subcontractor has no lien rights.

## **Challenges to the Lien**

The statute provides several options for challenging or discharging a lien. One method is a summary procedure for discharging a facially invalid lien. Under this procedure, an owner (or leaseholder, as is likely the case with a new restaurant) may commence a lawsuit to have the lien discharged if the undisputed documents show that the lien is invalid. One example of a facially invalid lien would be if the Notice of Contract was obviously untimely based on the last day work was performed. Another example would be if a Notice of Contract and Statement of Account were filed timely, but no lawsuit to enforce the lien was commenced within 90 days of filing the Statement of Account.

Another method of discharging a lien is bonding off the lien. In that case, the party seeking to discharge the lien obtains a bond in the amount of the lien and records that bond with the registry of deeds. In essence, the bond substitutes as security for the lien claimant without encumbering the property.

Of course, another method of discharging the lien is to negotiate a settlement with the claimant that requires the claimant to voluntarily dissolve the lien.

## **Conclusion**

This article has only briefly explored the complicated nature of the Massachusetts mechanic’s lien statute. A lien claimant is required to strictly comply with the statute, and failure to do so will invalidate the lien. An experienced construction attorney can guide you through understanding the lien process or otherwise resolving the underlying dispute to get the lien removed.

*Kirk McCormick is an attorney in RIW’s Litigation and Construction Law Groups. Kirk can be reached at [kjm@riw.com](mailto:kjm@riw.com) or 617-570-3551.*

## Choosing a Brand - Key Trademark Issues

Brands, or trademarks, are important in every industry. The name of a product, service, restaurant, or store can create coveted consumer brand recognition and loyalty ... or not. Choosing a trademark is a creative and strategic process, but as trademarks are protected under federal and state laws, there are many legal implications as well. The following are the most important things to consider from a trademark perspective when choosing a new brand.



Stacey Friends  
sfriends@riw.com

**Be Creative.** Before using a trademark, it helps to carefully choose the mark.

Try to avoid names that merely describe your product or service or an attribute of your product or service. Marks such as, “Mail Manager” for direct marketing services, or “Smooth Shave” for a razor, are typically descriptive and unprotectable. The more inventive names take time, effort, and advertising to build up an identity with consumers, but are the best source identifiers and the most valuable (think “Exxon,” “Google,” or “Amazon”). Arbitrary marks (“Gap,” “Apple”) and suggestive marks (“Cracker Barrel,” “Staples”) are also protectable and are good choices if you do not want a completely invented mark.

**Search!** There is a duty to do a search before adopting a trademark to ensure that no one else is using it already. Doing a Google search and a search of the United States Patent & Trademark Office (USPTO) site is good start, but a full search report from a reputable trademark research company is best to turn up all possible conflicts. If you plan to operate internationally, an international search is also helpful. The ideal strategy is to choose two or three marks, search them all, and then make a decision about the brand name.

**Use and Registration of Your Mark.** Once you have chosen and cleared your mark, you should begin using it (with the “™” symbol) to start building up your trademark rights. If your mark is truly unique and no one else is using it for a similar product or service, you can work with your trademark attorney to register the mark with the USPTO. A federal registration gives you nationwide rights and many other benefits. Be advised that in the U.S., the first, or “senior” user will probably prevail in a trademark conflict, but in the rest of the world, one obtains rights only through registration, so if you plan to operate internationally, you will need to register in the appropriate countries.

These are just some of the considerations when choosing and protecting a mark. For more information, contact Stacey Friends at sfriends@riw.com.

*Stacey C. Friends is an attorney in RIW’s Trademark, and Hospitality & Retail Services Groups. Stacey can be reached at sfriends@riw.com or (617) 570-3578.*

## Marketing Corner

### Name That Tune

If your restaurant has live music of any sort it is helpful to make sure that everyone who answers the phone has enough information to respond to the basic questions: the name of the band; the kind of music they play; and the band’s start time.

Howie Altholtz | haa@riw.com



## Industry Trends

### Dinners blending foodservice purchases, home cooking gain traction

<http://www.nrn.com/consumer-trends/dinners-blending-foodservice-purchases-home-cooking-gain-traction>

### Dinner decline stumps restaurants

<http://www.nrn.com/consumer-trends/dinner-decline-stumps-restaurants>

### What the Best Restaurants Have Planned for the Holidays

<https://www.foodnewsfeed.com/slideshows/what-best-restaurants-have-planned-holidays>

## RIW Client News

Congratulations to RIW clients **Wit's End** on their future opening in Cambridge. Check out the the full Story: <https://boston.eater.com/2017/9/12/16118300/wits-end-hops-n-scotch-cambridge>

Congratulations to RIW client **City Winery** on the grand opening of their Boston location. Check out the full story: <https://www.bostonglobe.com/lifestyle/names/2017/11/21/city-winery-finally-opens-its-doors/JSooA7HulGI2Q5vAuSsWvL/story.html>

## RIW Events and Participation

Informal get together at RIW client Les Zygomates. Attendees included RIW's Lou Katz and Howie Altholtz, Mark Tosi (owner, Les Zygomates), RIW clients Greg Kitowicz (City Winery), and Patrick Renna (Wahlburgers); and representatives from M.S. Walker.



RIW was a sponsor of the 2017 Taste of Fenway on September 21, 2017. RIW's Adam Barnosky and Kelly Caralis attended the event.



## RIW Events and Participation (cont.)

RIW's Adam Barnosky attended the **Greater Boston Chamber Event "Legalized Cannabis: Building a Successful New Industry"** on September 22, 2017.



RIW's Chris Agostino moderating a panel at the **New England Real Estate Journal's 2017 Summit on Construction Trends in Commercial Real Estate** on September 28, 2017.

Also in attendance from RIW was Kirk J. McCormick, Howie Altholtz, Adam Barnosky, Brad Croft, and Josh Bonneau.



RIW's Kelly Caralis moderated a panel at **Boston Magazine's Top New Restaurants** event on October 24, 2017.



Pictured left to right; Howie Altholtz (RIW), Russ Stein (RIW), Lisa Egan (Executive Director of the Reading-North Reading Chamber of Commerce), Catherine B. Rossetti (RIW), Kelly Caralis (RIW), Bill Friedler (RIW), and Michele Friedler

Also in attendance from RIW were Adam Barnosky and John Cohan.

RIW's Adam Barnosky attended **The 7th Annual Lovin' Spoonfuls Ultimate Tailgate Party** on November 5, 2017 at Cruiseport Boston.



RIW was a sponsor of **Boston Magazine's Taste of Boston** event which took place on November 14, 2017 at the Boston Children's Museum.

Picture includes Ginny Awbery; Howie Altholtz, RIW; Jon Howard, BNY Mellon; and Madeline Altholtz, Brown Advisory.

Also in attendance from RIW were Adam Barnosky and Catherine B. Rossetti.



RIW was a sponsor the **TEI Presidents Forum** on November 16, 2017.

Hospitality related topics included keynote addresses from John Pepper (Co-Founder & CEO, bo-loco) and Chris Comparato (CEO, Toast).

Pictured left to right; Russ Stein (RIW, presenting), Jan Zupnick (President TEI), Howie Altholtz (RIW), Jason Zicherman (President/CEO, The Alternative Board), and Deb Thompson (CEO, The Alternative Board).

Also in attendance from RIW were Dave Robinson (presenting) and Deborah Pechet Quinan.



Howie Altholtz (RIW), and Greg Kitowicz (VP of Operations & Venue Development for City Winery), at the grand opening of RIW client City Winery's Canal St., Boston location on Monday, November 20, 2017.

Also in attendance from RIW were Russ Stein, Brad Croft, Adam Barnosky, and Bill Friedler.



RIW was a sponsor and participant at the **Mass Lodging Association's Best Management Practices for Hotel Operators** event on December 7, 2017.

RIW attorney Adam Barnosky moderated, while RIW attorney Dave Robinson participated on the panel, which also included Daniel Donahue (President, Saunders Hotel Group) and Scot Hopps (Vice President, Operations & Sustainability, Saunders Hotel Group).



Charity Holiday Party at Alma Nove in Hingham. Guests were encouraged to bring an unwrapped toy or gently used/new coat to be donated to Wellspring Multi Service Center.  
<http://wellspringhull.org/web/>



Pictured here is RIW's Howie Altholtz with Paul Wahlberg and Patrick Renna of RIW client Wahlburgers.

Attorneys in RIW's Hospitality and Retail Services Group have provided legal services to industry clients for over 30 years. Our attorneys organize seminars, lecture, write articles, participate in trade associations, and serve on Boards of Advisors for retail, food and hospitality industry companies.

For a full description of our Hospitality and Retail Services Group, including a list of representative clients, please visit our website at [www.riw.com](http://www.riw.com).

## Industry Group Attorneys

**Adam Barnosky**

Liquor Licensing, Zoning, and Permitting  
[arb@riw.com](mailto:arb@riw.com)

**Kelly Caralis**

Mergers & Acquisitions and Leasing  
[kac@riw.com](mailto:kac@riw.com)

**Bradley Croft**

Construction Law  
[blc@riw.com](mailto:blc@riw.com)

**Michael J. Duffy**

Litigation  
[mjd@riw.com](mailto:mjd@riw.com)

**Stacey Friends**

Trademark and Branding  
[sfriends@riw.com](mailto:sfriends@riw.com)

**Bethany Grazio**

Mergers & Acquisitions and Financing  
[bag@riw.com](mailto:bag@riw.com)

**Louis Katz**

Hospitality & Retail Services Group, Chair  
Mergers & Acquisitions and Leasing  
[lck@riw.com](mailto:lck@riw.com)

**David Robinson**

Litigation, Employment  
[dwr@riw.com](mailto:dwr@riw.com)

**Michael D. Rosen**

Commercial Real Estate; Zoning; Land Use;  
Leasing & Financing and Green Initiatives  
[mdr@riw.com](mailto:mdr@riw.com)

**Catherine Barton Rossetti**

Trusts & Estates  
[cbr@riw.com](mailto:cbr@riw.com)

**Russell Stein**

Mergers & Acquisitions and Leasing  
[rns@riw.com](mailto:rns@riw.com)

Ruberto, Israel & Weiner, P.C. • 255 State Street, 7th Floor | Boston, MA 02109  
617.742.4200 • [info@riw.com](mailto:info@riw.com) • [riw.com](http://riw.com)

Published by Ruberto, Israel & Weiner.  
Adam Barnosky Esq., Editor.  
©2017 Ruberto Israel & Weiner.

This material is intended for informational purposes only and is not meant to be construed as legal advice. For a comprehensive understanding of the issues raised in this material, please contact a qualified attorney of your choice.