



NEWSLETTER

- Fall 2023 -

Many thanks to our clients, colleagues, and friends for their confidence, trust, and support over the last 17 years.

ANNOUNCEMENTS

Congratulations to the 13 Kenney & Sams lawyers who have been selected to the 2023 Massachusetts Super Lawyers and Rising Stars lists!



Find out more about our honorees [here](#).

K&S is pleased to welcome David Viens to the Firm

David Viens is an experienced business/commercial litigator and counselor who advises companies and individuals on how to avoid unnecessary litigation, and navigates clients, when necessary, through complicated business disputes in state and federal courts. Though often representing corporate clients and large property owners and developers, Dave's practice includes a broad variety of matters spanning construction, real



estate, closely-held businesses, employment, manufacturing, insurance, intellectual property and other complex litigation. Welcome to the team, Dave!

Massachusetts Lawyers Weekly selected **Mike Sams** as a 2023 **"Go To Lawyer" for Construction.**

"Go To Lawyers" are nominated by colleagues and chosen by a panel from Lawyers Weekly. Nominees are an expert in their field, think creatively, have a record of success, and receive frequent referrals from other lawyers. The award began in 2020 to showcase leaders in the Massachusetts legal community according to their practice area. Only 22 construction lawyers were chosen for this honor in 2023.

Please join Kenney & Sams in congratulating Michael for this honor.



CLIENT VICTORIES

Drew Colby and **M. Matthew Madden, Jr.** recently obtained a \$1,400,000 settlement on behalf of a contractor against a Fortune 100 company that tried to use its size to deprive our client of payment for services rendered. The turning point in the case involved our strategic use of the Prompt Pay Act. Immediately after deploying our strategy, the opposing party capitulated and wired the money into the client's account.



David Kerrigan and **Alex Zwillinger** obtained a jury verdict after a two-week trial in the United States District Court in Boston on behalf of their clients, a developer and a contractor. K&S's clients filed suit against the City of Haverhill and its Mayor over the timing to build a water booster station for a 50-lot subdivision, which led to the Mayor announcing that the developer would not receive more permits unless he dropped a separate lawsuit challenging the City's decisions. The plaintiffs brought the federal case against the Haverhill Mayor for interference with contractual relations, and after trial the jury found in the plaintiffs' favor, awarding close to \$1 million, which totals over \$1.7 million after interest is included.

RECENT KEY DECISIONS

In *Cummings Properties LLC v. Daryl C. Hines*, the Massachusetts Supreme Judicial Court reaffirmed Massachusetts law on liquidated damages. Namely, the Court made clear that a liquidated damages provision will be enforceable even when those damages do not reflect actual damages incurred. The key, consistent with existing law but reaffirmed here, is whether potential actual damages were difficult to ascertain when the contract was formed, and whether the amount included for liquidated damages was a reasonable approximation of potential actual damages at the time of contract execution. If these points are established, the liquidated damages provision will likely be enforced.

ARTICLES OF INTEREST

BUSINESS LITIGATION



Massachusetts Appeals Court Dismisses Action for Lack of Personal Jurisdiction Over Insurance Company that “Has Done Substantial Business” In Massachusetts

By: [Matthew C. Welnicki, Esq.](#)

Establishing personal jurisdiction over a defendant is a threshold each plaintiff must clear before it can proceed to the merits of a claim. In a recent decision, the Massachusetts Appeals Court reminds us that this analysis requires more than a cursory inquiry into whether the defendant does business in the Commonwealth. *D.F. Pray, Inc. v. Wesco Ins. Co.*, 22-P-734 (Sept. 14, 2023).

[Read More Here](#)

CONSTRUCTION & REAL ESTATE LITIGATION

Mechanic’s Lien for Rental Equipment Not Reduced Because of “Idle Time”

By: [Dave Viens, Esq.](#)

A recent Massachusetts Appeals Court case reinforces the proposition that the Massachusetts Mechanic’s Lien Statute will be strictly construed by our courts and provides important clarity for owners and subcontractors on projects involving rental equipment and delays.

[Read More Here](#)



Insurer’s Beware: Acknowledging a Duty to Defend

By: [Zachary J. Sullivan, Law Clerk](#)



In a recent decision, the Massachusetts Appeals Court held that a contractor was entitled to recover its costs of bringing a coverage suit against its insurer when the insurer acknowledged its duty to defend but failed to pay the contractor’s reasonable defense costs and reserved the right to recoup any fees it may pay toward the contractor’s defense.

[Read More Here](#)

EMPLOYMENT LAW & RISK MANAGEMENT



NLRB Adopts New Framework to Evaluate Whether a Workplace Policy is Lawful

By: [Michelle De Oliveira, Esq.](#)
and [Greg Vanden-Eykel, Esq.](#)

On August 2, 2023, the National Labor Relations Board (NLRB) adopted a new standard to evaluate whether employer workplace policies or rules infringe upon an employee’s rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Under the new burden-shifting framework, employers must ensure that workplace policies are narrowly tailored and aligned with a legitimate and substantial business interest.

[Read More Here](#)

U.S. Department of Labor Proposed Rule to Extend Overtime Protections and to Increase the Number of Overtime-Eligible Employees

By: [Greg Vanden-Eykel, Esq.](#)

Employers should regularly review job descriptions and their system for classifying employees as exempt and non-exempt from overtime pay as a regular part of their employment processes. This best practice has recently become more important after the U.S. Department of Labor (DOL) published a proposed rule that, if implemented, will once again modify the law surrounding overtime classification.



[Read More Here](#)

RECENTLY DRAFTED AND NEGOTIATED CONTRACTS



[Drew Colby](#) and [Ross Wecker](#) recently drafted and negotiated the following contracts on behalf of their clients:

- \$20,000,000 residential renovation contract using Cost-Plus Contract, the A102, A201, and HIC
- \$16,000,000 lab buildout Design-Build Agreement using A141
- Multi-million dollar Master Subcontractor Agreement for electrical services using custom contract
- \$55,000,000 mixed use Cost-Plus Contract using A102 and A201
- Multi-million dollar commercial renovation Cost-Plus Contract using A102 and A201
- \$1.5 home improvement contract using HIC



MEDIATOR'S CORNER

[Chris Kenney](#) has built a burgeoning practice as a mediator. In that role, he helps parties to resolve pending lawsuits before trial. The cases Chris has mediated range from business disputes, personal injury claims, and wrongful death claims to employment disputes, real estate matters, and construction claims.

Tip: Always prepare for success at mediation well in advance of the hearing. One of the keys to successful negotiation and resolution is setting the other sides' expectations for your settlement position.



To that end, never skip the opportunity to advocate in a well-prepared mediation brief. This will show them that you are prepared to prevail on liability and damages at trial if they blow the opportunity to reach a confidential, reasonable settlement at mediation. Advocate in a forceful, professional, and informative manner. The quality of the brief gives decision-makers on the other side a first impression of both your skill and your client's case. Those impressions factor directly into settlement value.

Also, get the mediation brief to opposing counsel to be shared with her clients and other decision makers, (e.g., insurer, surety, guarantors, etc.), well in advance of the mediation hearing. That way, they can set payment reserves and have complete settlement authority to meet your expectations at mediation.

Last, don't be timid about "showing your hand" in your brief. It should reflect your best case and how you rebut and dispose of their best case. Mediation is strictly confidential by statute, Rules of Evidence, and the mediation contract you enter for the hearing. Moreover, mediation normally takes place late in the case after discovery has exposed the strengths and weaknesses of each side's case. The rules of discovery are designed to promote settlement through fully informed decision-making before trial. If there truly is a "smoking gun" piece of evidence that you want to keep confidential for trial, you can entrust that to the mediator with instructions not to share it with the other side. Sometimes it's enough for the mediator to obliquely say: "I'm not authorized to disclose the specific evidence, but I can tell you that they are fully prepared to rebut/disprove/move to preclude your argument....."

For more information, please [visit our website](#).

FIRM HAPPENINGS



Kenney & Sams took to the beach this summer to spend some well-deserved time relaxing at the 2023 Annual Firm Outing. This year we played lawn games, roasted marshmallows, and spent quality time with our families at the SeaCrest Hotel in Falmouth.



Nate Cole was asked by outgoing **International Association of Defense Counsel** ("IADC") President, Mark Beebe, to serve on the Nominating Committee for the IADC's Annual Meeting in Waimea, Hawaii from July 9 - July 14. The Nominating Committee is comprised of a chair and four members selected at the discretion of the sitting IADC President. Its purpose is to nominate (1) the president-elect, (2) the three vacant seats for the Board of Directors, and (3) any other open office positions. This year, the Nominating

Committee had the responsibility of nominating the president-elect, three-board members, and the Vice President-International.

Nate also serves on the IADC Membership Committee and is the current Chair of the IADC's Construction Law and Litigation Committee.

Kenney & Sams was proud to sponsor the JPK Memorial Golf Tournament in September. We had three teams from the firm racing around the course. The results are in.... we proved that we are better lawyers than golfers!

The event was a grand success raising approximately \$50,000 for the **YJK Foundation**'s work funding research at the Juvenile Diabetes Research Foundation (JDRF) and a summer camp for children with Type One Diabetes.



On August 14, Kenney & Sams attorneys [Nate Cole](#), [Greg Vanden-Eykel](#), [Matt Madden](#), and [Herling Romero](#) went from litigators to golfers at the National Electrical Contractors Association (NECA) of Greater Boston's annual golf outing at Tedesco Country Club in Marblehead, Massachusetts.



Mike Dickman attended the 49th annual **International Association of Defense Counsel's** (IADC) Trial Academy, held from August 5-11 at Stanford University Law School. The Trial Academy, the IADC's "Crown Jewel", is a trial "bootcamp" where faculty instructors – seasoned trial lawyers and bar leaders from across the country and internationally – work alongside students on each aspect of civil trial practice. Students participate in hands-on, practical exercises from opening statements, direct and cross examinations of lay and expert witnesses, through closing argument. And foster lasting professional and personal relationships with their fellow students and faculty members.

[Read more about Mike's experience here](#)

RECENT AND UPCOMING SPEAKING ENGAGEMENTS

MIKE SAMS

September 28, 2023 ABC-MA Legal Roundtable: They Aren't All The Same Big Holes in Commercial General Liability Policies

Mike joined a panel of legal thought leaders to present a program focused on holes in Commercial General Liability policy coverages and specific endorsements/exclusions that could impact the coverage and have financial burdens if not recognized prior to a claim occurring.

MICHELLE DE OLIVEIRA

September 21, 2023 - MCLE Types of Employment Discrimination Cases

Michelle discussed the elements that need to be met in order to prove an employment discrimination claim in Massachusetts.

September 26, 2023 - Marlborough Regional Chamber of Commerce: Business Building Blocks Roundtable Discussion on Employment Management

October 4, 2023 - MCLE How to Analyze & Frame an Employment Case

Michelle discussed the most common types of employment cases and claims—and best practices when framing and analyzing them.

RACHEL EISENHAURE

November 6, 2023 2pm-5pm - MCLE Drafting Settlement Agreements & Releases

Rachel will discuss how they negotiate, develop, and draft settlement agreements and releases in their diverse practice areas. The program will identify: strategies for effective negotiations, including creative settlement options; essential provisions to

include in any draft settlement or release; recent case law and statutory changes; and other critical topics. Register for this upcoming MCLE [here](#).

NATE COLE

September 21, 2023 - What You Need to Know: The MA Prompt Pay Act

Nate presented a legal education program for NECA Boston on how the MA Prompt Pay Act (Ch. 149, Sec. 29A) governs certain private projects in the Commonwealth, including periodic applications for payment and why it's important for all construction contractors in the Commonwealth to be aware of the Act's requirements to protect (and arm) themselves in situations in which the Act applies.

October 12, 2023 - MCLE Out-of-State Subpoenas & Interstate Discovery

Nate and fellow K&S attorney, [Brittany Darcy](#), presented on obtaining out-of-state discovery for Massachusetts state court cases. Despite the costs involved, securing deposition testimony or documents from third-party witnesses in foreign states may be necessary. Counsel must understand the steps needed to obtain deposition testimony from individuals outside of Massachusetts because they will not be subject to a state court trial subpoena.

October 17, 2023 - Massachusetts Defense Lawyers Association: Understanding Key Insurance Provisions in Construction Contracts

Nate and fellow K&S attorney, [Brittany Darcy](#), discussed how construction contracts at all levels include requirements for certain types of insurance and related clauses, including those dealing with indemnification obligations, the key terms and how they relate to one another, including a discussion concerning the differences and interplay between liability insurance, builder's risk insurance, "additional insured" requirements, and indemnification provisions.

COMING ATTRACTIONS

Kenney & Sams is excited to announce that we will be releasing the first episodes of our new podcast, Trial Think, in the coming weeks. During the first season of Trial Think, we will discuss issues ranging from construction, business, and employment law through the eyes of trial attorneys who have seen how disputes play out in litigation and trial. We look forward to discussing hot legal issues in our core practice areas with K&S attorneys and our notable guests. Stay tuned!



GET TO KNOW YOUR K&S TEAM MEMBER:
David Kerrigan



Best advice you were ever given as a professional:

When I worked in the Attorney General's office, the Attorney General would say whenever the office performed an investigation that the office would go where the facts took it. This is very helpful advice to follow as a litigator because even though we may begin a case with preconceived notions about what the facts will be and what result should follow, adjusting those views on the proper themes and outcome as the facts unfold is crucial.

Favorite part about working for K&S:

There is a real emphasis on educating attorneys on the substantive and procedural aspects of our work. Even though the lesser experienced attorneys may not have as many chances to appear in court as

lawyers did 30 or 40 years ago, we place a significant emphasis on skill development that is rare for firms our size.

Best non-legal job you’ve ever had:

Bartending at a local country club during summers when I was in college. It was a lot of fun and kind of like Caddyshack without the gopher and Judge Smails.

Something we may not know about you:

I played the trumpet all through high school and performed with the marching band in parades. I have not played in years, which my family appreciates.

TIME TO REVIEW YOUR CONTRACTS AND EMPLOYEE HANDBOOKS?

Sophisticated companies understand the value of having their model contracts and employee handbooks reviewed annually. The law evolves constantly, which means your contracts and employment policies need to as well. If your model contracts or handbooks contain outdated provisions that violate new laws, your company could suffer significant damages.

Annual reviews are one of the most cost-effective risk management tools you can employ. We perform these reviews efficiently.

Please reach out to us to ensure your model contracts achieve your goals and, correspondingly, do not expose your company to unnecessary damages.

Trial-Think [trahy-uh l think] noun.
1. An approach to dispute resolution and risk management that brings trial experience, preparation and effectiveness to everything we do for our clients.



Kenney & Sams, P.C. | 10 High Street, Boston, MA 02110

[Unsubscribe pcmcquillan@kslegal.com](mailto:unsubscribe_pcmcquillan@kslegal.com)

[Update Profile](#) | [Constant Contact Data Notice](#)

Sent by events@kslegal.com powered by



Try email marketing for free today!