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NEW RHODE ISLAND MECHANICS' LIEN STATUTE TOOK EFFECT ON OCTOBER 1, 2006: CONTRACTORS MUST GIVE NOTICE TO OWNER WITHIN TEN DAYS OF STARTING WORK TO PROTECT LIEN

I. INTRODUCTION

The Rhode Island Mechanics' Lien Statute has recently been amended by the legislature. The new statute took effect on October 1, 2006. Some of the key changes include: (A) the lien period has increased from one hundred and twenty (120) days to two hundred (200) days, (B) the time period for lien holders to file suit has in turn been reduced from 120 days to 40 days after the recording of a mechanics' lien, and (C) general contractors, including most contractors who have direct contracts with owners, lessees or tenants on the property improved cannot lien the job unless they serve a certain statutory notice within (10) business days after beginning work. The key changes are discussed below.

A. Increase in the Lien Period

Now that the new statute is in effect, the lien period has increased to two hundred (200) days. This means that the day a lien notice is sent by certified mail to the owner of a project, it will cover all work performed in the prior two hundred (200) days (6 ½ months) as well as work performed in the future. This increase in time for work performed from 120 days to 200 days is advantageous to contractors, subcontractors and suppliers since more days and more work will be covered by the lien upon mailing. The following examples will demonstrate this principle.

Example #1- Subcontractor ("S") begins work on January 2nd and completes four weeks later on January 30th. He does \$10,000 worth of work per week under a total contract of \$40,000. *(continued on page 2)*

Firm Profile:

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NEW, TOUGHER, CONTRACTORS' REGISTRATION STATUTE GOES INTO EFFECT

The Rhode Island legislature recently amended the Contractors' Registration statute to provide increased protection for homeowners and harsher penalties for Rhode Island contractors who violate the statute. The new law increases fines, allows repeat offenders to be prosecuted as felons, requires written contracts, provides more detailed information about complaints against contractors on the Contractors' Registration website, increases insurance requirements, punishes contractors who refuse to pay outstanding judgments, allows the homeowner to file an additional action in the Superior Court, bans certain claims for false advertising, and in certain cases extends the time for a consumer to file a complaint with the Contractors' Registration Board.

In this issue, we will discuss who is covered by the statute, who is exempt from coverage, and some of the more important changes taking effect.

I. COVERAGE

As the statute is written, the Contractors' Registration statute covers contractors, remodelers, and most subcontractors who perform residential construction work. The statute covers projects ranging from single-family homes to large residential high rise condominiums.

On its web site, the Contractors' Registration Board has taken an aggressive stance as to who must register with the Contractors' Registration Board under the new statute. The Board has stated that, "a commercial contractor [has] to register," and that, "[i]f a contractor builds commercial structures exclusively or develops land exclusively, he does have to be registered." There is no support in the statute for the Board's argument that commercial contractors have to register with the Board, and it is unclear whether the Board intends to go after commercial contractors who refuse to register.

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On September 1, 2007 he sends out a lien notice. The lien is invalid and totally worthless.

| | | | | | | | | | |
|---------------------------|------|------|------|-----|------|------|--------|-----------|-------------|
| | | | | | | | | | Lien Notice |
| Jan. | Feb. | Mar. | Apr. | May | June | July | August | September | |
| work | | | | | | | | | |
| | | | | | | | | | |
| Lien covers back 200 days | | | | | | | | | |

Example #2-Same facts, except S sends out the lien notice on August 1st. The lien is valid, but only covers the last two weeks of S's work. S would be entitled to \$20,000 as a result of the lien.

| | | | | | | | | | |
|---------------------------|------|------|------|-----|------|------|--------|-----------|-------------|
| | | | | | | | | | Lien Notice |
| Jan. | Feb. | Mar. | Apr. | May | June | July | August | September | |
| work | | | | | | | | | |
| | | | | | | | | | |
| Lien covers back 200 days | | | | | | | | | |

Example #3- Same facts, except S sends out a lien notice on July 20th. The lien is valid and covers all work performed. S would be entitled to \$40,000 as a result of the lien notice.

| | | | | | | | | | |
|---------------------------|------|------|------|-----|------|------|--------|-----------|-------------|
| | | | | | | | | | Lien Notice |
| Jan. | Feb. | Mar. | Apr. | May | June | July | August | September | |
| work | | | | | | | | | |
| | | | | | | | | | |
| Lien covers back 200 days | | | | | | | | | |

B. Filing Suit Earlier

Another change to the statute impacts the lien process after the initial recording of the lien notice. The old statute had required that suit be filed 120 days after the recording of the lien notice. The new statute requires that suit be filed within forty (40) days of recording the lien notice, thus making the time period to file suit much shorter.

This is an unfortunate change in the statute. In many cases, lien holders are able to resolve payment in the time period between filing a Notice of Intention and filing suit. With that time period now reduced from 120 days to 40 days many lien holders will now have to unnecessarily incur the costs of filing suit, service and advertisement.

C. Notice of Possible Mechanic's Lien

A new provision in the statute requires that all contractors (excluding material suppliers), having a contract with the owner, lessee or tenant of the property in question, provide notice to the owner, lessee or tenant that a mechanic's lien could be filed against their property as a result of the construction. This "Notice of Possible Mechanic's Lien" is a letter which the contractor must send to the owner, lessee, and tenant by certified mail within ten (10) business days after they start work on a project. The form of the Notice is statutory and must be written in the form indicated on the insert to this newsletter.

If the contractor does not give this notice to the owner, lessee or tenant within the ten (10) day period the contractor will lose its right to file a mechanic's lien against the property and will be obligated to indemnify and hold harmless the owner (pay for cost of legal defense and any judgment) from certain subcontractor liens (unless owner did not pay contractor). When the contractor is working for a lessee or tenant the notice should be sent to the lessee or tenant and the owner.

D. Conclusion

Subcontractors are the biggest winners under the new statute. The Notice of Intention now covers 200 days, rather than 120 days worth of work. The new Statute does not hurt subcontractors in any significant respect.

The general contractors are winners or losers depending on the case. On the one hand, like their subcontractors, their liens now cover 200 days. However, they cannot lien the job unless they serve the required statutory notice within ten (10) business days after starting work on the project. Many general contractors will not want to serve this notice for business reasons, but they will have to if they want to protect their lien rights.

Strangely, owners are both winners and losers. On the one hand, owners will have to deal with more subcontractor liens now that the lien covers 200 days of work. On the other hand, the statutory notice will provide a powerful weapon for owners defending general contractor liens. Owners will successfully defend a number of potential general contractor liens on the grounds that the general contractor did not provide the statutory notice.

In conclusion, there are a number of new traps for the unwary in the new statute. Subcontractors, general contractors and owners should consult with their attorneys promptly before working on any construction project in which they have potential lien rights.

NEW, TOUGHER, CONTRACTORS' REGISTRATION STATUTE GOES INTO EFFECT *(continued from page 1)*

Commercial contractors will have to watch out for this potential problem in upcoming months.

II. EXEMPT CONTRACTORS AND PROJECTS

The registration requirement does not extend to subcontractors who are already licensed by another Rhode Island government agency. Thus, plumbers, electricians and pipefitters are exempt from the Contractors' Registration Board statute. This exemption will not apply, however, if the licensed contractor engages in work outside of the scope of their license.

III. IMPORTANT CHANGES

The new law adds teeth to the original Contractors' Registration Law enacted in 1989 by including among other things, stiffer monetary penalties, greater notice requirements and increased contractors' insurance requirements.

The following is an overview of just some of these new changes:

A. Increased Penalties

The law increases the maximum penalty that can be assessed against the contractor for his first violation. Under the old statute, the maximum penalty was \$10,000. Now, the Board can assess a fine up to the full value of the contract or the actual damages caused by the contractor - whichever is greater. For subsequent violations, a fine not to exceed \$10,000 may be imposed by the Board after a hearing. In addition to these fines, the Board may award treble damages, reasonable attorney's fees and costs, and service of process expenses up to \$1,000.

B. Written Contracts

Effective October 1, 2006, the new law requires a written contract for all contracting work performed in excess of \$1,000. The contract must include a certain signature line that the parties shall initial to evidence the receipt of certain consumer education materials. These educational materials include information on rights of recession, the contractor's registration number and the Use of Contractors' Registration Board Dispute Resolution Process. These educational materials must also include notification to the consumer of the potential for a sub-contractor or materialperson to place a lien on their property. A contractor who fails to notify the homeowner/consumer in accordance with RIGL 34-28-4.1 shall indemnify and hold harmless any owner, lessee, tenant, or owner of less than fee simple from any payment or costs incurred as a result of any liens placed on the property by the contractor's subcontractors and suppliers unless the hiring party has not paid the contractor. Contractors should revise their written contracts to conform to these provisions and should contact the Contractors' Board to obtain the approved consumer education materials.

C. Statute Of Limitations

In certain cases, homeowners now have two years, instead of one year, to file a complaint against the contractor. The two year statute of limitations only applies when the homeowner has notified the contractor in writing of a problem within the first year after the work's completion. In all other cases, the one year statute of limitations remains in effect. Thus, homeowners should still try to file their claims with the Board within the one year deadline.

D. Repeat Offenders

The new law contains provisions, which crack down on contractors who have repeatedly violated the statute. If a contractor is a repeat offender with violations of three (3) different final orders of the Board from three (3) different parties within two (2) years, the violation will be prosecuted as a felony, and will be punishable by up to five (5) years in prison and/or a \$10,000 fine.

E. Increased Insurance Requirements

The new law increases public liability and property damage insurance requirements for contractors from \$300,000 to \$500,000.

F. Posting of Final Orders, Proposed Orders and Hearing Notices

This section requires the Contractors' Registration Board to post on its website (www.crb.ri.gov) all final orders, proposed orders and hearing notices. Currently, all records of complaints against contractors appear on the site only if the Board issues a final order. Thus, if a contractor and a homeowner reach a settlement just before the hearing there is no way for a consumer to find information about that complaint. This new requirement will essentially allow homeowners to screen for potential problem contractors.

G. Failure To Pay Outstanding Judgment

Under the new law, contractors may have their registration revoked or suspended and can be denied registration or renewal if there are any "unsatisfied or outstanding judgments from arbitration, bankruptcy, courts and/or administrative agency against him or her relating to their work as a contractor." Contractors registering with the Board must sign an affidavit under the penalties of perjury that there are no unsatisfied or outstanding judgments against them relating to their work as a contractor.

H. Additional Private Right Of Action In Court

Under the old statute, the homeowner would have to abandon his or her Contractors' Registration Board claim if the homeowner decided to sue the contractor in court. Homeowners can now do both. They can sue the contractor in court, and simultaneously prosecute that action in addition to their Contractors' Registration Board case. If the homeowner does not receive sufficient damages from the Contractors' Registration Board proceedings, he or she may recover the difference if the homeowner proves their case in court. In addition to their damages, the homeowner may now be able to recover treble (triple) damages, attorney's fees and costs. Typical of the ambiguous language throughout the statute, the legislature did not identify the cases where triple damages and attorney's fees would be appropriate.

I. Claims For False Advertising

Finally, the Board has included new grounds for disciplining contractors relating to false advertising. Contractors can be disciplined for advertising "with a license number instead of using a registration number," and misrepresenting "the registration status as valid when said registration is suspended, revoked, invalidated, inactive or unregistered as required by the board."

IV. POTENTIAL ENFORCEMENT PROBLEMS

The new statute is a potentially powerful tool for aggrieved Rhode Island homeowners. The statute, however, is not without its problems. As pointed out

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by George Whalen, Executive Director of the Contractors' Board, in the July 31, 2006 issue of Rhode Island Lawyers Weekly, "the law is problematic because it does not provide additional money to enforce state rules governing home contractors. Registration fees and fines collected by the board go to the state's general fund, not the board."

Whalen went on to comment that, "[t]he board now has three investigators and one hearing officer, but no one dedicated to enforcement. As a result, hundreds of fines and orders to make repairs or stop working as a contractor have not been enforced." Homeowners must continue to carefully search for a reputable contractor. They will in many cases need to pursue their claim against the contractor in arbitration or state court.

V. CONCLUSION

The new Contractors' Registration Board statute is tougher. The Board is imposing new, more stringent requirements on contractors with new severe penalties for contractors who refuse to comply with the statute and the Board's orders. The statute benefits homeowners and imposes more onerous requirements on residential contractors.

There are potential problems with the new statute. The new statute was poorly drafted and a number of key provisions are ambiguous. This will probably lead to disputes between contractors, homeowners and the board, resulting in protracted court litigation necessary to interpret some of the key provisions of the statute. There are also potential problems

resulting from the passage of a tough new law, without giving the Board the resources to enforce these tough new requirements. In any event, residential contractors will have to deal with the new statute and should be careful to make sure that their actions are in compliance with this tough, new law.

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It is not intended to provide specific legal advice or to address fact specific legal issues. For that you should consult your own legal counsel. Heald & LeBoeuf, Ltd. assumes no liability in connection with the use of this newsletter.

Please contact Thomas W. Heald, Esq. with any Questions with respect to this newsletter.

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The Rhode Island Supreme Court may consider this material advertising.

[INSERT CONTRACTOR'S
NAME AND ADDRESS]

[INSERT DATE]

[INSERT NAME AND
ADDRESS OF OWNER]

[INSERT NAME AND
ADDRESS OF LESSEE
OR TENANT]

NOTICE OF POSSIBLE MECHANIC'S LIEN

Re: [INSERT PROJECT NAME / PROPERTY ADDRESS]

To: [INSERT NAME OF OWNER AND LESSEE OR TENANT]

The undersigned is about to perform work and/or furnish materials for the construction, erection, alterations or repair upon the land at [INSERT ADDRESS] under contract with you. This is a notice that the undersigned and any other persons who provide labor and materials for the improvement under contract with the undersigned may file a mechanic's lien upon the land in the event of nonpayment to them. It is your responsibility to assure yourself that those other persons under contract with the undersigned receive payment for their work performed and materials furnished for the construction, erection, alteration or repair upon the land.

Sincerely,

[INSERT CONTRACTOR'S NAME]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
[INSERT RECEIPT NUMBER]

Form prepared by: **HEALD & LEBOEUF, LTD.**
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