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## Client Advisory

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### **Amendment to Mechanics Lien Statute Now Provides Greater Protection for Architects, Engineers, Site Professionals and Land Surveyors**

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As of July 1, 2011, design professionals will have greater rights under the Massachusetts mechanics lien law. Previously, it was pretty universally accepted that design professionals had limited right to assert a mechanics lien. Under the prior law, design professionals could lien for unpaid construction administration services, but that was about it. The new amendment makes it clear that a design professional, which includes an “architect, professional engineer, licensed site professional or land surveyor” can now lien for “professional services.” These “professional services” include those “customarily and legally performed by or under the supervision or responsible control of design professionals in the course of their professional practice, including without limitation, programming, planning, surveying, site investigation, analysis, assessment, design, preparation of drawings and specifications and construction administration services.”

The basic steps for perfecting a mechanics lien are essentially unchanged. A design professional who has a written contract with an owner must first record a Notice of Contract (in the form set out in the new statute), which document may be recorded at any time, but no later than the earlier of 60 days from recording of a Notice of Substantial Completion under Section 2A of the lien statute (M.G.L. c. 254), or 90 days after the design professional or anyone claiming through him last performed professional services. Design professional subcontractors too can claim a mechanics lien (using the form in the statute and also assuming a written contract), and, just as with construction subcontractors, actual notice must be provided to the Owner. Subcontractors may record their Notice at any time after execution of the subcontract, but not later than the earlier of 60 days after recording of a Notice of Substantial Completion or 90 days after anyone who could claim a lien through the prime design professional or general contractor on the project could claim a lien. The statute does not appear to contemplate mechanics liens by lower tier design professionals, i.e. a sub-sub consultant. The amount of the design professional subcontractor mechanics lien cannot exceed the amount due under the original contract between the Owner and the prime design professional at the time the Notice is recorded and notice provided to the Owner.

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Within 30 days of the last date on which the design professional could record a Notice of Contract, a Statement of Account must be recorded. A lawsuit must then be filed within 90 days thereafter.

By enacting this legislation, Massachusetts has come into line with the laws of most other jurisdictions, recognizing the important role that architects and other design professionals play in a construction project. The key things to remember are that a written contract is required, and recording early, even before a problem arises, will maximize the amount of recovery under the mechanics lien. If you are an owner or developer, you should now require lien waivers from design professionals too. While your standard lien waiver forms may suffice, they should be reviewed to make sure that they cover design professionals. Additionally, you may wish to insist on broader indemnity clauses in your standard contracts to ensure indemnity not just against contractor and subcontractor mechanics liens, but also from mechanics liens asserted by architects, engineers and other design professionals.

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