

Commercial Counsel

KMKSC NAMED A 2011 "GO-TO LAW FIRM FOR LITIGATION" FOR TOP 500 COMPANIES

Kohner, Mann & Kailas has been honored as a "2011 Go-To Law Firm for Litigation" by ALM, a publisher of notable periodicals tailored to the legal community, including the "American Lawyer," the "National Law Journal" and "Corporate Counsel" magazine. We would like to thank our clients who recommended us, without whom such recognition would be meaningless.

The accolade is awarded annually, based upon recommendations from in-house general counsel at Fortune 500 companies. Each general counsel is asked to identify which outside law firm is relied upon most heavily to assist in the practice areas of litigation, corporate transactions/mergers & acquisitions, securities, labor & employment, intellectual property, Canadian law, and international law.

HAPPY HOLIDAYS!

All of us at KMKSC wish all of our clients and readers a joyous holiday season and a prosperous 2011!

LOSE A LIEN / LOSE A LOT

(CONSTRUCTION LIEN CLAIMS:

IF YOU DON'T GET YOUR FACTS STRAIGHT, THEY AREN'T WORTH THE PAPER THEY'RE WRITTEN ON)

Recently, a client advised us that they were owed about \$100,000.00 for materials they had sold to a customer for installation in a retail store in the Chicago area. The client asked us to prepare and file a construction lien against the job site to secure its claim. However, we could not legally do so, because of a mistake in the service of the required notice. Our client had sent the required preliminary notice of intent to file a lien, which was correct in every way, except that it was sent to the owner of *another* store in the same building, with the same physical address. By the time we received the claim, the legal window for correcting this error had closed. This dramatically illustrates the importance of accuracy and detail to successful enforcement lien claims, and the consequences of seemingly innocuous mistakes.

When you furnish labor or materials to a construction job, and your contractor goes broke, you typically have no protection to collect against the property owner unless you secure a lien against the property. However, the difficulty with liens is not in getting them, but making them enforceable. An unenforceable lien is just so much waste paper. Securing an enforceable lien requires planning. From the outset, you need to gather all of the facts regarding the job. Do not simply rely on job information sheets prepared by your customer or your salesperson. Too often, these contain

General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

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inaccurate information or omit key information. **If you file a lien based on inaccurate information, chances are that the lien will be invalid and unenforceable.** If that happens, often little or no recovery is possible. You lose not only the time and money you spent on filing the lien, but you will (like our client in the illustration above) probably also have lost your hope of recovering payment of your claim for labor and materials.

Our client in the illustration above, failed to pinpoint the *precise* location of its job site. If you don't know the precise job site, how can you correctly identify the owner of the job site you plan to lien? Failure to do so will be fatal to any hope of enforcement. In all cases, a valid lien must *precisely* identify the building and unit that constitutes the job site. Guesswork, approximation or oversight in preparation will not do—as the client's experience attests. (You may also incur additional problems, as an inaccurate filing may slander the title of the true property owner). As in the illustration above, this may result in sending preliminary lien notices to the wrong party and by the time you discover the error, it may be too late to correct it.

Be sure to double check and know exactly who is who on the job in question. Find out the full formal legal name and principal office address of the general contractor (don't just get a "doing business as" name of the general contractor and an address for the general contractor's construction trailer located on the job site). Make sure you do the same for your customer and your customer's customer, and any other parties in the chain above you on the job. This information will prove invaluable if you end up having to file a lien.

In the illustration above, we were, fortunately, able to produce a happy ending for our client. While we knew we couldn't file a lien against the job (because the client had sent the notice of intent to the wrong "owner"), there was nothing stopping us from contacting the job owner and the general contractor and using the possibility of filing a lien as leverage in an attempt to collect the \$100,000.00 owed to our client on the job. As it turned out, the general contractor apparently overlooked the absence of a timely notice of intent to the owner, and paid our client's claim. Fortunately, our "bluff" worked, but this was an exceptional result. In most cases this client would have ended up with a \$100,000.00 uncollectible construction receivable because they didn't double check their facts before sending out the notice of intent to file a lien. That's why the help of experienced construction counsel is so important.

If you want to enhance your protection and ability to recover against a distressed constructor, or would like more information on construction liens and bonds generally, contact *Dave Henry* of our office at 414.962.5110, dhenry@kmksc.com.

KMKSC LITIGATORS CO-AUTHOR MITIGATION OF DAMAGES CONTENT OF STATE BAR TREATISE

In October 2010, Pinnacle books, the publisher to the State Bar of Wisconsin released the new 5th edition of its treatise "The Law of Damages in Wisconsin."

KMKSC litigator Robert L. Gegios has been the author of the chapter on "Mitigation of Damages" since first publication in the 1980s. Stephen Taylor has been a co-author since 2007. The chapter discusses the doctrine of mitigation of damages as applied by Wisconsin courts and statutes, as well as addressing the general nature of mitigation of damages and the ways in which the doctrine is applied in tort and contract.

THE LAW OF DAMAGES IN WISCONSIN, Vol. III; 5th Ed., ISBN 1-57862-053-8, is available from PINNACLE™ Books, via the State Bar of Wisconsin in print and online formats.

KMKSC SECURES DEFINITIVE RULING ON PRIORITY OF MORTGAGES AND LIENS

Complex real estate dealings often require the involved parties to complete several separate transactions, which are then recorded at the county register of deeds in quick succession. As all lending institutions know, it is crucial that the mortgages and liens at issue be recorded in the correct order, so that priority of title can be correctly determined if litigation regarding the deal later becomes necessary. Wisconsin recording statutes require the register to stamp the documents with the date, hour, and minute they were recorded, but when multiple documents are recorded together, it often results in each document having the same time stamp. When that occurs, how does one conclusively determine priority of title?

Thanks to a recent unpublished appellate court ruling secured by William E. Fischer of KMKSC in *First Bank of Highland Park v. Summer Haven, LLC*, the answer appears

settled. The Court of Appeals agreed with KMKSC's argument that, under Wisconsin Law, in situations where two recorded instruments bear the same time stamp, the order in which they are numbered is conclusive.

This easy-to-follow rule of law provides a clear, bright-line guide to parties and courts alike in determining priority. It also emphasizes how important it is for mortgage and lien holders to actively ensure that these recordable instruments are immediately recorded in the correct order. Wisconsin law provides various protections for parties with properly recorded instruments, but those **protections work in your favor only if you execute the play correctly**. If you have questions relating to this ruling, contact William "Bill" Fischer at 414.962.5110, wfischer@kmksc.com.

MORE OUTSIDE RECOGNITION FOR KMKSC ATTORNEYS

Three KMKSC shareholders have been included in the 2011 Edition of **The Best Lawyers in America**®. As a business and commercial law firm devoted to providing legal counsel across the spectrum of legal issues encountered by businesses, we are particularly pleased that both our transactions and litigation capabilities have been recognized.

Matthew P. Gerdisch and *David S. Chartier* continue to extend KMKSC's more than seventy-year track record as a leader in the practice of **Bankruptcy and Creditor-Debtor Rights Law**. *Robert L. Gegios* represents our complex business litigation team through his inclusion among the Best Lawyers® for **Antitrust Law**.

All three attorneys were also named to **Wisconsin Super Lawyers**® this year, an honor also shared by *Steve Kailas*, *Alexander "Sandie" Pendleton* and *Christopher C. Kailas*. Our congratulations go out to all KMKSC attorneys who received third-party recognition in 2010, including KMKSC associate litigator William E. Fischer, who was named a Wisconsin **Rising Star**®.

LATEST SPEECHES AND PRESENTATIONS BY KMKSC ATTORNEYS

- November 16, 2010, "**Retaining Profits from Contract through Collection**," KMKSC shareholder David S. Chartier, Painting and Decorating Contractors of America, Milwaukee, Wisconsin.
- October 12, 2010, "**State Court Receiverships, Wage Earner Plans: What You Need to Know**," KMKSC shareholder David S. Chartier, Wisconsin Credit Association, 2010 Credit Professional's Conference & Expo, Green Bay, Wisconsin.
- October 13, 2010, "**What Do You Mean, My 20-Day Administrative Claim is Worthless?**" KMKSC shareholder Samuel C. Wisotzkey, Wisconsin Credit Association, 2010 Credit Professional's Conference & Expo, Green Bay, Wisconsin.
- October 13, 2010, "**Prepackaged Strategies: The Creditor's Response to Chapter 11**," KMKSC shareholder Samuel C. Wisotzkey, Wisconsin Credit Association, 2010 Credit Professional's Conference & Expo, Green Bay, Wisconsin.

MOST RECENT PUBLICATIONS BY KMKSC ATTORNEYS

- "**Mitigation of Damages**," Ch. 30, **THE LAW OF DAMAGES IN WISCONSIN, Vol. III; 5th Ed.**, Robert L. Gegios & Stephen D. R. Taylor, Pinnacle Books, State Bar of Wisconsin, October, 2010.



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