

Massachusetts Supreme Judicial Court to Address the Application of the Statute of Repose to Contractual Indemnification Claims

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An issue of great importance to all construction project parties, including design professionals and contractors, is pending before the Massachusetts Supreme Judicial Court (SJC). In the matter of *Trustees of Boston University vs. Clough, Harbour & Associates LLP*, SJC No.13685 (the *BU Matter*), the question before the Court is whether a plaintiff's contractual indemnification claim "that sounds in" tort is barred by Massachusetts' six-year Statute of Repose under Mass. Gen. Laws Ch. 260, § 2B.

The Massachusetts Statute of Repose sets an outer limit of six years for a plaintiff to assert a tort claim, i.e., a claim of negligence, "arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency[.]" The six-year limitation is measured by the earlier of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner. Unlike a statute of limitations which may not begin to run until well after substantial completion—depending on when a party knew or should have known of a potential cause of action—the Statute of Repose bars any claim (regardless of knowledge) that is not asserted within the six-year period. In establishing the six-year limitation period, the Statute of Repose recognizes that litigants may find it difficult to defend claims after the passage of time given the potential for loss of institutional knowledge, documents, and witnesses. It also provides assurance against the threat of litigation after the six-year limitation period has run.

The *BU Matter* involves a claim of design defect in connection with a turf sports field at Boston University (BU). It is undisputed that BU filed suit against the architect more than six years after the project was completed. At issue is whether M.G.L. ch. 260, § 2B, bars BU's claim for contractual indemnification. The trial court granted summary judgment for the architect ruling that the contractual provision at issue did not include a "heightened" standard of care, but rather imposed the reasonable standard of care, and therefore "sounded in" tort, or negligence. Relying on well-established precedent that the nature of a claim should be determined based on "whether the gist of the action" sounds in tort, the trial court concluded that BU's contractual indemnification claim was in reality a tort claim and was therefore barred by the Statute of Repose.

In its ruling, the trial court relied upon the unpublished Appeals Court decision of *University of Mass. Bldg. Auth. v. Adams Plumbing & Heating, Inc.*, 102 Mass. App. Ct. 1107 (2023) (UMass Decision), which similarly found a contractual indemnification claim did not impose a heightened standard of care or guaranty, was therefore barred by the Statute of Repose as a tort claim, notwithstanding that UMass claimed it was pursuing a claim for breach of contract.

The question presented to the SJC on appeal is whether the trial judge erred in relying on the UMass decision when it concluded that the contractual indemnification claim sounded in tort and was therefore barred by the Statute of Repose. This decision by the Massachusetts SJC will have significant implications for design professionals and the construction industry in Massachusetts, that will impact both how contractual indemnification provisions are drafted and enforced. Currently, oral argument before the SJC is scheduled on February 5, 2025.

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