

# MA Appeals Court to Weigh New Construction Defect Claims Under Statute of Repose

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An appeal being filed with the Massachusetts Appeals Court (Appeals Court) involving construction defects alleged against a condominium developer has the potential to impact construction and design professionals. As a result of a decision issued by the Massachusetts Superior Court in *Trustees of Three-Fifty West Broadway Condominium Trust v. Peter Leoutsakos, et al.*, No. 2184CV02254 (Mass. Super. Ct. Aug. 5, 2024), the Massachusetts Appeals Court will soon be asked to address whether new construction defect claims raised against a developer in a pending lawsuit relate back to the date of the initial filing of the lawsuit and may be asserted or are barred by the six-year limitation in the Massachusetts Statute of Repose (G. L. c. 260, § 2B).

The Appeals Court decision will be important because, if the lower court's decision is reversed, it would mean that professionals in the construction and design industry could be subject to claims of negligence (i.e., defective work or services) that are asserted after the six-year repose period has run.

The statute of repose provides a time limit of six years for a plaintiff to assert a tort claim, such as negligence, "arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property..." The six-year limitation begins accruing from 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.

*Trustees of Three-Fifty West Broadway Condominium Trust* involves allegations of construction defects at a condominium building in South Boston. The building received a certificate of occupancy on September 9, 2014, and the latest date on which a unit owner took ownership was November 12, 2014. On September 22, 2017, the condominium trustees (plaintiffs) filed suit against the condominium developer (defendant), alleging, among other things, that the developer failed to provide unit owners with storage and a video intercom system, fund the common fund, and properly install the building's elevator.

On April 15, 2021, the plaintiff-trustees filed a second amended complaint adding counts of negligence and breach of implied warranty, both premised on a number of alleged construction defects, including water intrusion and defects with window installation and the construction of the lobby, exterior siding, roof, and balconies.

The defendant-developer moved for summary judgment on the two new negligence and breach of implied warranty counts, arguing they are time barred by the statute of repose because they are actions in tort related to improvements to real property. The plaintiff-trustees argued that the new construction defect claims are merely a refinement of their previously alleged legal theories in the original complaint, and that under the relation back doctrine the new negligence and breach of implied warranty counts should be treated as if both were commenced on the original filing date of the complaint.

In granting summary judgment on the two new counts, the Superior Court found the "plaintiffs' tort claims, raised for the first time more than six years after the property was authorized for use and occupancy, do not relate back to the date of their original complaint and are thus barred by the statute of repose." The court relied, in part, on *Tindol v. Boston Hous. Auth.*, 396 Mass. 515, 519 (1986), where the Massachusetts Supreme Judicial Court (SJC) established the precedent that the relation back doctrine found in Mass. R. Civ. P. 15(c) could not be used in an amended pleading to circumvent the statute of repose. Relying on that precedent, the Superior Court in *Trustees of Three-Fifty*

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*West Broadway Condominium Trust* stated:

The [SJC] has held that an amended complaint does not relate back to the original date of filing for the purpose of adding claims against new parties otherwise barred by the statute of repose. . . . This reasoning extends to new, otherwise-barred claims against existing parties, particularly where the SJC has repeatedly specified that the statute of repose applies to *causes of action* rather than untimely lawsuits generally.

MG+M Partner David J. Hatem successfully represented the defendant-mechanical engineer in *Tindol*.

The court went on to state that while the plaintiff-trustees were presumably correct that that statute of repose would not bar refinement of a previously asserted legal theory, the plaintiff-trustees' original complaint did not allege negligence or breach of implied warranty, and the complaints of defects raised in that complaint "plainly did not allege or suggest the sweeping construction defects outlined in the second amended complaint."

The Superior Court reaffirmed its decision in a March 3, 2025, order denying the plaintiff-trustees' motion for reconsideration. The plaintiff-trustees are now appealing the decision to the Appeals Court.

Given the implications that a reversal of the Superior Court's decision would have on construction and design professionals, MG+M is seeking leave from the Appeals Court to file an amicus brief on behalf of the American Council of Engineering Companies of Massachusetts and the American Institute of Architects/Massachusetts.

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