

# Massachusetts Supreme Judicial Court Rules Contractual Indemnification Claim Is Not Barred by the Statute of Repose: Implications for Design and Construction Professionals

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On April 16, 2025, the Massachusetts Supreme Judicial Court (SJC), in *Trustees of Boston University vs. Clough, Harbour & Associates LLP*, SJC No. 13685, held that Boston University's (BU) indemnification claim for negligence was by its nature contractual and therefore not barred by the Statute of Repose, Mass. Gen. Laws Ch. 260, § 2B, that explicitly applies to tort claims. The case involved a contract between BU and an architect retained to design a parking garage with a turf athletic field at the top. The contract contained an indemnification provision stating, in relevant part:

To the fullest extent permitted by law, [architect] shall indemnify . . . [the university] . . . from and against any and all . . . expenses, including, but not limited to, reasonable attorney's fees, to the extent caused . . . by the negligence of [architect].

The field opened on August 31, 2013, after which it began to develop depressions that BU claims resulted from the architect's failure to consider the seasonal expansion of the joints in the parking garage below it. BU demanded the architect indemnify it for the expenses resulting from the alleged faulty design, citing to the indemnification provision in the contract. The architect declined and BU filed suit.

The architect moved for summary judgment on the basis that the contractual indemnification claim was barred by Massachusetts' six-year Statute of Repose in Ch. 260, § 2B (Section 2B). Under Section 2B, a claimant has no more than six years from project substantial completion to file an "[a]ction of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property ...." The architect argued that because the contractual indemnification provision includes a negligence standard of care, claims based on that provision are essentially tort-based and are governed by Section 2B. The issue before the SJC was whether BU's contractual indemnification claim is barred by Section 2B.

The SJC held that the contractual indemnification claim is contractual in nature and therefore not barred by Section 2B. The SJC in its reasoning stated:

[W]hile the parties chose to incorporate the negligence standard of care into the indemnification provision, the elements of the university's contractual indemnification claim differ from a claim for negligence.

In essence, the SJC held that the repose protections of Section 2B are applicable to only tort claims, and not to claims based on contractual indemnification obligations even if those obligations are tort-based.

The Statute of Repose in Section 2B was enacted to recognize the inherent difficulties and challenges associated with the protracted duration of legal liability exposure arising out of improvements to real property projects. These types of projects have a design and use life of several decades, resulting in corresponding and coterminous liability for design professionals without an appropriate Statute of Repose.

The implication of the SJC's holding appears to be that if owners and design professionals allocate risks—including indemnification obligations—by explicit contract terms, the design professional would not be entitled to the repose protections for the claims based on the contractual indemnification provision. This would serve to subvert, impede and frustrate the ability of parties in the design and construction processes to sensibly agree on and document risk allocation discussions and decisions between them. Simply put, the SJC's decision contradicts and undermines the achievement of fundamental underpinnings of contractual risk allocation negotiations and practices in the design and construction industry.

This decision has significant implications for design professionals and those involved in the construction industry regarding how contractual risk allocation provisions are negotiated. Indemnification provisions are paramount to most design and construction contracts. Most troublesome about the implications of the decision is that, as a general proposition, the more

protracted the period of indemnification exposure beyond project completion, the greater the likelihood that those exposures will be due to post-project completion factors (e.g., deficiencies or neglect in owner operations and maintenance of the completed project), which are beyond the ability of the design professional to control. Based on this decision, contractual indemnification claims, even ones premised on a negligence standard of care, could potentially be filed after the six-year limitation imposed by Section 2B. This could have the consequence of subjecting design professionals to an indeterminate duration of liability exposure following the substantial completion of a project.

This decision represents the last and final judicial proclamation on the issue presented, unless the SJC were to readdress the issue in another case. In the alternative, any solution would need to come from the legislature, i.e., through submission of a bill that, if passed, would amend Section 2B to expressly include contractual indemnification claims in which the trigger for the indemnity obligation is based on negligence or other conduct or failure to meet obligations or standards otherwise imposed by law.

There are many issues to explore in considering corrective paths forward to address the implications of the SJC's decision.

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