



Trustees of Boston University v. Clough Harbor and Associates LLP – Impact on Indemnification Claims in Design Professional Contracts

Howard P. Goldberg

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Trustees of Boston University vs. Clough, Harbour & Associates LLP (SJC-13685)



Plaintiff/Appellant: Trustees of Boston University ("BU").
BU is the Owner of the Project



Defendant/Appellee: Clough Harbour and Associates (CHA).
CHA is the Architect of the Project

Background

- On June 25, 2012, BU entered into an edited AIA Standard form of Agreement with CHA.
- As part of the Project, CHA designed New Balance Field, a new turf sports field located on top of a parking lot at Boston University.
- The Field opened and hosted its first field hockey game on August 31, 2013.
- On September 6, 2017, BU notified CHA of purported problems with the Field, including physical depressions at various locations where expansion joints ran beneath the field, making the turf unstable.



- The Parties unsuccessfully attempted to resolve their dispute.
- As a result, BU filed suit against CHA on July 20, 2020, alleging a breach of the contractual indemnification provision in the Parties' contract.



Contractual Provision at Issue

Indemnification provision at issue states:

*To the fullest extent permitted by law, [CHA] shall indemnify and hold [BU] harmless from and against any and all claims, demands, liabilities, actions, causes of action and expenses, including, but not limited to, reasonable attorney's fees, **to the extent caused by [CHA's] failure to meet its obligations under this agreement or by the negligence of [CHA].***



CHA Argues that Claim is Barred by Statute of Repose

CHA in their motion for summary judgment at the Trial Court level argues that BU's indemnification claim is barred by the six-year statute of repose under G. L. c. 260, § 2B

- **G. L. c. 260, § 2B states:**

Action 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, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates 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.

1. What type of case has BU initiated?

- Does their claim sound in contract (which carries a 6-year statute of limitations) or tort (implicating the statute of repose)?

2. The Six Year Statute of Repose begins running when either the Project is open, or substantial completion of the improvement AND the taking of possession by the owner.

- Neither of these issues are in dispute: the Field was open for use August 31, 2013, and the lawsuit was filed July 20, 2020, more than 6 years after the Field was opened.
- Statutes of repose are different from statutes of limitations because the repose period starts when a project is completed; a statute of limitations begins running once a breach occurs.

THE 194TH GENERAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

Part III	COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
Title V	STATUTES OF FRAUDS AND LIMITATIONS
Chapter 260	LIMITATION OF ACTIONS
Section 2B	TORT ACTIONS ARISING FROM IMPROVEMENTS TO REAL PROPERTY

Section 2B. Action 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, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates 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.

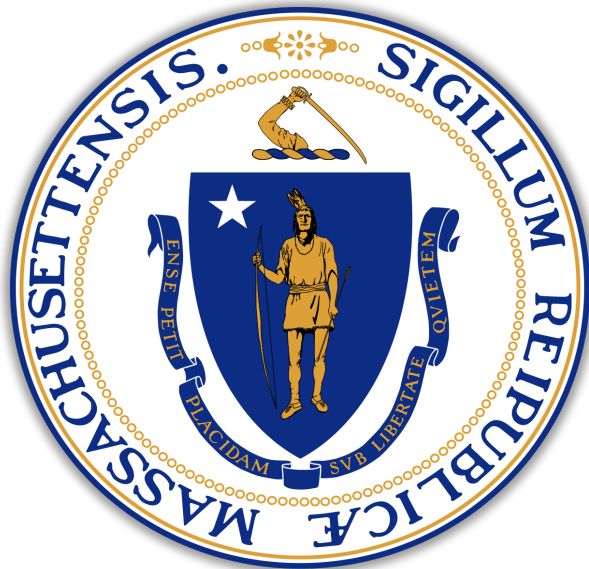
Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

Legislature passed G. L. c. 260, § 2B, which sets out the 6-year statute of repose for tort actions.

- Statute of repose recognizes that litigants may find it difficult to defend claims after the 6 years given the potential for loss of knowledge, documents, and witnesses.
- Provides end-limit for litigation threats.

Many States Have a Statute of Repose

- Many states have statutes of repose.
- Time frames can vary drastically.



Massachusetts
6 years



Connecticut
7 years



Rhode Island
10 years



Maine
10 years

Statutes of Repose v. Limitations



In Massachusetts, the statute of repose for tort claims is 6 years and begins running when a project is completed or substantially completed.

This favors CHA.

The statute of limitations for contract actions is 6 years and begins running upon a breach of contract, which may not occur until years after a project is completed.

This favors BU.

The Question Before the Supreme Judicial Court

- Trial Court granted CHA's Motion for Summary Judgment and ruled that BU's indemnification claim sounded in tort and, therefore, was barred by the statute of repose.
- The question on appeal to the SJC is:

Whether the motion judge erred in concluding that the plaintiffs' contractual indemnification claim sounds in tort and is therefore barred by the six-year statute of repose applicable to tort claims, G. L. c. 260, § 2B.



Tort v. Contract Claim



- Boils down to whether BU's cause of action pursuant to the indemnification provision sounds in contract or tort
- Indemnification Provision
 - *To the fullest extent permitted by law, [CHA] shall indemnify and hold [BU] harmless from and against any and all claims, demands, liabilities, actions, causes of action and expenses, including, but not limited to, reasonable attorney's fees, to the extent caused by [CHA's] failure to meet its obligations under this agreement or by the negligence of [CHA].*

What's the Difference?

The difference between these types of claims is at the crux of the BU/CHA case

- A tort claim is associated with the violation of the standard of care, including negligence. Tort claims can be brought with or without privity of contract. For engineers/architects, the standard of care is the skill and judgment that can be reasonably expected by how similarly situated professionals would act in a similarly situated project.
- A contract claim is associated with a breach of what is expressly warranted in the contract.



Does a Claim sound in Tort or Contract



- In Massachusetts, Courts look to the “gist of the action” to determine whether a claim sounds in tort or contract.
- Here, the indemnification provision arguably invokes both theories of recovery.

- BU argues that their claim accrued under the Parties' contract, so the tort statute of repose does not apply.
- Parties freely entered an agreement with a contractual indemnification provision.
- The negotiated indemnification terms are straightforward, and CHA is attempting to evade their duties under it by claiming that BU's claim sounds in tort and is therefore barred by the statute of repose.



CHA's Response – BU's Claim Sounds in Tort

- CHA argues that the “gist of the action” sounds in tort because the indemnification provision is based on a finding of negligence, and even uses the word “negligence,” which is a legal term of art.
- By allowing BU's indemnification claim premised on CHA's alleged negligence to sidestep the statute of repose would defeat the purpose of the statute itself.



Arguments before the SJC

- On February 5, 2025, the SJC heard Oral Argument on BU's Appeal.
- A decision is expected in the Spring.



Potentially Implicates each and every contract for professional services in Massachusetts



Potentially expands liability for projects completed over six years ago.

- Where are the documents stored?
- Who worked on this project?
- Who were the subconsultants on the project?
- Who were the main points of contact?
- Do these people still work at the same place?
- Have records been retained?
- How much of this project do you remember?



Questions/Discussion