REVISITING THE STATUTE OF REPOSE: INSIGHTS FROM *TRUSTEES OF BOSTON UNIVERSITY V. CLOUGH, HARBOUR & ASSOCIATES LLP*

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Case Overview

- Dispute between the project owner and architect because of design defects in athletic field.
- Contract included a negotiated indemnification provision for expenses caused by architect’s negligence.
- Court held the indemnity claim was not barred by the statute of repose.
- Takeaway: Contractual indemnity obligations may remain enforceable even after the statute of repose for negligence claims has expired.

G.L. c. 260, § 2B

Tort actions arising from improvements to real property

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.

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History of the Statute of Repose

- Enacted 1968.
- Not affected by tolling statutes.
- *Klein v. Catalano*, 386 Mass. 701 (1982) was the first major decision to analyze the statute, holding that the statute does not violate due process or equal protections.

Statute of Repose v. Statute of Limitations

- Statute of limitations: Limits the time to file suit after a cause of action accrues.
- Statute of repose: Imposes an absolute time bar that prevents a cause of action from accruing after a specified event.
- A statute of repose extinguishes the claim entirely, regardless of injury or discovery.

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What industries are impacted?

- “design, planning, construction, or general administration”
- Intended to protect providers of “individual expertise.”
- Generally, manufacturers and product supplies are not covered, though protections have extended to some custom-design manufacturers.
- Does not apply to sellers of real estate. *See Sullivan v. Iantosca*, 409 Mass. 796, 798-99 (1991).

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What constitutes “improvement”?

- The statute does not define “improvement.”
- Legislative history offers no clear guidance on the precise scope of the term.
- Courts have defined “improvement” as a permanent addition to or betterment of real property that enhances capital value, involves expenditure of labor or money, and is intended to make the property more useful or valuable as distinguished from ordinary repairs. *Conley v. Scott Products, Inc.*, 401 Mass. 645 (Mass. 1988).

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What constitutes “opening for use”?

- When is the improvement available for its intended purpose?
- For condominium developments, each building is considered a discrete improvement when it is either opened for use or substantially completed and taken into possession. *See D’Allesandro v. Lennar Hingham Holdings, LLC*, 486 Mass. 150 (2020).

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Substantial Completion and Taking of Possession

- Refers to Owner’s control over the improved property for its intended purpose.
- A Certificate of Occupancy is not always required.
- Key consideration Owner’s ability to take possession and use the property.

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Gist of the Action

- Statute of Repose applies only to tort claims. It does not apply to contract claims.
- To determine whether claim is tort-based or contract-based, court look to "gist of the action." See *Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs*, 396 Mass. 818, 823 (1986).
- Thus, substance of the claim, not labels, control.

Contractual Indemnity

“Indemnity clause” is a “contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur.” Black's Law Dictionary 837-838 (9th ed. 2009). *See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison*, 456 Mass. 463, 471 (2010).

Back to the Case…

Trustees of Boston University v. Clough, Harbour & Associates LLP

- More than six years after athletic field opened, BU sued the Architect.
- Alleged design defects rendered the field unusable.
- BU sought recovery under a broad contractual indemnity provision.

Sequence of Events

- June 2012 – BU and the Architect enter into a contract for the design of an athletic field (modified AIA B101-2007).
- August 2013 – Athletic field opens for its first hosted event; design defects render it unusable.
- September 2017 – BU notifies the Architect of the design defects.
- July 2020 – BU files suit against the Architect.

The Indemnity Clause

- Parties specifically negotiated terms of contractual indemnity provision: “To the fullest extent permitted by law, [CHA] shall indemnify … [BU] … from and against any and all … expenses, including, but not limited to, reasonable attorneys’ fees, to the extent caused … by the negligence of [CHA].”

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BU’s Claims

- Contractual Indemnity (Architect to indemnify for negligence)
- Breach of Contract (negligence standard of care)
- Negligence

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Two Rounds of Summary Judgment

- CHA moved for summary judgment based on the statute of repose.
- First Superior Court judge dismissed the breach of contract and negligence claims, but ruled in BU's favor on contractual indemnity.
- On renewed motion for summary judgment, second Superior Court judge dismissed contractual indemnity claim (in light of unpublished Appeals Court decision: *UMass v. Adams Plumbing & Heating*).
- BU appealed and SJC undertook direct appellate review.

Question Presented

Does the statute of repose, which sets a six-year bar for “actions of tort” arising out of improvements to real property, bar BU’s contractual indemnity claim against the Architect?

Holding

- Gist of BU's action is "essentially contractual" – the enforcement of a contract indemnification provision.
- CHA's duty to indemnify not imposed by law; arose only based on parties' contract.
- "[t]he parties freely and intelligently entered into a contract for indemnification. They should be bound to it."
- Applying *Gomes v. Pan Am. Assocs.*, 406 Mass. 647 (1990), reversed & remanded.

Notable Excerpts

- Sophisticated parties “specifically negotiated” terms of an express indemnification provision covering “any and all” expenses, including “attorney’s fees.”
- “Key difference” between tort action and contract action is that in a contract action “the standard is set by the defendant’s promises, rather than imposed by law.”

SJC Oral Arguments

- Standard form vs. negotiated terms; sophistication of parties.
- Hypotheticals identifying statute of repose in provision.
- Gist of action Defamation/non-disparagement in settlement agreement comparison.
- Distinguished *Klein*.
- Contract included insurance for six years.
- Establish elements: offer, acceptance, consideration.
- https://www.youtube.com/watch?v=TD2cvmshw2Q

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But What Did CHA Agree to Indemnify?

- CHA had argued that BU's claim was – in actuality – a negligence claim "disguised" as a contract claim.
- After all, the indemnification provision provided that CHA would indemnify BU against expenses caused by CHA's "negligence."
- Therefore, negligence was the "trigger." However, BU could never prove negligence because the statute of repose indisputably ran on negligence claims.

Specific Promise v. Duty Imposed by Law

- The problem for CHA is that it had agreed to indemnify BU against more than what BU could recover in a negligence action.
- “Any and all” expenses, including “attorneys’ fees.”
  - As the SJC noted (n. 9): “Unlike the damages available for negligence, here the parties negotiated that CHA would indemnify the university for ‘reasonable attorney’s fees’ in addition to the university’s expenses incurred to fix the field.”
- Therefore, the contractual indemnity claim was not duplicative of a negligence claim.

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UMass Building Authority v. Adams Plumbing & Heating

- CHA relied on an unpublished Appeals Court decision, in which the panel concluded that UMass's contractual indemnification claim against a contractor "sounded in negligence" and was barred by the statute of repose.
- The court found no injury/damage separate from "shoddy work" and stated that the issue was "whether the defendants were negligent."
- The Appeals Court did not address the specific language of the indemnification clauses at issue.
- The SJC did not discuss the *UMass* case other than to mention that the Superior Court had relied on it to dismiss BU's contractual indemnity claim.

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Practical Considerations

- The SJC's decision highlights several practical considerations that parties should keep in mind when drafting indemnification provisions in construction contracts.
- Parties should expect Massachusetts courts to continue enforcing contractual terms as written.
- You should review and revise (as needed) your contract forms.

Defense v. Indemnity

- Indemnification clauses may include a duty to defend, this one did not.
- Although not discussed in the SJC's decision, this issue came up in the briefs.
- Namely, whether or not a duty to defend coupled with a duty to indemnify suggests that the indemnification provision is a ***third-party*** indemnification provision.

Defense v. Indemnity (Cont'd)

- If seeking to include a duty to defend alongside a duty to indemnify, consideration should be given as to whether the duty to defend should be addressed separately from the indemnification obligation.
- Combining these may lead to arguments that, even if the indemnification clause is drafted broadly, its scope could be limited to third-party claims.

Contractual Standard of Care

- In this case, the contract standard of care was tied to a negligence standard.
- As a result, the Superior Court dismissed BU's underlying breach of contract claim because it was indistinguishable from a negligence claim.
- If the parties had agreed to a higher contractual standard of care (i.e., one that differs from that imposed by law), the direct contract claim may not have been time-barred.

Scope of Indemnification

- The SJC noted that the elements of the contractual indemnity claim are different than the elements of a negligence claim.
- But the “trigger[]” was the same: negligence. Therefore, the scope of the indemnification clause was critical.
- Ask: is the indemnitor agreeing to protect the indemnitee against a greater form of exposure than what is otherwise imposed by law?
  - Investigation costs? Attorneys’ Fees? Expert/consultant Fees?

Duration of Indemnification Obligation

- If the Statute of Repose does not apply to contract actions, if indemnification claims do not accrue until there has been a breach of the indemnification obligation, and if breach of contract claims are subject to the discovery rule, how long is the exposure to a contractual indemnity claim?
    - G.L. c. 260, § 2 (6-year limitations period for contracts)
    - G.L. c. 260, § 1 (20-year period for contracts under seal)

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Duration of Indemnification Obligation (Cont'd)

- Potential exposure could last for years beyond what a contracting party might assume.
- Parties seeking to limit their exposure to future indemnity claims should consider including a contractual "repose" period.
- In other words, expressly limit the indemnification obligation to a specified duration.

“Flow Down” Clauses & Scope Gaps

- Contracting parties should be sure to appropriately flow-down indemnification requirements to avoid scope gaps in coverage.
- Example: Contractor agrees to broadly indemnify Owner, but executes subcontracts that include a narrower form of indemnification.
- Contractor C may then be responsible for indemnity obligations up the chain with no indemnity protection from its subcontractors.

Insurance Considerations

- Many insurance programs are effective only through the expiration of statute of repose. Consider longer-tail coverage if agreeing to broad indemnity provision.
- Some policies exclude coverage for voluntarily assumed risk.
- Takeaway: Consult with an insurance broker early and often, including with respect to the interplay between indemnification and insurance.

Example #1

Standard AIA indemnification provision

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

If the facts were the same, would the Court have reached the same outcome?

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Example #2

Standard AIA indemnification provision, modified as follows:

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall defend (with counsel acceptable to the Owner), indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, ~~provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself),~~ but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

If the facts were the same, would the Court have reached the same outcome?

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Example #3

Standard AIA indemnification provision, modified as follows:

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses recoverable at law or in equity ~~including but not limited to attorneys' fees~~, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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Example #4

Standard AIA indemnification provision, modified as follows:

§ 3.18 Indemnification

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses ~~including but not limited to attorneys' fees~~, arising out of or resulting from performance of the Work~~, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)~~, but only to the extent caused by the ~~negligent~~ acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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Final Thoughts

- Negotiate carefully: Broad indemnity provisions can have long-term financial implications.
- Know your exposure: Understand what types of claims are covered and for how long.
- Documentation matters: Keep detailed records of design, construction, and inspections.
- Consult experts early: Engineer or legal review can prevent costly disputes.
- Clarify responsibility: Clearly define who bears risk for latent defects or extreme events.
- Continuous monitoring: Legal landscape and industry standards evolve.

Questions?

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