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Indemnity Lessons From Mass. Construction Defect Ruling

By **Christopher Sweeney** (June 13, 2025, 5:29 PM EDT)


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In Trustees of Boston University v. Clough Harbour & Associates LLP, the Massachusetts Supreme Judicial Court considered anew whether a construction defect claim tendered under the terms of a bespoke contractual indemnity provision is subject to Massachusetts' six-year statute of repose.[1]

On April 16, the court held that under the parties' specifically negotiated indemnity provision, the answer was "no." But questions remain, and practitioners and industry participants alike would be well-advised to take a hard look at their standard operating procedures going forward.

Background

The Massachusetts statute of repose generally bars tort claims involving improvements to real estate that are asserted for the first time more than six years after the improvement's opening to use.[2] So, for example, if a worker suffers a job site injury because of an architect's design defect, the worker's claim against the architect is barred if it is not asserted within six years of the owner taking beneficial use of the project.

Unlike statutes of limitations, this is true even if the claimant reasonably does not discover the negligence until after six years. In contrast, the statute of repose does not apply to claims that are considered contractual in nature.

But what about hybrid claims like those arising from negligence but asserted under the terms of a contractual indemnity provision? That is, extending the example above, what if the injured worker sues the architect, and the architect, in turn, demands contractual indemnification from a subconsultant?

Is that contractual indemnity claim covered by the statute of repose such that it is subject to the six-year bar? Enter the Supreme Judicial Court.

BU Case

In 2012, Boston University hired CHA, an architecture firm, to design an athletic field suitable for hosting collegiate sporting events. CHA did so, and the field opened for use about a year later.

It soon became obvious, however, that a defect in CHA's design caused the field to sag, rendering it

unsafe for its intended purpose. BU corrected the defect on its own, and then tendered the bill to CHA for payment under the parties' broad, specifically negotiated contractual indemnification provision.[3]

CHA declined to pay the bill, and as a result, in 2020 — i.e., more than six years after the field opened — BU sued CHA to recover its costs. BU asserted three claims: professional negligence, breach of contract and breach of the parties' contractual indemnity provision.

Ultimately, the trial court granted CHA summary judgment on all three claims. BU did not challenge the court's decision on the former two claims, but it did appeal the dismissal of its contractual indemnity claim.

The Appeal

After accepting the case for direct appellate review, the Supreme Judicial Court reversed the trial court's ruling in favor of CHA. At base, it concluded that because the gist of BU's claim was contractual, not tort-based, the statute of repose did not apply.[4] In support of this conclusion, it advanced two primary rationales.

First, the elements of BU's indemnity claim — i.e., the occurrence of a triggering negligent event, notice of the event and failure to pay — are different than the elements of a negligence claim arising out of the same facts.

And second, BU's right to reimbursement was created by a specifically negotiated indemnity provision in the parties' contract, and absent that provision, CHA had no obligation to cover BU's losses.

Perhaps importantly, the court also noted in a footnote that CHA's indemnity obligation required it to pay BU's legal fees — relief that otherwise would not have been available in a pure tort action. Thus, based on these distinguishing features, the Supreme Judicial Court concluded that the gist of BU's contractual indemnity claim was contractual, and the claim therefore was not subject to the statute of repose.

Although well-reasoned, the Supreme Judicial Court's opinion does appear to leave at least one open question: Namely, does a contractual indemnity claim always fall outside the statute of repose — because, by definition, its elements differ from a negligence claim — or is something more required?

That is, for the gist of a contractual indemnity claim to be truly contractual, must it impose liability or permit relief beyond what is otherwise provided at law? The Supreme Judicial Court doesn't say directly, but its long-standing "gist of the action" jurisprudence, coupled with its footnote about BU's right to recover legal fees, suggests that contractual indemnity claims still must be carefully parsed before they are declared to be outside the statute of repose.

Going Forward

At first glance, the BU case appears troubling for design and construction professionals. After all, a broad indemnity provision may effectively eliminate any temporal limitation on one's liability for negligent work.

But that's not the end of the story. Parties, of course, generally are free to negotiate any contractual terms they wish.

Indeed, the Supreme Judicial Court recognized that BU and CHA had specifically negotiated the terms of their indemnity provision, as opposed to relying on boilerplate terms, and it therefore had little trouble enforcing the provision according to the parties' written intent.

Thus, design and construction professionals that are wary of extended liability can and should negotiate indemnity provisions more limited than the one at issue in the BU case. They would also be well advised to consider the following practical issues, in no particular order of importance.

Flow-Down Provisions

Higher-tier contractors should make sure that their subcontractors assume the same indemnity obligations to them as they have assumed to the project's owner and the owner's other representatives. Otherwise, the higher-tier contractor may be liable to the owner for a subcontractor's negligence without downstream indemnity rights of its own.

Insurance Considerations

Many common construction insurance programs are effective only through the expiration of the statute of repose. Some exclude coverage for voluntarily assumed risks.

Accordingly, design and construction professionals should consult early and often with their insurance brokers to ensure that all assumed risks are covered.

Decoupling Defense and Indemnity Obligations

From the owner's standpoint, the broader the indemnity provision, the better. So, one may be tempted to draft indemnity language requiring the owner's representatives to defend and indemnify the owner against certain losses.

This language makes good sense in the third-party context — i.e., where the owner has been sued by a third party, often in personal injury cases. But it would be anomalous in first-party claims involving the owner's own losses.

Therefore, for purposes of clarity, if the goal is to preserve both first- and third-party indemnity rights, it probably makes sense to decouple defense and indemnity obligations.

The Bottom Line

Although the Supreme Judicial Court's BU decision surely could have deleterious consequences for the unwary, smart professionals can reform their standard contracts and take other practical steps to avoid unbargained-for risks. Doing so just might make the difference between business as usual and expensive litigation.

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[1] Trustees of Boston Univ. v. Clough Harbour & Associates LLP, 255 N.E.3d 596, 495 Mass. 682 (Mass. 2025).

[2] The statute reads, in relevant part, as follows:

> Action[s] 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 ... shall be commenced only within three years next after the cause accrues; provided 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. G.L. c. 260, § 2B.

[3] The parties' indemnity provision provided that: "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]."

[4] See Anthony's Pier Four Inc. v. Crandall Dry Dock Eng'rs Inc., 396 Mass. 818, 823 (1986) (in determining applicability of statute of repose, courts must look to "gist of the action" — i.e., the thrust of the plaintiff's factual allegations — not mere labels and conclusions attached to allegations).