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eUpdate

Indemnification by Designers and the Statute of Repose

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Earlier this year, the Supreme Judicial Court ("SJC") issued a decision in Trustees of Boston Univ. v. Clough, Harbour & Assocs. LLP, 495 Mass. 682 (2025), holding that a contractual indemnification clause in a design contract was not subject to the Commonwealth' s statute of repose, G.L. c.260, §2B. The statute of repose limits the time in which tort actions must be brought for negligent design or construction of buildings or other real property to no more than six years after use of the improvement begins or substantial completion of the improvement and the start of occupancy by the owner.

At the center of the case was a 2012 contract between Boston University and the defendant Clough, Harbour & Associates ("CHA") for the design of an athletic turf field that would sit on top of a parking garage. In 2013, following completion of the project and initial use of the field, issues arose involving improper expansion of structural joists and resulting concaving of the field. Boston University expended funds to address the issues and make the field usable. Boston University then made a demand to CHA for reimbursement of the funds it had expended, and CHA refused to pay. Later, in July of 2020, Boston University sued CHA, seeking indemnification for the costs it had incurred. The Complaint relied on a contract clause stating that CHA would indemnify the university for any and all expenses to the extent caused by CHA's negligence. When the Complaint was filed, the six-year period under the tort statute of repose had expired.

The Superior Court granted CHA's motion for summary judgment under G.L. c.260, §2B in that more than six years had passed. Boston University appealed, and the case went straight to the SJC on an application for direct appellate review. After analyzing the contract language, the SJC reversed the Superior Court, holding that the university's indemnification claim was based in contract and therefore not a tort action restricted by the G.L. c.260, §2B statute of repose.

The SJC reasoned that the "gist" of Boston University's claim was contractual, a breach of the contract obligation to indemnify, rather than tort-based. The SJC confirmed that the "key difference" between an action in tort and an action in contract "is that in the latter, the standard of performance is set by the defendants' promises, rather than imposed by law." Observing that the contract language was an explicit promise to "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 [CHA]," the SJC concluded that the indemnification obligation was a duty arising out of negotiations between the parties, rather than one imposed by law. As a result, the SJC concluded that the contract clause was not subject to G.L. c.260, §2B, which, the Court stated, "expressly provides a limitation only for actions of tort."

Unless and until the Legislature amends G.L. c.260, §2B, the decision in Trustees of Boston Univ. will have a significant impact on the liability of designers and related parties in construction projects for issues that arise after completion of the design work and will necessarily play an important part in the negotiation of contracts for these projects.

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