SJC Makes Unexpected Ruling that Statute of Repose Does Not Protect Architects from Indemnity Claims

This week, the Supreme Judicial Court issued a stunning decision in the construction field by finding that the state's six-year Statute of Repose (G.L. c. 260, § 2B) that bars torts claims does not, in fact, bar a claim after the six-year mark for express indemnification under an architect's contract.

In 2012, a university entered into a contract with a design firm for a new athletic field. The contract included language requiring the architect to indemnify the university for "any and all" expenses to the extent caused by the architect's negligence. This language is not included in the standard AIA form contract but was specifically negotiated by the parties. The new athletic field opened to students in 2013. Seven years later in 2020, after years of problems with the field, the university filed a claim against the architect, seeking indemnification for the costs it incurred to repair the field due to the architect's negligent design.

The architect argued, and the lower court agreed, that since the indemnity is tied to the architect's negligence, the Statute of Repose bars the university's indemnification claim. The SJC, however, reasoned that the limits did not apply to claims for a breach of contract – here, breach of the indemnification provision – even if the underlying claim alleged negligence. Because the contract included a negotiated, express warranty to guarantee a particular result (*i.e.*, the architect explicitly agreed to indemnify the university for its negligence), the gist of the university's action is contractual in nature.

This result is likely to cause great uncertainty for architects going forward. This is obviously beneficial to owners who will be better protected against latent defects or problems that can take years to surface, provided explicit indemnity language is included in contracts. Architects, however, will not only have to grapple with the lack of any clear cut-off period for claims, but will also have to consider insurance coverage questions that this decision brings up. For instance, an architect's Errors and Omissions Insurance is almost always claims based. Coverage is triggered when: (1) a claim is made against the insured and reported to the insurer during the policy period; or (2) insured gives notice to the insurer during the policy period of circumstances that might give rise to a claim. Architects risk being without coverage if they do not anticipate a claim or realize there was an incident and, therefore, do not give notice to the insurer, or if they switch insurance carriers and the new carrier does not provide coverage for prior acts. It is not clear how the insurers will handle such claims, but architects now have to contend with a potential gap in coverage due to contracts claims made long after a project is complete.

In any event, both owners and architects should pay close attention to the language in an indemnity provision, since that language may provide the right to sue long after the project is finished.