

A Tort, By Any Other Name, is Just a Tort: Massachusetts Court Bars Contract Claims That Sound in Negligence

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In *University of Massachusetts Building Authority v. Adams Plumbing & Heating, Inc.*, 2023 Mass. App. Unpub. LEXIS 28, 102 Mass. App. Ct. 1107, the Appeals Court of Massachusetts (Appeals Court) considered whether the lower court properly held that the plaintiff's breach of contract and indemnification claims were time-barred by the statute of repose because they sounded in tort. The Appeals Court held that while the six-year statute of repose only applies to tort claims, they can also bar claims for breach of contract and indemnification if they sound in tort. The Appeals Court affirmed the lower court's ruling, finding that the plaintiff's breach of contract and indemnification claims were just negligence claims disguised as non-tort claims.

In 2013 and 2014, the University of Massachusetts (UMass) retained various contractors to renovate the dining hall for one of its campus buildings, which included the installation of new ductwork for the kitchen's exhaust system. The dining hall opened for service in September 2014. In the Spring of 2018, it was discovered that the ductwork for the kitchen had collapsed. Further investigation revealed other deficiencies with the exhaust system. On December 1, 2020, UMass filed a lawsuit against various contractors, asserting negligence, breach of contract, and indemnification. The breach of contract claims alleged breach of express warranties.

Massachusetts statute G.L.c. 260, § 2B creates an absolute six-year time limitation on "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." While the statute applies specifically to torts, courts have held that a plaintiff cannot evade the statute of repose by simply recasting a negligence claim in the form of another claim. In assessing whether the statute of repose applies, courts have considered the nature, or "gist", of the claim.

Here, there was no dispute that the statute of repose began to run when the dining hall opened for use on September 2, 2014. Thus, UMass did not dispute that it was outside the six-year time limitation when it filed the lawsuit on December 1, 2020, and the statute of repose barred its negligence claim. The issue for the Appeals Court was whether UMass's claims for breach of contract and indemnification were also time-barred.

While the statute of repose does not apply to claims for breach of express warranties, the plaintiff must establish an explicit guarantee of a heightened level of workmanship. In support of its breach of warranty claim, UMass cited to technical specifications, descriptions of the work to be performed and basic requirements of ensuring the systems being installed were operational, and that the work would be performed in accordance with industry practices. The Appeals Court held that these provisions were general contract provisions that merely established a duty of reasonable care. Therefore, the court found that the breach of express warranties claim was nothing more than a negligence claim and, thus, held that UMass's express warranties claim was barred by the statute of repose.

The court also found that UMass's indemnification claim was merely a negligence claim in disguise. The court did not find a genuine indemnification claim because UMass was making a direct claim against contractors for damage to the work they performed, which was simply an alleged breach of their duty of reasonable care. Based on these findings, the Appeals Court affirmed the lower court's dismissal of the plaintiff's action.

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The *Adams Plumbing & Heating, Inc.* case highlights that, in Massachusetts, the six-year statute of repose may also bar breach of contract and other non-tort claims if the court finds that those claims merely sound in tort. A subrogating plaintiff in Massachusetts should be aware of the six-year statute of repose, which is shorter than the ten-year repose period in the majority of the United States. Also, to survive a statute of repose defense, a breach of contract claim should explicitly reference provisions that create a guaranteed heightened level of workmanship beyond the ordinary, reasonable standard of care.

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