STATE OF MASSACHUSETTS CONSTRUCTION COMPENDIUM OF LAW

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The following is a synopsis of construction law in Massachusetts. It is designed to provide a general overview of basic legal principles and for use as a research tool. It is not intended to provide an exhaustive or comprehensive description of all relevant Massachusetts law, and should not be construed as legal advice.

I. Breach of Contract and Warranty Claims

Breach of construction contract claims generally are governed by established principles of contract law, and Massachusetts courts will look to the language of the contract to determine the rights and obligations of the parties.

To make out a breach of contract claim, a plaintiff must demonstrate four basic elements: (1) the existence of an agreement supported by valid consideration; (2) the plaintiff’s readiness, ability, and willingness to perform; (3) the defendant’s breach of the agreement; and (4) resulting damage. See Singarella v. Boston, 342 Mass. 385, 387 (1961). In addition, every contract in Massachusetts implies a covenant of good faith and fair dealing between the parties, prohibiting either party from doing “anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .” Anthony’s Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991) (citation omitted).

Generally, to recover on a breach of contract claim, a contractor must fully perform before it is entitled to recover damages suffered as the result of the other party’s breach. See U.S. Steel v. M. DeMatteo Constr. Co., 315 F.3d 43 (1st Cir. 2002); Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436 (1998). However, a contractor can make out a breach of contract claim when it can demonstrate that it was prevented from performing by the breaching party. See Singarella v. Boston, 342 Mass. 385, 387 (1961).

In addition, where a contractor has made a good faith attempt to substantially perform the work, the contractor may seek recovery in quantum meruit. See J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 796 (1986); Andre v. Maguire, 305 Mass. 515, 516 (1940); see also, U.S. Steel v. M. DeMatteo Constr. Co., 315 F.3d 48. However, quantum meruit will not be available where there is an intentional departure from the requirements of the contract. See Albre Marble & Tile Co. v. Goverman, 353 Mass. 546, 54-550 (1968).

Massachusetts courts will enforce contracts in accordance with their plain meanings and express written terms. See Central Ceilings, Inc. v. Suffolk Constr. Co., 2013 Mass. Super. LEXIS 230 (Dec. 19, 2013); Freelander v. G & K. Realty Corp., 357 Mass. 512, 515-16 (1970) (stating that “court cannot subvert” the plain meaning of contract); Koshland v. Columbia Ins. Co., 237 Mass. 467, 471 (1921) (“When a contract has been made, plain in its words and free from doubt as to its meaning, the parties must be held to be bound even though the result may seem to be hard upon one or both of them. The contract must be enforced according to its terms.”).

A contractor’s right to sue for breach of contract is bound by the rules of contractual privity. For example, a subcontractor may only sue the general contractor with whom it has a contract, and generally cannot assert a breach of contract against an “up-the-line” party (such as the Owner, or, in the case of a supplier to a subcontractor, the general contractor). See Brick Construction Corp. v. CEI Development Corp., 46 Mass. App. Ct. 837, 839-40 (1999) (citing, among others, Evans v. Multicon Construction Corp., 30 Mass. App. Ct. 728, 740 (1991), review denied, 410 Mass. 1104 (Jul. 30, 1991) (“In the absence of a lien perfected under G.L. c. 254, an owner who enters into a general contract for improvements on real property is not ordinarily liable to subcontractors whose sole contractual arrangements are with the general contractor.”)). In addition to traditional breach of contract claims, Massachusetts, like most states, recognizes claims for breach of warranty. Warranties may be either express or implied. See, e.g., Anthony’s Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 489 N.E.2d 172 (1986).


One issue that has recently arisen is whether established construction law principles applicable in the traditional design-bid-build context – like the Spearin Doctrine – continue to apply in construction projects using alternative delivery methods. In 2014, a Superior Court decision that addressed a project using the construction manager at risk delivery method held that

Given the material changes in the roles and responsibilities voluntarily undertaken by the parties in modern [construction manager at risk] contracts, the protections that Massachusetts courts historically have extended to construction contractors

Revised 2015
in the traditional design-bid-build context . . . simply are inapplicable to such contracts.


II. Negligent and Intentional Acts, Including Misrepresentation, Fraud, and Violations of the Unfair Business Practices Statute (G.L. Chapter 93A)

In addition to breach of contract claims, construction cases frequently include tort-based claims, based on negligent or intentional acts (or both). One example is negligent or intentional interference with contractual relations, a claim that sometimes arises when a subcontractor claims that an owner has deprived the sub of the benefits of its contract with the general contractor. Another example is nuisance, a claim that neighbors to a construction project may assert based on some alleged intrusive effect of the work (such as noise or vibration). Negligence claims arising out of defective work alleged to have caused property damage also frequently crop up in construction cases – often asserted by a project owner as a counterclaim against a down-the-line subcontractor.

Of course, design professionals may be subject to liability for failing to comply with the applicable standard of care. See Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 823 (1986); Hendrickson v. Sears, 365 Mass. 83, 85, (1974). According to the Supreme Judicial Court:

Architects . . . [and] engineers . . . deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance . . . . Because of the inescapable possibility of error which adheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Klein v. Catalano, 386 Mass. 701, 718, 437 N.E.2d 514 (1982). See LeBlanc v. Logan Hilton J.V., 463 Mass. 316, 329 (2012) (“Architects, like other professionals, do not have a duty to be perfect in their work, but rather are expected to exercise “that skill and judgment which can be reasonably expected from similarly situated professionals.”) (citation omitted).

The Massachusetts Consumer Protection Act, M.G.L. c. 93A, prohibits unfair and deceptive trade acts or practices and provides for multiple damages and attorneys’ fees for violations of the statute. The statute has wide application and is commonly included in construction cases. See, e.g., Certified Power Sys., Inc. v. Dominion Ener. Brayton Point, 2011 Mass.Super. LEXIS 317 at *185-87 (contractor violated 93A through course of conduct in wrongfully suspending and withholding payments to subcontractor, knowing of its precarious financial situation and virtually destroying it as a viable enterprise).

Nevertheless, practically speaking, prevailing on a Chapter 93A claim in construction cases may be difficult. There is no clear or absolute standard to determine what type of conduct falls within the scope of Chapter 93A. Cf. Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 396 N.E.2d 149, 153 (Mass. App. Ct. 1979) (explaining that "objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce" in order to support a chapter 93A action); see also, Rex Lumber Co. v. Acton Block Co., 29 Mass. App. Ct. 510, 850 (Mass. App. Ct. 1990); Quaker State Oil Refining Corp. v. Garrity Oil Co., 884 F.2d 1510, 1513 (1st Cir. 1989); Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243, 251 (1979); 780 CMR 110.R6.4.4.4. See, e.g., Gooley v. Mobil Oil Corp., 851 F.2d 513, 515-16 (1st Cir. 1988) (explaining that, "in Massachusetts, the litmus test for transgression of chapter 93A involves behavior which falls within ‘the penumbra of some . . . established concept of unfairness’") (quoting Massachusetts cases).


With respect to fraud claims, in construction cases they typically are framed as claims for “fraud in the inducement,” which, if proven, can lead to rescission of the contract. To prove fraud in the inducement, a plaintiff must show that the defendant did not intend to carry out the promise at the time the promise was made. See Coastal Energy v. R.W. Granger & Sons, 1998 Mass. Super. LEXIS 373 (Jan, 28, 1998). General fraud claims require proof of a false statement of material fact made with knowledge of its falsity, reliance on the statement and damages resulting therefrom. See Davis v. Dawson, Inc., 15 F. Supp. 2d 64, 146 (D. Mass. 1998).

Massachusetts also has a False Claims statute, which can lead to civil and criminal liability where, among other circumstances, a contractor makes a materially false statement in connection with a request for payment on any project administered by a state agency, municipality, or political subdivision. See M.G.L. c. 12, § 5A. Contractors may also be liable for “reverse false claims” where they are found to have made misrepresentations to public owners in order to reduce or decrease payments the contractor owes or would otherwise be obligated to pay to the owner.

III. Indemnity

Massachusetts has only one “anti-indemnity” statute M.G.L. c. 149, § 29C, which voids an indemnification clause that makes a subcontractor liable for a general contractor’s negligence regardless of fault by the subcontractor. See M.G.L. c. 149, § 29C; Herson v. Boston Garden, 40 Mass. App. Ct. 779, 786 (1996). An indemnification provision that is limited to indemnity for injuries or damages caused by the acts or omissions of the subcontractor (including its employees, agents and subcontractors) does not violate the statute. Id. at 787. Ultimately, to determine the validity of an indemnification clause under M.G.L. c. 149, § 29C, Massachusetts courts focus on the language of the indemnity clause: “it us upon the language of the indemnity clause that we focus rather than upon a finding of the facts of the particular accident and an assessment of fault of the parties.” Id. at 779, 786 (1996) (citing Harnois v. Quannapowitt Dev.


One question that periodically arises is whether a contracting party must indemnify the other party to the contract against its own direct claims against the other party. This issue recently arose in Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al. (discussed in the previous section), in which the Superior Court dismissed a general contractor’s direct claims against the project owner based in part on a broad indemnification provision. WOCV2013-1300 (Superior Court, Worcester Co., June 24, 2014) (J., Davis, Brian A.). The court stated:

[The general contractor’s] duty under the [construction manager at risk contract] to indemnify and defend [the owner] with respect to [the general contractor’s] own claims creates an impermissible “circuity of obligation.” In such circumstances, the “plaintiff’s right to recover damages from the defendant is offset by the plaintiff’s obligation to repay the same damages to the defendant.” Having established that [the general contractor] cannot recover [from the owner] on its third-party claims as a matter of law, those claims will be dismissed pursuant to Mass. R. Civ. P. 12(b)(6).

Id. (citations omitted). The Coghlin decision is currently on appeal with the Massachusetts Supreme Judicial Court.

In addition to contractual indemnity, Massachusetts recognizes common law indemnity claims in limited circumstances typically involving derivative or vicarious liability.
IV. Statutes of Limitation and Repose

There is a general 6-year statute of limitations period for contract claims. M.G.L. c. 260, § 2B. Contracts under seal are subject to a 20-year limitations period. See M.G.L. c. 260, § 1.

The statute of limitations may be tolled if the plaintiff can demonstrate that its claims were “inherently unknowable”; i.e., that the plaintiff did not know of the defect within the statute of limitations and that “in the exercise of reasonable diligence, they should not have known.” See Albrect v. Clifford, 436 Mass. 706, 715 (2002) (citing Friedman v. Jablonski, 371 Mass. 482, 487 (1976)). However, some courts have limited the application of this principle in construction cases. Where an owner is able to “keep an eye on construction as it proceeds,” the owner may not later attempt to show that the defects were latent and undiscoverable. Kingston Housing Auth. v. Sandonato & Bouge, 31 Mass. App. Ct. 270 (Mass. App. Ct. 1991); see also Melrose Housing Auth. v. New Hampshire Ins. Co., 407 Mass. 27, 32 (1998) (construction defect cannot be considered inherently unknowable where contract documents provided owner with right to inspect the work as it progressed); Hanson Housing Auth. v. Dryvit Sys. Inc., 29 Mass. App. Ct. 440, 444 (Mass. App. Ct. 1990) (claims related to cracking in an exterior wall not inherently unknowable where they could have been discovered by the architect during the construction phase of the project). Parties may impose contractual limitations on the operation of the discovery rule, but such limitations must be reasonable. See Creative Playthings Franchising Corp. v. Reiser, 463 Mass. 758, 764-65 (2012).

In 2003, Massachusetts passed emergency legislation providing for a 10-year limitations period – calculated from the later of the date the cause of action accrued or the effective date of the law – for claims arising out of Boston’s Central Artery/Tunnel Project, otherwise known as the “Big Dig.” See Chapter 4 of the Acts of 2003, § 83. The law’s 10-year anniversary was in March 2013.

Tort claims are subject to a 3-year limitations period, which also is subject to the “discovery rule.” See M.G.L. c. 260, § 2A. See also Laboeuf v. Biglazzi, 2011 Mass. Super. LEXIS 267 (April 10, 2001) (citations omitted). That is, the limitation period will begin to run when the plaintiff “learns, or reasonably should have learned” that the plaintiff “has been harmed by the defendant’s conduct.” Bowen v. Eli Lilly & Co., Inc., 408 Mass. 204, 206 (1990).

One issue that arises under the statute of repose is whether the claim is a contract claim (and not subject to the statute of repose) or a tort claim (subject to the statute of repose). To resolve this question, Massachusetts courts will look to the true nature of the claim; labels will not control the outcome. *Anthony’s Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818 (1986) (stating that a plaintiff may not “escape the consequences of a statute of repose or statute of limitations on tort actions merely by labeling the claim as contractual.”). Therefore, if a claim labeled “breach of contract” is – in essence – a tort claim, it will be subject to M.G.L. c. 260, § 2B. For example, since “the act of unintentionally failing to conform with contract specifications is not different from negligent workmanship,” claims for breach of warranty on these grounds amount to tort claims that are barred by the statute of repose. See *Kingston Housing Authority v. Sandonato & Bouge, Inc.*, 31 Mass. App. Ct. 270, 273 (Mass. 1991). To avoid the bar of the statute of repose, the plaintiff asserting an otherwise barred breach of warranty claim must demonstrate that the warranty at issued promised a “certain result.” See *Klein*, 386 Mass. at 719.

V. Damages

The Massachusetts Supreme Judicial Court has stated:

The fundamental rule of damages applied in all contract cases was stated by this court in *Ficara v. Belleau* in the following language: “It is not the policy of our law to award damages which would put a plaintiff in a better position than if the defendant had carried out his contract.” ‘The fundamental principle upon which the rule of damages is based is compensation . . . . Compensation is the value of the performance of the contract, that is, what the plaintiff would have made had the contract been performed.’ The plaintiff is entitled to be made whole and no more.”


This basic principle generally informs the measure of damages in construction cases. So, for example, “[t]he measure of . . . damages (at least in the absence of other elements of damages, as, for example, for delay in construction[]) can be only in the amount of the reasonable cost of completing the contract and repairing the defendant’s deceptive performance less such part of the contract price as has not been paid.” See *Louise Caroline Nursing Home, Inc. v. Dix Constr. Corp.*, 362 Mass. at 311 (quoting *DiMare v. Capaldi*, 336 Mass. 497, 502 (1957)).

Damages in construction cases will be highly dependent on the facts of the case, the issues in dispute, and the language of the parties’ agreement. For example, Massachusetts courts generally enforce no-damage-for-delay clauses. In addition, the parties may also agree to limit their damages, and can waive consequential damages altogether. On the opposite side of the
coin, the parties may also provide for liquidated damages and include prevailing-party attorneys’ fees provisions in their contracts. These issues are discussed briefly below.


a) Direct Damages v. Consequential Damages

Direct damages are those damages that “flow according to common understanding as the natural and probable consequences of the breach.” Boylston Housing Corp. v. O’Toole, 321 Mass. 538, 562 (1947) (quoting Hadley v. Baxendale, 156 Eng. Rep. 145 (1854)).

Beyond direct damages, courts have long since recognized an evolution of “special” or “consequential” damages. Consequential damages are those that may not flow according to common understanding as a natural and probable consequence of the breach, but may be presumed to have been in the contemplation of the parties at the time the contract was made by reason of special circumstances known to the parties. See, e.g., Boylston Housing Corp., 321 Mass. at 563. Massachusetts courts will enforce waivers of consequential damages, which can be accomplished through flow-down clauses. Costa v. Brait Builders Corp., 463 Mass. 65, 78 (2012).

b) Delay


Massachusetts courts have carved out a narrow exception to the enforcement of no damage for delay provisions applied in rare cases, typically where the party seeking recovery has been effectively “whipsawed.” See Farina Bros. Co. v. Commonwealth, 357 Mass. 131 (1970) (declining to enforce no damage for delay provision where Commonwealth used provision to whipsaw contractor by refusing time extension on highly complex project and failed to coordinate with contractor). The Superior Court applied the rationale of Farina Bros. in a recent

c) The Economic Loss Doctrine

The Economic Loss Doctrine generally holds that a plaintiff asserting a tort claim (not a contract claim) cannot recover strictly economic losses absent personal injury or property damage. See, e.g., Cumis Ins. Soc’y, Inc. v. BJ’s Wholesale Club, Inc., 455 Mass. 458, 470 (2009).

However, Massachusetts courts have carved out some exceptions to the Economic Loss Doctrine in construction cases. The Massachusetts Supreme Judicial Court in Craig v. Everett M. Brooks Co. held that, despite the absence of contractual privity, a general contractor may have recovery against a land surveyor who had negligently staked a property because it was known that the general contractor would rely on the surveyor’s work:

The question remains whether the law permits recovery for pecuniary loss due to erroneous placing of stakes. The requirement of a contractual relation for recovery for injury to the person due to negligent performance of a contractual duty was done away with in Carter v. Yardley & Co. Ltd. 319 Mass. 92. In the case at bar where the defendant was under contract with the owner to perform professional services, where the plaintiff was under another contract with the owner which contemplated reliance on those services, where the identity of the only possible plaintiff and the extent of his reliance were known to the defendant, and where damages are not remote, it is reasonable to reach an analogous result. We are reluctant to perpetuate a distinction which would be logically indefensible. Accordingly, we hold that it was error to direct a verdict for the defendant on count 2. For so doing, there is support in authority.


In a 1998 decision, the Appeals Court in Nota Construction v. Keyes Assoc., Inc. applied similar rationale to “representations” made by designers. 45 Mass. App. Ct. 15, 21 (1998) (“we see no reason why a design professional such as an architect should be exempt from liability for negligent misrepresentation to one where there is no privity of contract”).

In a recent 2014 decision, the Massachusetts Supreme Judicial Court expressly held that the economic loss doctrine did not bar a condominium trust from recovering damages from the original builder-developer for negligent construction. Wyman v. Ayer Properties, LLC, 469 Mass. 64 (2014). Otherwise, the trust would be left without a remedy:

The problem arises where the party exclusively responsible for bringing litigation on behalf of the unit owners for the negligent construction of the common areas (here, the trustees) has no contract with the builder under which it can recover its
costs of repair and replacement, that is, its economic losses caused by defective construction. We agree with the Appeals Court that “the rule does not require a court to leave a wronged claimant with no remedy,” Wyman v. Ayer Props., LLC, 83 Mass. App. Ct. at 28, and that “[t]he fundamental purpose of the rule is to confine the indeterminacy of damages, not to nullify a right and remedy for a demonstrated wrong and its harm.” Id.

Id. at 71.

d) Economic Waste

As discussed above, in the event of a typical breach, the objective is to place the injured party in the position he would have been had the contract been fully performed. See Anthony's Pier Four, Inc., 411 Mass. at 451. However, this traditional approach to measuring damages may not strictly apply in the event of partial or defective construction. See Bachman v. Parkin, 19 Mass. App. Ct. 908, 909 (1984). Within this framework, the injured party is entitled to judgment for “the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste.” Ficara, 331 Mass. 80, 81 (1954).

In determining what constitutes unreasonable economic waste, courts have long held that although the structure under construction may be materially diminished by the defects or partial incompletion, the structure is built to the extent that “it would not be practicable and economical to alter it so as to conform to the contract.” Walsh v. Cornwell, 271 Mass. 555, 563-564 (1930). When measuring damages with consideration to economic waste, and in the context of partial or defective work, the common approach is provided as “the reasonable cost of completing the contract and repairing the defendant’s performance less such part of the contract price as has not been paid.” Bachman at 909 (quoting Dimare v. Capaldi, 336 Mass. 497, 502 (1957)).

e) Lost Profits

Lost profits are most commonly classified as special or consequential damages. See Anthony's Pier Four, Inc., 411 Mass. at 479. However, absent a contract provision limiting or precluding lost profits, they are recoverable if proven. See Gagnon v. Sperry& Hutchinson Co., 206 Mass. 547, 556 (1910). Courts have held that “some damages can be determined with some degree of exactitude, but others, as in this case with future lost profits, can be speculative and can only be finally determined in the fact-finding process.” Cavanaugh v. Athena Equip. & Supply Co., 2000 Mass. App. Div. 254, 257 (Mass. App. Div. 2000) (affirming that lost profits resulting from a fire caused by defective equipment installed in a company van were definite enough to come within the test of “reasonable likelihood”).

f) Liquidated Damages
Liquidated damages provisions are valid and enforceable under Massachusetts law, so long as potential damages were difficult to ascertain at the time the agreement was made and the liquidated damages constituted a reasonable forecast of damages expected to occur as a result of a breach. See NRT New England, Inc. v. Moncure, 78 Mass. App. Ct. 397, 400 (2010). This is largely a factual analysis. See Kelly v. Marx, 428 Mass. 877, 877 (1999).

However, a liquidated damage clause will not be enforced “if the sum is grossly disproportionate to a reasonable estimate of actual damages made at the time of contract formation.” Kelly v. Marx, 428 Mass. at 877. A contractual clause “fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.” Id. at 877.

g) Attorney’s Fees

Attorneys’ fees are generally not recoverable in Massachusetts under the American Rule. K.G.M. Custom Homes, Inc. v. Prosky, 468 Mass. 247, 258 (2014) (“Our traditional and usual approach to the award of attorney’s fees for litigation has been to follow the ‘American Rule’: in the absence of statute, or court rule, we do not allow successful litigants to recover their attorney's fees and expenses.”) (citation omitted). However, parties are free to include contract provisions allowing recovery of attorneys’ fees, and those provisions are enforceable. Id. (“The parties, however, may construct their agreement to provide for the payment of attorney's fees through clear and unambiguous language.”) (citation omitted).

One statutory avenue for recovery of attorneys’ fees is the Massachusetts Consumer Protection Act, which mandates attorneys’ fees in cases involving unfair and deceptive trade acts or practices in violation of the statute. See M.G.L. c. 93A. Attorney’s fees may also be awarded to bond claimants under M.G.L. c. 149, § 29. The purpose of the bond statute is to provide security for payment by contractors and subcontractors on applicable public projects. See American Air Filter Co. v. Innamorati Bros., Inc., 358 Mass. 146, 148 (1970). If a party files a bond claim under the statute, and prevails, the award shall include “reasonable legal fees based upon the time spent and the results accomplished...” M.G.L. c. 149, § 29.

In addition, attorneys’ fees may also be available in those rare cases involving truly frivolous claims. M.G.L. c. 231, § 6F.

h) Punitive Damages

Generally, punitive damages are not permitted in breach of contract cases. As an exception to this general rule, Massachusetts does permit punitive damages if expressly authorized by statute. See Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 670 (2002). One such example is the Massachusetts Consumer Protection Act, M.G.L. c. 93A.
Although an action pursuant to M.G.L. c. 93A is “neither wholly tortious nor wholly contractual in nature Standard Register Co. v. Bolton Emerson, Inc., 38 Mass. App. Ct. 545, 548 (1995) (quoting Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704 (1975)), Chapter 93A, § 11, often acts as a deterrent to the wrongdoer, authorizing “multiple damages of two to three times a plaintiff’s actual damages when a defendant’s [unfair or deceptive] conduct was willful or knowing.” Kraft Power Corp. v. Merrill, 464 Mass. 145, 157 (2013). Because the assessment of multiple damages is premised on a defendant’s wrongful conduct, and not the amount of harm suffered by a plaintiff, the multiple damages permitted under Chapter 93A, § 11, is widely viewed as the imposition of punitive damages. See id.

i) Prejudgment Interest

Massachusetts allows for recovery of interest in judicial proceedings. Prejudgment interest in tort and contract cases is governed by M.G.L. c. 231, §§ 6B & 6C, respectively.


Notably, Massachusetts has enacted a statute providing for penalty interest for late payment on public works projects. See M.G.L. c. 30, § 39G.

VI. Insurance

There are numerous types and forms of insurance that come into play in construction projects, from builder’s risk, to commercial general liability (“CGL”), to worker’s compensation, to owner-controlled or contractor-controlled insurance programs (“OCIP” and “CCIP,” respectively), to name a few.

Insurance questions are highly fact intensive and depend on specific language of specific policies. However, a few generalities can be made. In Massachusetts, the insurer bears the burden of demonstrating the applicability of a given coverage exclusion. See, e.g., Driscoll v. Providence Mut. Fire Ins. Co., 69 Mass. App. Ct. 341, 343 (2007). Massachusetts is generally deemed to be very solicitous of insureds. In that vein, any ambiguity in the policy will be construed against the insurer. See, e.g., Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 356 (2009).

When it comes to a duty to defend under an insurance policy, Massachusetts courts will look to the four corners of the complaint. As long as the allegations of the complaint are
“reasonably susceptible” to an interpretation that they “state or adumbrate” a claim covered by
the policy terms, the duty to defend is triggered. See Doe v. Liberty Mut. Ins. Co., 423 Mass. 366,

One frequently arising issue is what constitutes the appropriate “trigger” for insurance
coverage in property damage cases. Massachusetts courts have not adopted a single, universal
coverage trigger in all cases. See Trustees of Tufts University v. Commercial Union Ins. Co., 415
Mass. 844, 855 (1993) (“We note that different triggers may be applied to different types of
(D. Mass. 2002) (“But the SJC has refrained from electing a single trigger of coverage theory,
noting that ‘different triggers may be applied to different types of injuries and property
damage.’”). The appropriate trigger will depend on the facts and the policy. Keyspan New
Indus., 407 Mass. 675, 687 (1990) (“We agree with the certifying judge that ‘[a] crucial factor in
determining when an injury occurs for purposes of insurance coverage is the nature of the
injury.’”).

Another important note is that insurers can face liability under the Massachusetts
Consumer Protection Act – which provides for multiple damages and attorneys’ fees – if they fail
to make a reasonable offer of settlement where liability is reasonably clear. See M.G.L. c. 176D,
93A, § 2’s incorporation of c. 176D, § 3).

i) Builder’s Risk Insurance

Builder’s risk insurance typically indemnifies builders or contractors against the loss of, or
195, 195 (2002). Although builder’s risk insurance is most commonly understood as providing
coverage for the structure and the materials incorporated therein, some policies will further
provide coverage to those materials stored, but not yet incorporated into the building under
construction. However, the terms of the policy will determine the ultimate extent of the losses
covered, including the cost of completing the work and the building materials required to do so,
as the interpretation of an insurance contract is handled in the same manner as any other
contract, requiring the court to “construe the words of the policy in their usual and ordinary

ii) All-Risk Insurance

An all-risk insurance policy, such as a builder’s risk policy, commonly provides coverage for a
multitude of risks not ordinarily contemplated, and recovery is generally allowed for all fortuitous
losses, unless a specific exclusion to the policy applies to the loss in question. McQuade v.

iii) **CGL Insurance**

CGL policies insure claims arising from an occurrence involving bodily injury and property damage to third parties. An “occurrence” is generally understood to be “an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage, advertising liability during the policy period.” *E.g.*, *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd’s*, 59 Mass. App. Ct. 646, 655 (2003). However, as is the case with every insurance policy, CGL policies generally recognize a number of exclusions often having significant impact on claims within the construction industry.

Probably most notable among the common construction-based CGL exclusions are those occurrences involving faulty workmanship or defective materials and products – business risks typically excluded under the “Business Risk Doctrine.” See *Commerce Ins. Co. v. Betty Caplette Builders*, 420 Mass. 87, 92 (1995). “Your Work” and “Your Product” exclusions exclude damage to an insured’s work that arises out of the insured’s faulty workmanship [or product], while damage to a third party’s work as a result thereof is usually not excluded from coverage. See *Limbach Co., LLC v. Zurich Am. Ins. Co.*, 396 F.3d 358, 365 (2005). The “Your Work” exclusion cannot be discussed without a mention of the “Subcontractor Exception” to the exclusion. Although Massachusetts has not addressed the Subcontractor Exception to the Your Work exclusion, the language of the exception restores coverage for defective work when it is performed by a subcontractor.

iv) **Workers’ Compensation Insurance**


v) **Owner- or Contractor-Controlled Insurance Programs (OCIP & CCIP)**

In recent years, owners and contractors alike have assumed a more invested role in the administration of insurance on their construction projects. Specifically, both parties now commonly provide insurance for most, if not all, parties performing work on a given project,
while also requiring all bidders to exclude their typical insurance costs from their bid proposals. However, case law on this emerging area of construction insurance law is sparse to date.

**VII. Mechanic’s Liens**

Like many states, Massachusetts has a Mechanic’s Lien statute protecting those who provide labor, equipment, materials, or design services to a construction project under a written contract for private—not public—projects. See M.G.L. c. 254, § 1 et seq.; *Young v. Inhabitants of Falmouth*, 183 Mass. 80 (1903). Since the right to lien a project is a “creature of statute,” the Massachusetts generally require strict compliance with the specific requirements of the statute. See, e.g., Mullen Lumber Co. v. Lore, 404 Mass. 750, 752 (1989).

The statute grants lien rights to general contractors, subcontractors, suppliers, laborers, and designers, and the lien requirements differ depending on who is claiming the lien. See M.G.L. c. 254, §§ 1 (laborers), 2 (general contractors), 2C (design professionals), & 4 (subcontractors and suppliers).

**General Contractors.** To perfect a lien, a general contractor must take the following basic steps under the statute:

3. Timely File a civil action in the appropriate Court. See M.G.L. c. 254, §§ 5 & 11.
4. Timely Record an attested-to copy of the Complaint in the appropriate Registry of Deeds. See M.G.L. c. 254, § 5.

The statute specifies the deadlines for taking these steps.

The Notice of Contract must be recorded “not later than the earliest of”: (i) 60 days after filing or recording of the “Notice of substantial Completion” under M.G.L. c. 254, § 2A; (ii) 90 days after filing or recording of the “Notice of Termination” under M.G.L. c. 254, § 2B; or (iii) 90 days after the general contractor or anyone by, through or under the general contractor last performed or furnished labor or materials or both labor and materials. See M.G.L. c. 254, § 2. The statute sets out the prescribed form for the Notice of Contract. Id.

Similarly, the Statement of Account must be recorded “not later than the earliest of”: (i) 90 days after the filing or recording of the “Notice of Substantial Completion under M.G.L. c. 254,
§ 2A; (ii) 120 days after the filing or recording of the “Notice of Termination” under M.G.L. c. 254, § 2B; or (iii) 120 days after the last day the general contractor “or anyone claiming by, through or under him,” performed or furnished labor or material or both labor and materials or furnished rental equipment, appliances or tools to the Project. See M.G.L. c. 254, § 8.

The civil action must be filed in the appropriate court within 90 days after the recording of the Statement of Account. See M.G.L. c. 254, § 11. An attested-to copy of the Complaint must be recorded in the Registry of Deeds within 30 days after filing with the Court. See M.G.L. c. 254, § 5.

Subcontractors/Suppliers. The steps to perfect a subcontractor/supplier lien are similar to – but not the same as – the steps applicable to general contractor liens. To perfect a lien, a subcontractor/supplier must take the following basic steps:


(2) Provide “actual notice” of the recording to the owner. See M.G.L. c. 254, § 4.

(3) Timely Record a “Statement of Account” in the appropriate Registry of Deeds. See M.G.L. c. 254 § 8.

(4) Timely File a civil action in the appropriate Court. See M.G.L. c. 254, §§ 5 & 11.

(5) Timely Record an attested-to copy of the Complaint in the appropriate Registry of Deeds. See M.G.L. c. 254, § 5.

Unlike the Notice of Contract applicable to general contractors, the Notice of Contract for subcontractors/suppliers must include a contract accounting. See M.G.L. c. 254, § 4. The statute sets out the prescribed form. Id.

In addition, in contrast to general contractor liens, subcontractors and suppliers must provide “actual notice” of the recording of the Notice of Contract to the owner. See M.G.L. c. 254, § 4.

The time parameters for recording the Notice of Contract are structurally the same as those applicable to General Contractor liens. As a result, the Notice of Contract must be recorded “not later than the earliest of”: (i) 60 days after filing or recording the “Notice of Substantial Completion” under M.G.L. c. 254, § 2A; or (ii) 90 days after filing or recording of the “Notice of Termination” under M.G.L. c. 254, § 2B; or (iii) 90 days “after the last day a person entitled to enforce a lien under [M.G.L. c. 254, § 2] or anyone claiming by, through or under him performed
or furnished labor or materials or both labor and materials to the project or furnished rental equipment, appliances or tools, or performed professional services."

Note that to protect those subcontractors and suppliers who performed work early on in the project, the statute grants those lien claimants the right to record the Notice of Contract within 90 days after the general contractor (and anyone claiming “by, through or under him”) performed work. See M.G.L. c. 254, § 4; Ng Bros. Constr. v. Cranney, 436 Mass. 638, 645 (2002).

The timing requirements for recording the Statement of Account, filing a civil action, and recording an attested-to copy of the Complaint in the appropriate Registry of Deeds apply equally to subcontractor/supplier liens as they do to general contractor liens.

It is important to note that the liens of down-the-line subcontractors and suppliers with no direct contract with the general contractors will be limited to the “amount then due or to become due” to the general contractor at the time the lien is recorded, unless the lien claimant previously served a “Notice of Identification.” See M.G.L. c. 254, § 4; BloomSouth Flooring Corp. v. Boys’ & Girls’ Club of Taunton, 440 Mass. 618 (2003) (enforcing limitation of amount of lien as established by M.G.L. c. 254, § 4); McNally v. Dominion Energy Salem Harbor, LLC, 2010 Mass. Super. LEXIS 142 (Roach, J.) (March 25, 2010) (dismissing claimant’s Section 4 lien in light of the fact that there was full payment and no outstanding balance due from the general contractor to the subcontractor at the time of the recording of the notice of contract).

**Laborers.** Unlike contractors, subcontractors, suppliers and designers, neither a written contract, nor a notice of contract is required for a laborer (or a party on the laborer’s behalf) to establish a mechanic’s lien pursuant to M.G.L. c. 254. Instead, a laborer must take the following two steps:

1. File or record a statement of account pursuant to M.G.L. c. 254, § 8, within 90 days after last performing labor; and
2. Commence a civil action within 90 days after filing the statement of account.

**Designers.** Pursuant to a 2011 amendment to the lien statute, design professionals now have lien rights. See M.G.L. c. 254, § 2C. To perfect a lien, the design professional must take the following basic steps:

1. Record a “Notice of Contract” at the appropriate Registry of Deeds “not later than the earliest of”: (i) 60 days after filing or recording of the “Notice of Substantial Completion under M.G.L. c. 254, § 2A; or (ii) “90 days after such design professional or any person by, through or under him, last performed professional services.” See M.G.L. c. 254, § 2C. The statute sets out the prescribed form. Id.
(2) Record a “Statement of Account” at the appropriate Registry of Deeds “within 30 days after the last day that a notice of contract may be filed or recorded under [M.G.L. c. 254, § 2C].” See M.G.L. c. 254, § 8.

(3) File a civil action in the appropriate Court within 90 days after recording the Statement of Account. See M.G.L. c. 254, § 11.

(4) Record an attested-to copy of the Complaint in the appropriate Registry of Deeds within 30 days after filing the civil action. See M.G.L. c. 254, § 5.

In addition to the basic requirements outlined above to claim a lien, the lien statute provides for the recording of additional documents, including, but not limited to, lien prevention bonds (M.G.L. c. 254, § 12) and lien dissolution bonds (M.G.L. c. 254, § 14). Liens may also be dissolved by the lien claimant by recording a notice as provided in M.G.L. c. 254, § 10. The lien statute also provides for enforcement of lien claims in court. See, e.g., M.G.L. c. §§ 5, 5A, 11, 15, & 15A

VIII. Public Construction

A. Public Bidding

All Massachusetts contracts for the “construction, reconstruction, alteration, remodeling or repair of any public work” (i.e., horizontal projects) estimated to cost more than $10,000 must be awarded to the “lowest responsible and eligible bidder” on the basis of a competitive sealed bid process. See M.G.L. c. 30, § 39M. Additionally, all contracts for the “construction, reconstruction, alteration, remodeling or repair of any building by a public agency” (i.e., vertical projects) estimated to cost between $25,000 and $100,000 must also be awarded to the lowest responsible and eligible bidder on the basis of a competitive sealed bid process. See id. The awarding authority is entitled by statute to reject any and all bids if doing so is in the public interest. See id.


In addition to these statutes, Massachusetts has also enacted a Uniform Procurement Act, M.G.L. c. 30B, which applies “to every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body as defined herein.”
B. Project Delivery Methods

Massachusetts enacted legislation in 2004 providing for alternative delivery methods (i.e., construction manager at risk or design-build) for certain types of projects. A public authority may use the construction manager at risk delivery method for any contract “for the construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost no less than $5,000,000” upon receipt of a notice to proceed from the inspector general. See M.G.L. c. 149A § 1 (emphasis added). A public authority may use the design-build delivery method for any contract “for the construction, reconstruction, installation, demolition, maintenance or repair of any public work estimated to cost no less than $5,000,000” upon receipt of a notice to proceed from the inspector general. See M.G.L. c. 149A § 14 (emphasis added). Chapter 149A sets out detailed requirements for the use of both types of methods. See generally, M.G.L. c. 149A, §§ 1-14.

There has been very little case law interpreting Chapter 149A in the 10 years since it was enacted. However, in June 2014, the Massachusetts Superior Court interpreted a construction manager at risk contract procured under Chapter 149A. See Coghlin Electrical Contractors, Inc. v. Gilbane Building Company, Docket No. 2013-1300-D, Worcester County Superior Court (June 23, 2014) (Davis, J.). The court in that case dismissed the construction manager’s pass-through claims against the owner in light of the construction manager’s contractual responsibilities and duties, which – in the court’s view – were different than the responsibilities and duties of general contractors in the traditional design-bid-build context. The decision is currently under review by the Massachusetts Supreme Judicial Court.

C. Minority and Women Owned Businesses


The Supplier Diversity Office, formerly known as the State Office of Minority and Women Business Assistances (“SOMWBA”) is responsible for certifying whether a MBE or WBE is eligible to participate in affirmative business opportunities programs. See M.G.L. c. 7C § 6. In order for a MBE or WBE to be certified, a woman or minority must own and control at least 51% of the business and the business must be independent and ongoing. See 425 CMR 2.02.

D. Changes and Extra Work
Many aspects of public construction in Massachusetts are regulated by statute. See, e.g., M.G.L. c. 30 § 39A et seq. In particular there are specific statutory provisions applicable to: 1) conformity with plans and specifications; 2) delay claims; and 3) claims for differing site conditions.

Conformity with Plans and Specifications

All public contractors are required to perform the work required by the contract in conformity with the plans and specifications. See M.G.L. c. 30 § 39I. Any deviations from the plans and specifications must be authorized in writing by the awarding authority. See id. Failure to comply with the plans and specifications may result in both civil and criminal penalties. See id.

Delay Claims

Pursuant to M.G.L. c. 30 § 39O, a contractor may have a limited “delay damages” recovery where: 1) the awarding authority orders the general contractor in writing to suspend, delay, or interrupt all or any part of the work for more than fifteen days; 2) the order is due to a failure of the awarding authority to act within the time specified in the contract; and 3) the general contractor submits a claim for any costs resulting from the delay “as soon as practicable” after the end of the suspension, delay, interruption or failure to act, and no later than the final day of payment under the contract. M.G.L. c. 30 § 39O must be incorporated in full into all public construction contracts, limits the recovery to increases to the “cost of the performance” of the contract, and specifically excludes “any profit” for any cost increase.

Differing Site Conditions

M.G.L. c. 30 § 39N allows a contractor to recover for actual subsurface or latent physical conditions which substantial or materially differ from those shown on the plans or indicated in the contract documents. In order for a contractor to recover, the contractor must make a request for an equitable adjustment in writing as soon as possible after discovering the conditions. See M.G.L. c. 30, § 39N. Upon receipt of a claim by a contractor, the awarding authority must make an investigation of the conditions and if the contractor’s claim is corroborated, the authority must make an equitable adjustment in the contract price.

IX. Miscellaneous

There are numerous other issues, topics, statutes and laws that frequently apply in construction cases, but are not addressed above and are beyond the scope of this synopsis. For example, the Massachusetts Uniform Code, M.G.L. c. 106, often applies in construction. In addition, Massachusetts has enacted a comprehensive statutory and regulatory scheme pertaining to environmental conditions, including the handling, disposal and remediation of hazardous materials. See, e.g., M.G.L. c. 21E; 310 CMR 40.0000, et seq. Also, the Massachusetts
Arbitration Act frequently comes into play in construction cases, where contracts often include arbitration clauses. See M.G.L. c. 251, § 1 et seq. Consistent with federal policy, Massachusetts strongly favors arbitration as an alternative to litigation.

Below are a few additional notable topics worth addressing briefly.

A. Massachusetts Prompt Payment Act

In 2010, Massachusetts enacted the Prompt Payment Act, M.G.L. c. 149 § 29E, which applies to all private projects with prime contracts entered on or after the effective date of the statute with original values of more than $3 million. The Prompt Payment Act does not apply to residential projects containing 4 or fewer dwelling units. For all covered projects, the law applies to any party entitled to a Massachusetts mechanic’s lien: prime contractors, first and second tier subcontractors and suppliers.

The Prompt Payment Act establishes mandatory requirements for the following aspects of construction contracts: 1) Pay-if-Paid clauses; 2) periodic payments; 3) change orders; 4) dispute resolution; and 5) forced continuation of the work.

Pay-if-Paid Clauses

The Prompt Payment Act prohibits the use of clauses conditioning payment upon receipt of payment from a third person that is not a party to the contract (such as an owner, or a general contractor), except in certain specific circumstances outlined in the statute.

Periodic Payments

The Prompt Payment Act requires all payment applications to be submitted on a cycle of no more than 30 days, and sets forth detailed requirements for the acceptance or rejection of payment applications.

Change Orders

Similar to payment applications, the Prompt Payment Act requires all submitted change order requests to be accepted or rejected within 30 days of either submission or commencement of the extra work, with the time period extended by 7 days for each tier below the prime contract. If approved, the change order work may be included in the next requisition for payment. As with requisitions, the statute outlines specific requirements for rejection of change order requests.

Dispute Resolution

The Act provides that for all rejected payment requisitions or change order requests, the entity seeking payment may commence dispute resolution as provided in the contract (including
arbitration or litigation) within 60 days after rejection. A construction contract cannot require the parties to hold disputes until the completion of the work.

**Continuation of the Work**

The Act provides that a contractor, subcontractor or supplier may suspend the work after 30 days of non-payment, subject to certain exceptions outlined in the statute.

B. **Massachusetts Retainage Act**

In 2014, Massachusetts enacted new retainage legislation entitled an Act “Relative to Fair Retainage Construction.” The Retainage Act went into effect on November 6, 2014 and like the Prompt Payment Act, applies to all private projects with prime contracts entered on or after that date with original values of more than $3 million and does not apply to residential projects containing 4 or fewer dwelling units.

The Retainage Act limits the amount of retainage that may be withheld on periodic payments to 5% of the payment. An application for payment of retainage must be submitted either 60 days following substantial completion, or in the case of a dispute, 60 days following final and binding resolution of the dispute. The Act further requires an application for retainage to be paid within thirty days of submission of the application, with the time period being extended by 7 days for each tier below the prime contract.

The Retainage Act defines substantial completion as the date the work “is sufficiently complete so that the Owner may occupy or utilize the project for its intended use.” This definition is mandatory and cannot be changed by the parties. The prime contractor is required under the Act to submit a “Notice of Substantial Completion” within 13 days of achieving substantial completion. The Owner in turn, must accept or reject the notice within 14 days of receipt. If the Notice is not timely rejected by the Owner, it will be deemed accepted.

Within 14 days after acceptance of the Notice of Completion, the Owner must furnish the Prime Contractor with a written punchlist within 14 days. The punchlist must be certified as being issued in good faith. In turn, the prime contractor must provide the written punchlist to subcontractors within 21 days after acceptance of the Notice of Substantial Completion, which must also be certified as being issued in good faith.

C. **The Massachusetts Home Improvement Contractor Law**

Massachusetts has enacted a Home Improvement Contractor law to protect homeowners in connection with residential improvement/renovation projects. See M.G.L. c. 142, § 1, et seq. Among other things, the law requires home improvement contracts to contain certain specific contractual provisions and disclosures, and provides that violations of “any of the provisions” of the law constitute per se violations of the Consumer Protection Act, Chapter 93A. See M.G.L. c.
142A, § 17. The Home Improvement Contractor Law also establishes a private arbitration program for disputes arising out of home improvement projects and provides a limited Guaranty Fund to compensate owners for actual losses.

D. Massachusetts Joint Tortfeasors Act

Massachusetts has enacted a uniform joint tortfeasors act, which may come into play in construction defect cases. See M.G.L. c. 231B, § 1 et seq.

E. Bid Protest Decisions of the Attorney General

While an aggrieved bidder can certainly seek relief from the Court, the Massachusetts Attorney General’s Office has a Bid Protest Unit dedicated to hearing and resolving bid protests as part of the Attorney General’s overall responsibility to enforce certain competitive bidding laws in Massachusetts. Although the Attorney General’s bid protest decisions are not binding law, there is a substantial body of decisions from the Attorney General’s office that provide guidance on a wealth of issues. Those decisions are available in a searchable database located at the Attorney General’s website: http://www.bpd.ago.state.ma.us/ (last visited April 3, 2015).

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