COMMONWEALTH OF MASSACHUSETTS CONSTRUCTION COMPENDIUM OF LAW

Revisions and Updates By
Michael D. Riseberg
Rubin and Rudman LLP
53 State Street, 15th Floor
Boston, MA 02109
(617) 330-7180
mriseberg@rubinrudman.com
Website: www.rubinrudman.com

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Hinckley Allen & Snyder LLP

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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, a contractor must fully perform before it is entitled to recover breach of contract damages suffered as the result of the other party's breach. See U.S. Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002); Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436, 442 (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 at 54. 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, 549-550 (1968). A contractor cannot recover on the contract itself without showing complete and strict performance of all its terms, which the SJC has interpreted as limited to the design and construction itself. See G4S Tech. LLC v. Mass. Tech. Park Corp., 479 Mass. 721, 731-32 (2018). In addition, when the claimant has a contract with one party, the claimant ordinarily will not be able to successfully assert a quantum meruit claim against a third party absent some conduct by the third party giving rise to a reasonable expectation of payment. See, e.g, Mike Glynn Co., Inc. v. Hy-Brasil Restaurants, Inc., 75 Mass. App. Ct. 322 (2009); Bolen v. Paragon Plastics, Inc., 747 F. Supp. 103, 107 (D. Mass. 1990) ("[R]ecovery is denied if the plaintiff conferred a benefit expecting compensation from one person, but then seeks restitution from a second person."); Zichelle Steel Erectors, Inc. v.

Middlesex Paving, Inc., 2000 Mass. Super. LEXIS 228, *4 (Feb. 25, 2000) ("[a] contractor (or subcontractor) may bring a claim for quantum meruit only against the person for whom the work was done and by whom the contractor expected to be paid.") (citing LaChance v. Rigoli, 325 Mass. 425, 427 (1950)).

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.").

On public projects in particular, the parties must adhere strictly to contract requirements: "[i]t is well established that contractors seeking to recover payment in excess of the contract price must follow the procedures set out in the contract." Green Acres Landscape & Constr. Co. v. Town of Belmont, 2011 Mass. Super. LEXIS 345, *22 (Sept. 26, 2011) (citing Sutton Corp. v. Metropolitan Dist. Comm'n, 423 Mass. 200, 207-208 (1996)); Lawrence-Lynch Corp. v. Department of Envt'l Mgmt., 392 Mass. 681, 685 (1984); State Line Contractors, Inc. v. Commonwealth, 356 Mass. 306, 318-319 (1969); Sutton Corp. v. Metropolitan Dist. Comm'n, 38 Mass. App. Ct. 764, 767 (1995), superseded on other grounds, 423 Mass. 200 (1996); Glynn v. Gloucester, 21 Mass. App. Ct. 390, 394-395, rev. den., 396 Mass. 1107 (1986); D. Federico Co., Inc. v. Commonwealth, 11 Mass. App. Ct. 248, 252 (1981)). A failure to follow notice or claim submission requirements can result in a forfeiture of claims. See Marinucci Bros. v. Commonwealth, 341 Mass. 141, 144 (1968) (". . . the failure of the contractor to make a timely claim in writing . . . and an itemized statement setting forth the details of the work done or damage incurred results in a forfeiture of its claim"); but see Central Ceilings, Inc. v. Suffolk Construction Company, Inc., 91 Mass. App. Ct. 231 (2017) (upholding lower court's decision allowing recovery for claimant despite absence of evidence that claimant submitted written time extension requests).

A contractor's right to sue for breach of contract is limited 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 claim 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 (1986).

Massachusetts also recognizes the so-called *Spearin* Doctrine, which holds that on public projects, every set of construction plans and specifications contains an implied warranty that they are sufficient for their intended purpose and accurate as to descriptions of the kind and quantity of work required. See Richardson Electrical Co. v. Peter Francese & Son, Inc., 21 Mass App. Ct. 47, 50 (1985) (citing M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, 348 Mass. 682, 686-688 (1965) and Alpert v. Commonwealth, 357 Mass. 306 , 320-1 (1970)). Cf. U.S. v. Spearin, 54 Ct. Cl. 187, 248 U.S. 132, 39 S. Ct. 59 (1918).

In 2015, the Massachusetts Supreme Judicial Court ("SJC") confirmed that the *Spearin* Doctrine applies outside the traditional design-bid-build context in a case involving the construction manager at-risk ("CMR") project delivery method. See Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al., 472 Mass. 549, 558 (2015) (addressing applicability of implied warranty under new statute authorizing CMR delivery method for certain projects). The SJC found that the relationships among the parties in the CMR context were not "so different [from the traditional design-bid-build context] that no implied warranty of the designer's plans and specifications should apply in construction management at risk contracts . . . ." Id. at 558. While the implied warranty still applies in the CMR context, the Coghlin court noted that construction managers at-risk will carry a greater burden in showing a breach of the implied warranty. That is, as a CMR's responsibilities increase under the contract, so too will its burden "to establish the owner's liability under the implied warranty, that its reliance on the defective design was reasonable and in good faith." Id. at 560 (stating that "[t]he amount of recoverable damages may be limited to that which is caused by [the construction manager at risk's] reasonable and good faith reliance on design defects that constitute a breach of the implied warranty.").

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, premised 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, 396 Mass. at 823; 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 (1982). See also 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). An architect may also be held liable for failing to catch a contractor's failure to comply fully with plans and specifications promulgated by the architect where the architect had a contractual duty to the owner to report any deficiencies in the work or any deviations from the requirements of the construction contract that came to its attention. Id. at 328.

Misrepresentation is another common construction claim. As noted below in the discussion of the Economic Loss Doctrine, design professionals can face misrepresentation liability in Massachusetts. The elements of intentional misrepresentation and negligent misrepresentation are similar, but not the same. "A claim for misrepresentation requires … a false statement of material fact made to induce the plaintiff to act and reliance on the false statement by the plaintiff to his detriment." McEneaney v. Chestnut Hill Realty Corporation, 38 Mass. App. Ct. 573 (1995), rev. denied, 420 Mass. 1107 (1995); accord, Danca v. Taunton Savings Bank, 385 Mass. 1, 429 N.E.2d 1129, 1133 (1982); see Elias Brothers Restaurants, Inc. v. Acorn Enterprises, Inc., 831 F. Supp. 920, 922-923 (D. Mass. 1993) (stating above elements as required for the defendant's fraudulent inducement counterclaim); VMark Software, Inc. v. EMC Corporation, 37 Mass. App. Ct. 610 (1994). A claim of negligent misrepresentation must allege that the offending party: "(1) in the course of his business, (2) supplie[d] false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information." Nota Construction Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15, 19-20 (1998) (citing Fox v. F&J Gattozzi Corp., 41 Mass. App. Ct. 581, 587-88 (1996)). Notably, intentional misrepresentation may also give rise to liability under the Massachusetts Consumer Protection Act, M.G.L. c. 93A. See Nota Construction Corp., 45 Mass. App. Ct. at 21.

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, *185-87 (Jan. 3, 2012) (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); D.D.S. Indus. v. P.J. Riley & Co., 2016 Mass. App. Unpub. LEXIS 249 (March 7, 2016) (upholding Chapter 93A liability against contractor that withheld less than $40,000 from subcontractor at end of subcontracts valued at more than $2,000,000 on basis of unfinished drawings and down-the-line claim).

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 (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 (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). While phrases like “level of rascality” and “rancid flavor of unfairness” are not controlling (see Mass. Empl’rs Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39 (1995) (criticizing use of such phrases as “uninstructive”)), courts continue to use these types of phrases when determining whether a Chapter 93A violation has occurred. See, e.g., Baker v. Goldman, 771 F.3d 37, 51 (1st Cir. 2014) (collecting cases). Ultimately, the courts will focus on the nature of the conduct and the purpose and effect of such conduct to determine liability under Chapter 93A. See Mass. Empl’rs Ins. Exch. v. Propac-Mass, Inc., 420 Mass. at 43.

At one end of the spectrum, a mere breach of contract claim – without more – will not establish a violation of Chapter 93A. See Davis v. Dawson, Inc., 15 F. Supp. 2d 64, 146 (D. Mass. 1998), citing Pepsi-Cola Metropolitan Bottling Company, Inc. v. Checkers, Inc., 754 F.2d 10, 18 (1st Cir. 1985). At the other end of the spectrum is conduct that has a clear extortionate quality: “one of the more specific categories of unfairness developed by the case law consists of coercive or extortionate tactics designed to extract undeserved concessions . . .” See Renovator’s Supply, Inc. v. Sovereign Bank, 72 Mass. App. Ct. 419, 430 (2008) (citing Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 472-476, (1991) (landowner's pretextual disapproval of a development plan attempted to squeeze additional compensation out of the developer)); Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. at 39 (a contract breach employed to disrupt another party's remaining rights has the coercive character of a c. 93A violation); Frank J. Linhares Co. v. Reliance Ins. Co., 4 Mass. App. Ct. 617, 622-623 (1976) (holding a truck hostage in exchange for the owner's waiver of warranty rights); Community Builders, Inc. v. Indian Motorcycle Assocs., 44 Mass. App. Ct. 537, 557-559 (1998) (nonpayment of contractual debt to pressure an opponent for a compromise of its claim); Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 52 (1st Cir. 1998) (withholding validly owed payments as bargaining leverage).

Fraud claims generally 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). To prove a 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).

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. The Massachusetts Office of the Attorney General established a False Claims Division in 2015 "to safeguard public funds by enforcing high standards of integrity against companies and individuals that make false statements to obtain government contracts or government funds." See http://www.mass.gov/ago/bureaus/hcfc/false-claims-division/ (last visited March 22, 2018). The Attorney General has reportedly recovered "hundreds of millions of dollars in government funds" enforcing this "powerful" statutory tool. See id. In one 2017 example, the Attorney General filed an "Assurance of Discontinuance" in Massachusetts Superior Court in which a contractor agreed to accept penalties for alleged False Claims Act violations. According to the AG, the contractor failed to wrap iron ductile pipe with polyethylene as a result of its failure to familiarize itself with the requirements of the project specifications. As a result, the AG went after the contractor under for alleged False Claims Act violations because when the contractor submitted its applications for payment on the project, the contractor allegedly provided false certifications that it had complied with the project specifications.

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. Inc., 35 Mass. App. Ct. 286, 288 (1993), and Callahan v. A.J. Welch Equip. Corp., 36 Mass. App. Ct. 608, 611 (1994)). Notably, the duty to defend does not fall within the protective ambit of M.G.L. 149, § 29C. See id.

Massachusetts courts are unlikely to enforce indemnification provisions that relieve a party from liability stemming from its own gross negligence. See, e.g., Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC, 478 Mass. 697, 708 (2018) (citing CSX Transp.,

Inc. v. Massachusetts Bay Transp. Auth., 697 F. Supp. 2d 213, 226 (D. Mass. 2010) ("[T]he [Supreme Judicial Court] would not enforce agreements purporting to require indemnification against gross negligence."); Angelo v. USA Triathlon, 2014 U.S. Dist. LEXIS 131759 (D. Mass. Sept. 19, 2014) (Sorokin, U.S.D.J.).

Otherwise, contractual indemnity provisions are generally enforceable. See Sharon v. City of Newton, 437 Mass. 99, 106 (2002) (indemnification agreements represent a practice Massachusetts courts have long found acceptable) (citing Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 492 (1987), and Shea v. Bay State Gas Co., 437 Mass. 218 (2002)). Other than as noted above, an indemnity clause is generally enforceable even where the indemnitee is concurrently at fault, or the indemnitor is wholly without fault. See Kelly v. Dimeo, Inc., 31 Mass. App. Ct. 626 (1991) (citing Whittle v. Pagani Bros. Constr. Co., 383 Mass. 796 (1981) and Jones v. Vappi & Co., 28 Mass. App. Ct. 77 (1989)). Massachusetts courts will enforce indemnity agreements in accordance with their plain meaning, and without any bias in favor of either party (i.e., the indemnitor or the indemnitee). See Speers v. H.P. Hood, Inc., 22 Mass. App. Ct. 598, 600 (1986); Urban Inv. & Dev. Co. v. Turner Constr. Co., 35 Mass. App. Ct. 100, 107 (1993).

In Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al. (discussed in the previous section), the trial and appellate courts tackled the unusual question whether a contracting party must indemnify the other party to the contract against its own direct claims against the other party. In reversing the Superior Court, the Massachusetts Supreme Judicial Court held on appeal: "We instead interpret the indemnification provision in light of the implied warranty [of the designer's plans and specifications] and conclude that, although broad in scope, the indemnification provision does not cover claims, damages, losses, and expenses arising out of the Designer's work, as opposed to [the construction manager at risk's] design-related duties." Coghlin Electrical Contractors, Inc. v. Gilbane Building Co., et al., 472 Mass. 549, 564 (2015).

In addition to contractual indemnity, Massachusetts recognizes common law indemnity claims in limited circumstances typically involving derivative or vicarious liability. See, e.g., Fireside Motors, Inc. v. Nissan Motors Corp., 395 Mass. 366, 369-370 (1995) ("At common law a person may seek indemnification if that person 'does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another.'") (citations omitted).

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. Notably, claims against the Commonwealth are subject to a 3-year statute of limitations period. See Wong v. University of Massachusetts, 438 Mass. 29 (2002) ("Breach of contract claims against the Commonwealth must be commenced within 3 years, as provided in G.L. c. 260, § 3A.").

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 Albrecht 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 (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 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 10-year period was calculated from the later of the date the cause of action accrued or the effective date of the law. 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. Bigliazzi, 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). In addition, the Massachusetts Torts Claim Act establishes a 3-year period for claims against public employers falling within the statute, including a 2-year "presentment" requirement. See M.G.L. c. 258, § 1 et seq.

Claims of unfair and deceptive trade acts or practices under M.G.L. c. 93A are subject to a 4-year statute of limitations period. See M.G.L. c. 260, § 5A.

There is also a 6-year statute of repose placing an absolute time-limitation on the tort liability of those involved in design and construction. See M.G.L. c. 260, § 2B; See Klein v. Catalano, 386 Mass. 701 (1982); see also Shafnacker v. Raymond James & Associates, Inc., 425 Mass. 724, 728 (1997); Sullivan v. Iantosca, 409 Mass. 796 (1991). Unlike with the statute of limitations, the concept of "latent defects" is inapplicable to the statute of repose analysis and the discovery rule has no application. "Simply put, after six years, the statute completely eliminates a cause of action against certain persons in the construction industry." Aldrich v. ADD Inc., 437 Mass. 213, 221 (2002) (quoting Klein v. Catalano, 386 Mass. 701 (1982)).

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, 396 Mass. at 823 (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.

In a 4-3 split decision, the SJC has held that claims for violation of Chapter 93A brought against contractors, where premised on a breach of the home improvement contractor law, G.L. c. 142A, sound in tort and are subject to the 6-year statute of repose contained in G.L. c. 260, §2B, and must be brought within six years of completion of the project. See Bridgwood v. A.J. Wood Construction, Inc., 480 Mass. 349, 356, 358 (2018). The statute of repose in G.L. c. 260, §2B, imposes an absolute time limit on the liability of those within its protection and applies even if the plaintiff's injury does not occur, or is not discovered, until after the statute's time limit has expired. Id. at 353.

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.'"

Louise Caroline Nursing Home, Inc. v. Dix Constr. Corp., 362 Mass. 206, 310-311 (1972) (citations omitted).

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. The parties may also provide for liquidated damages and include prevailing-party attorneys' fees provisions in their contracts. These issues are discussed briefly below.

No matter the form or type of damages, a plaintiff must demonstrate its damages to a reasonable or "fair degree of certainty" to recover; speculative damages are not recoverable. Novel Iron Works, Inc. v. Wexler Constr Co., 26 Mass. App. Ct. 401, 412 (1988) (quoting White Spot Constr. Corp. v. Jet Spray Cooler, Inc., 344 Mass. 632, 635 (1962)).

The Appeals Court's 2017 decision in Central Ceilings, Inc. v. Suffolk Constr. Co., Inc., 91 Mass. App. Ct. 231 (2017) marks the first time a Massachusetts appellate court addressed total cost claims in Massachusetts. The subcontractor in that case presented a loss of productivity claim on a total cost basis. After a bench trial, the Superior Court ruled in the subcontractor's favor. Despite acknowledging why total cost claims are disfavored, the Appeals Court upheld the decision on appeal.

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

Absent a contract provision or applicable statute limiting or precluding damages for delay, delay damages are generally a recoverable form of damages. See, e.g., St. Germain & Son, Inc. v. Taunton Redevelopment Authority, 4 Mass. App. Ct. 46, 48 (1976). However, construction contracts frequently include no-damage-for-delay provisions, and those provisions are enforceable in Massachusetts. See, e.g., Reynolds Bros., Inc. v. Commonwealth, 412 Mass. 1, 7 (1992); Charles I. Homer, Inc. v. Commonwealth, 302 Mass. 495 (1939); Worcester v. Granger Bros., Inc., 19 Mass. App. Ct. 379, 380 (1985); Commercial Masonry Corp. v. Barletta Eng'g Corp., 2014 Mass. Super. LEXIS 40 (noting that no damage for delay provision "in a construction contract

generally is enforceable"); but see Central Ceilings, Inc. v. Suffolk Construction Company, Inc., 91 Mass. App. Ct. 231 (2017). In addition, M.G.L. c. 30, § 39O, limits the amount and type of recovery for suspensions, delays, and interruptions on public construction projects.

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 case, which includes a cogent discussion of Farina Bros., its application, and its progeny. See XL Specialty Ins. Co. v. Mass. Hwy Dept., 2012 Mass. Super. LEXIS 383 (Jan. 3, 2013). In a more recent decision, the Massachusetts Appeals Court upheld a Superior Court decision which did not enforce a no-damage-for-delay clause. See Central Ceilings, Inc. v. Suffolk Construction Company, Inc., 91 Mass. App. Ct. 231, 237 & n. 9 (2017) (upholding lower court's decision that contractor materially breached subcontract and was therefore precluded from invoking no-damages-for-delay clause).

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.

351 Mass. 497, 499 (1967) (citations omitted).

In a 1998 decision, the Appeals Court in Nota Construction v. Keyes Assocs., 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 v. Belleau, 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).

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. 877, 881 (1999). A contractual clause "fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." Id. at 877.

g) Attorneys' 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. Attorneys' 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.

Prejudgment interest in contract cases against the Commonwealth is governed by M.G.L. c. 231, § 6I, but prejudgment interest cannot be imposed against the Commonwealth in tort actions. See Dinsdale v. Commonwealth, 39 Mass. App. Ct. 926, 927 (1995).

Massachusetts also generally provides for post-judgment interest under M.G.L. c. 235, § 8. However, sovereign immunity bars post-judgment interest in cases against the Commonwealth. See Chapman v. University of Mass. Med. Ctr., 423 Mass. 584, 587-588 (1996).

There are also statutes providing for penalty interest for late payment on public works and public building projects. See M.G.L. c. 30, § 39G; M.G.L. c. 30, § 39K.

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, ambiguities in insurance policies are generally 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, 368-69 (1996).

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 injuries and property damage."); Amtrol, Inc. v. Tudor Ins. Co., 2002 U.S. Dist. LEXIS 18691, *14 (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. See Lumbermans Mut. Cas. Co. v. Belleville 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.'"); Rubenstein v. Royal Ins. Co. of America, 44 Mass. App. Ct. 842, 850 (1998); Keyspan New England, LLC v. Hanover Ins. Co., 2008 Mass. Super. LEXIS 326 (Aug. 14, 2008).

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, § 3; Wheatley v. Mass. Insurers Insolvency Fund, 465 Mass. 297, 303 (2013) (explaining M.G.L. c. 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 damage to, a building under construction. Lodge Corp. v. Assurance Co. of Am., 56 Mass. App. Ct. 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 sense." Tocci Bldg. Corp. v. Zurich Am. Ins. Co., 659 F. Supp. 2d 251, 257 (2009).

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. Nationwide Mut. Fire Ins. Co., 587 F. Supp. 67, 68 (1984). Generally, an all-risk policy is designed to extend protection against the kind of fortuitous loss not usually covered under other insurance. HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co., 26 Mass. App. Ct. 374, 376 (1988). In the context of all-risk policies, the insured usually bears the burden of establishing coverage, and only upon such a showing does that burden shift to the insurer. See Cotter v. Phoenix Ins. Co., 2008 Mass. App. Div. LEXIS 22 (Mass. App. Div. 2008).

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." See 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 (4th Cir. 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 generally restores coverage for defective work when it is performed by a subcontractor. However, in policies containing the standard Subcontractor Exception to the Your Work exclusion, be mindful to check that there is no endorsement to the policy eliminating the Subcontractor Exception.

iv) Workers' Compensation Insurance

The Massachusetts Workers' Compensation Act is the sole legal remedy available to an employee in the event of a work-related injury. See M.G.L. c. 152, §§ 1 et seq. With few applicable exceptions, every employer in the Commonwealth must purchase and provide workers' compensation insurance to its employees. See M.G.L. c. 152, § 25A. Under the statute, an employee is paid benefits for injuries, lost wages, and disability, irrespective of fault. Cox v. Safety Ins. Co., 1996 Mass. App. Div. 211, 215 (Mass. App. Div. 1996).

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:

(1) Timely Record a "Notice of Contract" in the appropriate Registry of Deeds. See M.G.L. c. 254, § 2.

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

(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:

(1) Timely Record a "Notice of Contract" in the appropriate Registry of Deeds. See M.G.L. c. 254, § 4.

(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, including a process for summary discharge of a lien. See, e.g., M.G.L. c. 254, §§ 5, 5A, 11, 15, & 15A.

VIII. Public Construction

A. Public Bidding

Massachusetts utilizes competitive bidding for various types of public contracts relating to public construction projects. There are several statutes governing the procurement of public contracts in the construction context:

- M.G.L. c. 149, §§ 44A-H (Public Buildings)
- M.G.L. c. 30, § 39M (Public Works Projects; Limited Public Buildings)
- M.G.L. c. 30B (Uniform Procurement Act – procurement/disposition of supplies, services, & real property by local governmental bodies)

- M.G.L. c. 149A (CM-at-Risk & Design-Build)

- M.G.L. c. 7C, §§ 44-57 (Design Services for Public Building Projects)

- M.G.L. c. 7, § 22 (State Procurement of Supplies, Equipment, Property)

A new law became effective in 2016 (the Municipal Modernization Act of 2016) making changes to several of these competitive bidding statutes. Among other things, the law created new procurement requirements depending in part on the size of the project.

In general, the purpose of the competitive bidding scheme in Massachusetts is to "create an open and honest competition with all bidders on equal footing, and to enable the public contracting authority to obtain the lowest eligible bid." See J.F. White Contr. Co. v. State Port Auth., 51 Mass. App. Ct. 811, 814 (2001) (citing Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 396 (1994)). The statutory procedure are designed to "facilitate[] the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts." See Interstate Eng'g Corp. v. Fitchburg, 367 Mass. 751, 757-758 (1975).

Most large-scale public construction projects implicate either M.G.L. c. 30, § 39M (applicable to horizontal public works projects and limited public building projects) or M.G.L. c. 149, §§ 44A-H (applicable to vertical building projects). Generally speaking, large projects falling within the scope of either of these statutes are to 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; M.G.L. c. 149, § 44A.

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. As discussed above, in 2015, the Supreme Judicial Court held that the implied warranty of plans and specifications applies in the construction manager at-risk context under Chapter

149A, and that the broad indemnification clause in the contract did not bar the construction manager at-risk's claims against the owner. See Coghlin, 472 Mass. at 560-61, 565.

C. Minority and Women Owned Businesses

M.G.L. c. 7C § 6 calls for awarding authorities to establish the processes and procedures for participation by minority business enterprises ("MBE") and women business enterprises ("WBE") in all state construction contracts and state assisted construction contracts. The current construction phase participation goal for certain state funding building construction projects is 10.4% combined MBE and WBE participation. See https://www.mass.gov/service-details/learn-about-the-municipal-construction-affirmative-marketing-program (last visited March 22, 2018).

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.

One issue that has arisen in recent years is whether Portuguese-owned business enterprises ("PBEs") qualify as MBEs in Massachusetts. In an April 21, 2016 decision, a Massachusetts Superior Court preliminarily enjoined the state from continuing its practice of generally certifying PBEs as MBEs. See Federal Concrete, Inc. v. Executive Office for Administration and Finance, et al., Suffolk Superior Court, Civil Action No. 16-0627. In a February 20, 2018 decision, the Suffolk Superior Court entered summary judgment continuing the injunction, permanently enjoining the state from "certifying Portuguese-owned businesses as MBEs unless and until (1) they determine that a disparity study demonstrates a 'strong basis in evidence' of past discrimination against Portuguese-owned businesses that would support certifying such businesses as MBES . . . (2) [the Massachusetts Supplier Diversity Office ("SDO")] amends its regulation, through a public notice-and-comment process, to permit certification of Portuguese-owned businesses as MBEs on that basis[; and] (3) SDO allows at least 10 business days between promulgation of any such regulation and the effective date, gives notice to the plaintiff of such promulgation, and cooperates in expeditious litigation of any lawsuit brought to challenge any such regulation." See id. (February 20, 2018 Summary Judgment Decision).

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. Among other things, 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 substantially 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. Massachusetts courts strictly construe the statute. See, e.g., Tocci Bldg. Corp. v. IRIV Partners, LLC, 2020 Mass. Super. LEXIS 152 (Super. Ct. Nov. 19, 2020).

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. See id. at *16- *18 (ordering project owner to pay contractor disputed monies because project owner failed to object in a timely and proper manner to contractor's applications for payment in accordance with the Prompt Payment Act).

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 retainage legislation entitled an Act "Relative to Fair Retainage Payments in Private 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. See M.G.L. c. 149, § 29F.

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" no later than 14 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

The Massachusetts Home Improvement Contractor law protects 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. These decisions are available in a searchable database located at the Attorney General's website: http://www.bpd.ago.state.ma.us/ (last visited February 15, 2017).