MASSACHUSETTS

Grace V.B. Garcia, Esq.
Stephen G. Troiano, Esq.
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
Phone: (617) 737-8822
Fax: (617) 342-4914
ggarcia@morrisonmahoney.com
stroiano@morrisonmahoney.com

I. MECHANICS' LIEN BASICS

Massachusetts General Laws (M.G.L.) c. 254, et seq., governs the procedure for obtaining and enforcing mechanics' liens. Claimants that furnish labor and/or materials in connection with the construction, repair, removal or alteration of a building or structure may obtain a mechanics' lien upon real property. [1] With a limited exception, the statute requires that the party seeking to enforce the lien be acting under a written contract.[2] A party with a direct contract with an owner, or someone acting on behalf of the owner, may enforce a mechanic's lien against the property that is the subject of the improvement.[3] A subcontractor or supplier may also enforce a mechanics' lien against the "real property, land, building, structure or improvement owned by the party who entered into the original contract as appears of record at the time of such filing."[4]

A mechanics' lien claimant is not entitled to a lien for attorney's fees or interest associated with the claim.[5] A mechanics' lien may not be placed on public property.[6] The mechanics' lien statute sets forth a four step procedure to establish and enforce a mechanics' lien for general contractor and subcontractor/supplier liens. Strict compliance with the terms of the statute is necessary to obtain a valid lien[7] A party may move for summary dissolution of an improper or procedurally defective lien, and is entitled to a prompt hearing on such application.[8] Lien waivers in a contract are prohibited by statute and will be void.[9]

The procedures to perfect and enforce a mechanics' lien differ depending on whether or not the claimant has a direct contractual relationship with the owner.

A. Direct Contract with Owner (General Contractor's Lien):

(1) Notice of Contract. The general contractor claimant must record a Notice of Contract in the Registry of Deeds of the county or district where the project is located, per M.G.L. c. 254, § 2. The Notice of Contract must include the name of the general contractor and owner, as well as a statement that a written contract between them exists. The Notice of Contract requires a detailed description of the property in question. The Notice of Contract may be filed or recorded at any time after the execution of the written contact, but no later than the earliest of: (1) 60 days after filing or recording a notice of substantial completion under M.G.L. c. 254, § 2A; (2) 90 days after the filing or recording or a notice of termination under M.G.L. c. 254, § 2B; or (3) 90 days after the general contractor, or any person by, through or under the general contractor last performed or furnished labor and/or materials.[10]

(2) Statement of Account. The general contractor claimant must next record with the Registry of Deeds a "Statement of Amount Due," also referred to as a "Statement of Claim" or "Statement of Account," per M.G.L. c. 254, § 8. The Statement of Account must set forth "a just and true account of the amount due or to become due him, with all just credits" as well as a brief description of the property, and the names of the owners as set forth in the Notice of Contract.[11] The Statement of Account must be filed or recorded within 90 days after notice of substantial completion, 120 days after notice of termination; or 120 days after the general contractor, or anyone claiming by, through, or under him last furnished the labor or materials.[12]

(3) File Civil Action. The general contractor claimant must next file a civil action to enforce the lien, and must do so within 90 days after the recording of the Statement of Amount Due. This action must be brought in either the Superior Court for the county where the land is located, or in the District Court in the Judicial District where the land is located.[13]

(4) Record Attested Copy of Complaint. The general contractor claimant must record in the Registry of Deeds an attested-to copy of the complaint, and must do so within 30 days of the commencement of the action in the previous step.[14]

B. No Direct Contract With Owner (Subcontractor/Supplier's Lien):

The above steps are generally the same, however M.G.L. c. 254, § 4 governs the Notice of Contract.[15] The Notice of Contract under Section 4 must include an accounting of the current status of payment as of the date of the notice, and the regular mailing address of the party recording or filing the notice. The subcontractor/supplier claimant must also provide the owner with actual notice of the filing of the Notice of Contract.[16]

The subcontractor/supplier claimant may record a Notice of Contract at any time after the execution of the written contract, but not later than the first of the following to occur: (1) 60 days after filing of the notice of substantial completion under Section 2A; (2) 90 days after filing the notice of termination under Section 2B; or (3) 90 days after the last day a person entitled to enforce the Section 2 lien or anyone claiming by, under or through him performs or furnishes labor or materials under the general contract.

The remaining three steps for the subcontractor/supplier claimant are the same as for the general contractor's lien as discussed above.

A subcontractor's lien is limited by statute in that it "shall not exceed the amount due or to become due under the original contract as of the date notice of the filing of the subcontract is given by the subcontractor to the owner."[17] Thus, the amount of the subcontractor's lien may not exceed the amount owed by the owner to the general contractor at the time the Section 4 written notice (see above) is provided to the owner.

C. Claimant With No Contract with General Contractor:

Where a subcontractor/supplier claimant has no direct contract with the general contractor (a sub-subcontractor), the amount of the lien may not exceed the amount due or to become due under *the subcontract between the original contractor and the subcontractor whose work includes the work of the claimant*, as of the date the claimant files a notice of contract,

unless the claimant provided to the general contractor a "Notice of Identification" within 30 days of commencement of work.[18] The form of the Notice of Identification is provided M.G.L. c. 254, § 4. The failure to meet this step does not deprive the second tier subcontractor of the lien, but further limits the amount of the lien.

D. Discharge of Liens

Liens may be discharged by recording a judgment dissolving the lien[19], by recording a voluntary "Notice of Dissolution of Lien,"[20] or by the recording of a lien removal bond in response to the lien.[21] If a lien removal bond is recorded and served on the claimant, the lien is dissolved and the claimant must then bring the action against the surety.[22] A party may also record a lien prevention bond prior to a lien being recorded.[23] Where a lien prevention bond is in place, the claimant must follow the steps to perfect and enforce the lien, but must file suit against the surety, not the property owner.

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Massachusetts law requires advertising and bidding of both public building and public works construction.[24] There are specific statutory provisions regulating performance and claims for public construction contracts. A contractor performing work under a public contract is required by statute to do the work in conformity with the specifications contained in the contract unless written authorization to deviate is given by the awarding authority or by an engineer or architect in charge of the work.[25]

B. Claims

With respect to payment, the public awarding authority must make periodic payments pursuant to estimates provided by the contractor.[26] When making periodic payments and/or the final payment, the awarding authority may reduce the payment by (1) a retention based on its estimate of the fair value of its claims against the contractor and (2) a retention for direct payments to subcontractors based on demands for same.[27]

There exists specific statutory authority that allows a contractor to recover for the discovery of actual subsurface or latent physical conditions encountered at the site that differ substantially from those shown on the plans or indicated in the contract documents.[28]

A contractor may recover for delay damages only when the awarding authority orders the contractor, in writing, to suspend, delay or interrupt all or part of the work for fifteen days or more.[29] The contractor should submit the amount of the claim to the awarding authority in writing as soon as practicable after the date of suspension.

III. STATUTES OF LIMITATION & REPOSE

A. Statute Of Limitations

1. Breach of Contract

The statute of limitations for breach of contract is six years from the date of breach.[30] If the transaction is primarily for the sale of goods under the U.C.C., the limitations period is four years from the date of breach. This can be reduced by the terms of contract to not less than one year, and cannot be extended by the contract.[31]

2. Negligence

For tort actions related to "damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property," three years.[32] A tort cause of action accrues either when the plaintiff is injured as a result of the defendant's unlawful act or omission.[33] If the wrong is "inherently unknowable," Massachusetts law recognizes the "discovery rule," and the cause of action accrues when the plaintiff knows or should know that she has been injured.[34] The knowledge required to trigger the statute of limitations "is not notice of every fact which must eventually be proved in support of the claim," but rather "knowledge that an injury has occurred."[35]

3. Breach of Warranty

If the claim is akin to a product liability suit for personal injuries or property damage, M.G.L. c. 106, § 2-318 provides a three year statute of limitations from the date that injury and damage occurs, subject to the discovery rule for tort actions as set forth above. If the claim is a contract based breach of warranty claim, and involves the sale of goods, M.G.L. c. 106, § 2-725 provides a four year limitations period, which runs from the date of "tender of delivery" of the goods, unless "the warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance."[36]

4. Mass. Gen. Laws. Chapter 93A

Mass. Gen. Laws ch. 93A is Massachusetts Consumer Protection Statute. It prohibits against unfair or deceptive trade practices. The statute of limitations under the statute is four years.[37]

B. Statute of Repose

Massachusetts law provides for an absolute statute of repose with regard to actions in tort related to "damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property."[38] The Statute of Repose will bar tort claims, regardless of the operation of the "discovery rule," set forth above. For private construction projects, the Statute of Repose runs from the earlier of: (a) the opening of the improvement to use or (b) substantial completion and the taking of possession for occupancy by the owner. For public construction projects, the Statute of Repose runs from the earlier of: (a) official acceptance of the project by the agency; (b) its opening to public use; (c) the contractor's acceptance of a final estimate by a public agency; or (d) substantial completion and the taking of possession for occupancy by the awarding authority.

The Statute of Repose protects those who "perform acts of individual expertise akin to those commonly thought to be performed by architects and contractors - that is to say, to parties who render particularized services for the design and construction of particular improvements to

particular pieces of real property. The Statute of Repose does not protect manufacturers and materialmen, or "mere suppliers of standardized products."[39]

The Statute of Repose does not apply to claims for breach of contract.[40] This includes claims between defendants based upon contractual indemnification clauses.[41] Claims based upon breach of express warranty are considered to be breach of contract actions, and thus outside the scope of the statute of repose.[42] The Statute of Repose bars the addition of protected parties in an action that had previously been commenced against other parties, and does not allow amended claims to relate back to the date of commencement as otherwise allowed under Mass. R. Civ. P 15(c).[43] The Statute of Repose also applies to claims for statutory contribution. [44]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

At least 30 days before a consumer complaint for violation of M.G.L. c 93A may be filed, the consumer claimant is required to serve a demand letter upon the defendant.[45] Chapter 93A proscribes acts in trade or commerce that may be considered "unfair" or "deceptive." Chapter 93A allows recovery of double or treble damages and attorney's fees. Double or treble damages are allowed if the Court finds a "knowing or willful" violation of the statute. A finding of a violation Chapter 93A mandates an award of attorney's fees and costs.

A consumer claimant must serve a written Chapter 93A demand letter prior to filing suit. This is a jurisdictional prerequisite to maintaining such claim, wherein the plaintiff is a consumer alleging a violation of Section 9.[46] A finding of multiple damages and attorney's fees under Chapter 93A may be avoided if the defendant, after receipt of a demand letter under M.G.L. c. 93A, makes a reasonable offer of settlement within 30 days. If the court subsequently finds that the tender of settlement was reasonable, timely, and rejected by the claimant, the plaintiff will be barred from recovery of attorney's fees and multiple damages, even if the court finds that the violation of G.L. c. 93A was willful or knowing.[47]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Commercial General Liability (CGL) insurance provides coverage for legal liability, as well as defense costs, if an alleged lawsuit covered under the policy arises out of an accidental occurrence. Typically, CGL coverage protects against claims of damage to third party property. However, the "business risk exclusion" which is common in most policies may preclude coverage of risks to the project itself.[48]

B. Trigger of Coverage

Coverage is triggered on the date that the complaining party is actually damaged. An occurrence policy covers a claims that took place during the applicable policy period.[49] The Supreme Judicial Court of Massachusetts has ruled that coverage for latent injury claims is not restricted to the year in which damage "manifests."[50] Thus, regardless of the date of discovery, if the complaining party is actually damaged during the policy period the claim should be covered.

C. Allocation Among Insurers

As of yet, Massachusetts courts have not addressed allocation issues in the specific context of construction defect claims. Such case law as exists with respect to pollution and toxic tort claims suggests, however, that Massachusetts will not permit allocation of orphan shares to policyholders and will instead allow insureds to maximize their coverage through an "all sums" approach.[51]

VI. CONTRACTUAL INDEMNIFICATION

Massachusetts law does not interpret indemnification contracts in favor of the indemnitee. Rather, indemnification provisions are to be read without any bias for the indemnitor or against the indemnitee. They are to be interpreted like any other contract, with attention to language, background, and purpose.[52]

Pursuant to M.G.L. c. 149, § 29C, an indemnity provision will be declared void if it "requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents, or subcontractors."[53] The court will look at the language on its face, and will not base its decision on the particular facts of the case, in examining the validity of a clause under the statute.[54] While the statute refers to claims "caused by" the subcontractor, the language arising out of or in consequence of the performance of the subcontractor's work" has been deemed acceptable.[55] Savings language ("to the fullest extent permitted by law") will allow the Court to excise any offensive portions of indemnity provision and enforce remainder to the extent that the remainder was consistent with the statute.[56]

Where a party is entitled to indemnification, the indemnitee may recover reasonable attorney's fees incurred in defending a claim within the scope of the indemnity clause, regardless of whether the indemnity clause provides for recovery of attorney's fees.[57] It has been held that late notice may preclude a claim, where the contract requires prompt notice as a condition precedent.[58]

The Appeals Court has held that an indemnity provision in a subcontract agreement was a proportional indemnity provision and that M.G.L. c. 149, §29C, the Massachusetts indemnity limiting statute, does not prohibit proportional indemnity.[59] The clause obligated the subcontractor to indemnify the general contractor against any claims arising out of the performance of the subcontractor's work, "but only to the extent caused in whole or in part by the negligent or willful acts or omissions" of the subcontractor. The Appeals Court agreed that the prefatory phrase "but only to the extent" restricted the indemnity obligation to "only" those losses caused by its negligent conduct, and held that it imposed a proportional indemnity obligation.

VII. CONTINGENT PAYMENT AGREEMENTS

On public projects, Massachusetts has long required prompt payment of contractors and subcontractors. Now, under the Prompt Payment Law, M.G.L. c. 149, § 29E, such protections are also given to contractors on private projects. The new law, which generally will cause "pay if paid clauses" to be unenforceable, applies to all private projects of $3 million or more, with the exception of small-scale residential projects (four or fewer units).

The prompt payment law requires that payment applications be submitted on a cycle of no more than 30 days. The requisition then must be either approved or rejected within 15 days of submission, with opportunity for a 7 day extension for each tier below the prime contract. Any rejection of a requisition has to be in writing, has to explain the basis for the rejection, and has to include a certification that the rejection is made in good faith. If there is no written rejection meeting those requirements within the 15-day period, the requisition is "deemed to be approved." Payment must be made within 45 days after approval or "deemed" approval.

There are two exceptions to prompt payment which must be clearly expressed in the subcontract: (1) money not paid due to nonperformance (after notice and opportunity to cure) of the person seeking payment; and (2) allows nonpayment if the payor is insolvent or becomes insolvent within 90 days after pay request is made. Notwithstanding the exception, the person seeking to enforce the paid if paid clause due to insolvency must file a Notice of Contract prior to the first payment requisition and pursue all other reasonable legal remedies against the insolvent party.[60]

VIII. SCOPE OF DAMAGES RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

In Massachusetts, tort claims for personal injury and property damage are permitted without limitation.[61] On the other hand, construction defect damages are limited. A claim for property damage resulting from negligent construction is only permitted when the property damage exceeds the value of the defective work itself.[62]

B. Attorney's Fees

Attorney's fees are not recoverable, unless agreed to by contract, or where allowed by statute. A significant statute allowing recovery of attorney's fees is M.G.L. c. 93A, et seq., Massachusetts Consumer Protection Statute. M.G.L. C. 93A claims may be brought both in a consumer and business to business context. To prevail, the claimant must prove that the defendant, in the course or trade or commerce, committed an "unfair" or "deceptive" practice.[63] Under Massachusetts law, a breach of warranty in a consumer context[64], or a violation of the Massachusetts Home Improvement Contractors Act (M.G.L. c. 142A, et seq.) is a *per se* violation of Chapter 93A.[65]

C. Consequential Damages

In a breach of contract action, a plaintiff is entitled to be made whole, and no more.[66] The plaintiff is allowed damages so that the plaintiff is "placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence, and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, as so far a compensation therefor in money can be computed by rational methods upon a firm basis of facts."[67]

D. Delay and Disruption Damages

Delay and disruption damages are recoverable if allowed by contract, and if not otherwise precluded by operation of law. "No damage for delay" clauses are upheld under Massachusetts law.[68] In public construction projects in Massachusetts, M.G.L. c. 30, § 39O, as interpreted by the Supreme Judicial Court, greatly restricts claims for delay damages in public projects.[69]

E. Economic Loss Doctrine

The economic loss rule provides that economic losses are not recoverable in tort, unless arising from physical damage to a plaintiff's property or personal injury.[70] In the absence of personal injury or physical damage to a plaintiff's property, a negligent actor is not liable in tort for economic losses.[71] Economic loss includes "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property."[72] The economic loss doctrine is applicable to construction claims.[73]

F. Interest

In Massachusetts state court, the statutory interest rate for pre-judgment interest on contract and tort actions is 12%.[74] For tort action, interest runs from the date of filing the action.[75] For breach of contract actions, interest runs from the date of breach, if established, or the date of demand, if established, or otherwise from the date of filing suit.[76]

G. Punitive Damages

Absent statutory authority, none. A statutory source of punitive damages in Massachusetts for construction defect claims is M.G.L. c. 93A, et seq. To prevail under Chapter 93A, the claimant must prove that the defendant, in the course or trade or commerce, committed an "unfair" or "deceptive" practice. If the Court finds a "knowing or willful" violation of the statute, the Court must award not more than treble, but not less than double damages. M.G.L. c. 93A, §§ 9(3) & 11.

Punitive damages are allowed in wrongful death actions if the decedent's death "was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant."[77]

IX. CASE LAW AND LEGISLATIVE UPDATE

1. Tocci Building Corporation v. IRIV Partners, LLC et al., 101 Mass App. Ct. 133 (2022)

The Massachusetts Prompt Payment Act, G.L. c. 149, §29E, sets forth a limited time period for approval or rejection of a periodic progress payment. In Tocci Building Corp. v. IRIV Partners LLC et al., the plaintiff subcontractor entered into a written contract with defendant contractor to provide construction services and materials. Plaintiff submitted periodic payment applications and defendant had the opportunity to either approve or reject all of plaintiff's payment applications. Defendant did not provide a timely written rejection of the certain payment

applications that included an explanation of the factual and contractual basis for the rejection that was certified to have been made in good faith. The Massachusetts Superior Court, therefore, held that the payment applications must be treated as approved. Plaintiff was entitled to judgment on its contract claims for the payments demanded.

2. Graycor Construction Company, Inc. v. Pacific Theaters Exhibition Corp., et al., 490 Mass. 636 (2022)

In the early months of the COVID-19 pandemic, the Supreme Judicial Court issued a series of orders which, among other things, tolled deadlines set forth in statutes. In Graycor Construction Company, Inc. v. Pacific Theaters Exhibition Corp., the Supreme Judicial Court found that these orders only applied to those statutory deadlines that pertained to cases pending in court or to be filed in court. The SJC found that these orders did not apply to executive agencies, such as the registry of deeds. Therefore, an untimely mechanic's lien filing at the registry of deeds could not be considered timely under the SJC's COVID-19 tolling orders.

3. Doull et al. v. Foster et al., 487 Mass. 1 (2021)

The Massachusetts Supreme Judicial Court clarified the instruction to be given in cases where there are multiple defendants, or multiple claims arising out of a tort. After Doull, the correct instruction for a jury is the "but-for" standard. In doing so, the SJC ended the use of the substantial fact test in negligence cases, except in toxic tort cases. Simply, if the plaintiff's injury would not have occurred but for the defendant's actions, then the defendant's conduct is a factual case of the injury or harm. If the injury or harm would have occurred regardless of the defendant's conduct, then a plaintiff has not established that a defendant's conduct caused injury or damage to plaintiff.

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[1] M.G.L. c. 254, § 2 (general contractor's lien); M.G.L. c. 254, § 4 (subcontractor's lien).
[2] Absent a written contract, a mechanics' lien may be obtained only for personal labor for "not more than thirty days' work actually performed" during the 90 days preceding recording a statement of claim. M.G.L. c. 254, § 1.
[3] A party with a written contract with "the owner of any interest in real property, or with any person acting for, on behalf of, or with the consent of such owner," for "the whole or part of the erection, alteration, repair or removal of a building, structure, or other improvement to real property, or for furnishing material or rental equipment, appliances, or tools therefor," may enforce a lien upon such property as "owned by the party with whom or on behalf of whom the contract was entered into, as appears of record on the date when notice of said contract is filed or recorded in the registry of deeds for the county or district where such land lies." M.G.L. c. 254, § 2.
[4] M.G.L. c. 254, § 4.
[5] *Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co.,* 440 Mass. 723, 728 (2004).
[6] M.G.L. c. 254, § 6 ("No lien shall attach to any land, building or structure thereon owned by the commonwealth, or by a county, city, town, water or fire district.")
[7] *Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co*., 440 Mass. 723 (2003); *NG Bros. Constr. v. Cranney*, 436 Mass. 638, 644 (2002); *East Coast Steel Erectors, Inc. v. Ciolfi*, 417 Mass. 602, 605 (1994); *Pratt & Forrest Co. v. Strand Realty Co*., 233 Mass. 314, 318 (1919).
[8] M.G.L. c. 254, § 15A.
[9] M.G.L. c. 254, § 32.

[10] The form of the Notice of Contract is set forth in the statute, M.G.L. c. 254, § 2.
[11] M.G.L. c. 254, § 8.
[12] M.G.L. c. 254, § 8.
[13] M.G.L. c. 254, § 11.
[14] M.G.L. c. 254, § 5.
[15] The form of the Notice of Contract is set forth in the statute, M.G.L. c. 254, § 4.
[16] M.G.L. c. 254, § 4.
[17] M.G.L. c. 254, § 4; *BloomSouth Flooring Corp. v. Boys' and Girls' Club of Taunton,* 440 Mass. 618, 620 (2003).
[18] M.G.L. c. 254, § 4.
[19] M.G.L. c. 254, § 15.
[20] M.G.L. c. 254, § 10.
[21] M.G.L. c. 254, § 14.
[22] M.G.L. c. 254, § 14.
[23] M.G.L. c. 254, § 12.
[24] M.G.L. c. 30, §39M.
[25] M.G.L. c. 30, §39I.
[26] M.G.L. c. 30, §39K.
[27] M.G.L. c. 30, §39K.
[28] M.G.L. c. 30, §39I.
[29] M.G.L. c. 30, §39O.
[30] M.G.L. c. 260, § 2.
[31] M.G.L. c. 106, § 2-725.
[32] M.G.L. c. 260, § 2B.
[33] *Pagliuca v. Boston,* 35 Mass. App. Ct. 820, 824 (1994).
[34] *Riley v. Presnell,* 409 Mass. 239, 245-48 (1991).
[35] *White v. Peabody Constr. Co.,* 386 Mass. 121, 130 (1982).
[36] M.G.L. c. 106, § 2-725 (2007); *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 110-11 (1989); *Wilson v. Hammer Holdings, Inc.,* 850 F.2d 3, 7 (1st Cir. 1988).
[37] M.G.L. c. 260, § 5A.
[38] M.G.L. c. 260, § 2B.
[39] *Dighton v. Federal Pacific Elec. Co.,* 399 Mass. 687, 695 (1987), *cert. denied* 484 U.S. 953 (1987); *Fine v. Huygens,* 57 Mass. App. Ct. 397, 401-02 (2003) (manufacturer of custom GFRC panels deemed protected actor).
[40] *Klein v. Catalano,* 386 Mass. 701, 718 (1982).
[41] *Gomes v. Pan American Assoc*., 406 Mass. 647, 648 (1990).
[42] *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.,* 396 Mass. 818, 823 (1986).
[43] *Tindol v. Boston Housing Authority,* 396 Mass. 515, 519 (1986).
[44] *Ferrera & Sons, Inc. v. Samuels,* 21 Mass. App. Ct. 170. 174 (1985), *rev. denied* 396 Mass. 1106 (1986).
[45] M.G.L. c. 93A, § 9.
[46] M.G.L. c. 93A, § 9; *Spring v. Geriatric Authority of Holyoke*, 394 Mass. 274, 287 (1985).
[47] *Kohl v. Silver Lake Motors, Inc.,* 369 Mass. 795, 801-02 (1976).
[48] *Commerce Ins. Co. v. Betty Caplette Builders, Inc.*, 420 Mass. 87, 92 (1995).
[49] *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 350 (2009).
[50] *Trustees of Tufts University v. Commercial Union Ins. Co.,* 415 Mass. 844, 853-54 (1993) (persistence of pollution from earlier industrial activity held to trigger insurers' duty to defend).
[51] In *Rubenstein v. Royal Ins. Co. of Am.,* 44 Mass. App. Ct. 842 , 853-54(1998), the Appeals Court ruled that a trial court had not erred in refusing to apportion the insureds' damages among all of the years in which pollution occurred holding that each insurer is jointly and severally liable for the entire claim. As the trial court had concluded that property was continuously being contaminated by the leakage of oil during Royal's 1969-72 policy, the Appeals court ruled that it was this continuous exposure to contaminants that was decisive and that Royal's claim for allocating damage awards among other years of coverage must fail. The Appeals Court ruled in *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyds,* 59 Mass. App. Ct. 646 (2003), *rev. denied* 441 Mass. 1101 (2004) (Illinois law) that a Superior Court had correctly ruled that a polluter was entitled to recover the entirety of its loss under certain umbrella policies issued before 1970. *See also Boston Gas Co. v. Century Indem. Co.,* No. 02-12062 (D. Mass. June 21, 2006) (opining that there is no reason to believe the Supreme Judicial Court would not follow "all sums" approach).

[52] *Herson v. New Boston Garden Corp.,* 40 Mass. App. Ct. 779, 782 (1996), *rev. denied* 423 Mass. 1108 (1996); *Speers v. H.P. Hood, Inc.,* 22 Mass. App. Ct. 598, 600 (1986), *rev. denied* 398 Mass. 1105 (1986).
[53] M.G.L. c. 149, § 29C provides as follows: "Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void."
[54] In *Harnois v. Quannapowitt Dev*, 35 Mass. App. Ct. 286, 288 (1993), *rev. denied* 416 Mass. 1106 (1993), the Appeals Court ignored the effect of the indemnification provision as applied to the facts of the particular case before it. The court recognized that indemnity disputes between general contractors and subcontractors were unduly burdening the courts and parties with time-consuming assessments of negligence and comparative negligence.
[55] In *M. DeMatteo Construction Co. v. A.C. Dellovade, Inc.,* 39 Mass. App. Ct. 1, 3-4 (1995), *rev. denied* 421 Mass. 1103 (1995), the Massachusetts Appeals Court determined that an indemnity provision which contained the language "arising out of or in consequence of the performance of the subcontractor's work" survived the state's anti-indemnity statute because the language limited the subcontractor's indemnity obligation to situations where there was a causal connection between the subcontractor's work and the injury. In addition, the Court determined that the anti-indemnity statute does not require a finding of negligence in order to trigger the indemnity obligation.
[56] *Callahan v. A.J. Welch Equip. Corp.,* 36 Mass. App. Ct. 608, 611-613 (1994).
[57] *Id.* at 614 n. 6 (1994); *Amoco Oil Co. v. Buckley Heating, Inc.,* 22 Mass. App. Ct. 973, 973 (1986).
[58] In *Cheschi v. Boston Edison Co., et al.,* 39 Mass. App. Ct. 133, 142 (1995), *rev. denied* 421 Mass. 1102 (1995), *rev. denied* 421 Mass. 1105 (1995), the Massachusetts Appeals Court determined that the owner's failure to give the contractor notice of a negligence claim brought against it by an employee of the contractor until four years after the accident and two and one-half years after the negligence action was filed relieved the contractor of its obligation to defend and indemnify the owner, where the indemnity provision specifically required prompt notification as a condition precedent to the contractor's indemnification.
[59] *North American Site Developers, Inc. v. MRP Site Development, Inc.,* 63 Mass. App. Ct. 529, 534-35 (2005).
[60] M.G.L.c. 149 § 29E (e).
[61] *McDonough v. Whalen*, 365 Mass. 506, 515 (1974).
[62] *Id.* at 512; *Zompetti v. Fleetwood Travel Trailers of Maryland, Inc*., 63 U.C.C. Rep. Serv. 2d 333 (Mass. Super. Ct. 2007).
[63] M.G.L. c. 93A, § 2.
[64] *Maillet v. ATF-Davidson Co.,* 407 Mass. 185, 193 (1990); 940 C.M.R. 3.08(2).
[65] M.G.L. c. 142A, § 17.
[66] *Ficara v. Belleau,* 331 Mass. 80, 82 (1954).
[67] *John Hetherington & Sons, Ltd. v. William Firth Co.,* 210 Mass. 8, 21 (1911).
[68] *Bonacorso Construction Corp. v. Commonwealth,* 41 Mass. App. Ct. 8, 13 (1996); *Reynolds Bros. v. Commonwealth,* 412 Mass. 1, 7 (1992); *B.J. Harland Electrical Co. v. Granger Bros.,* 24 Mass. App. Ct. 506, 509 (1987), *rev. denied* 400 Mass. 1105 (1987), *rev. denied* 401 Mass. 1101 (1995).
[69] *Reynolds Bros. v. Commonwealth,* 412 Mass. 1, 7 (1992).
[70] *Fisher v. Stop & Shop,* 387 Mass. 889, 893-94 (1983).
[71] *Berish v. Bornstein,* 437 Mass. 252, 267 (2002).
[72] *Marcil v. John Deere Indus. Equip. Co.,* 9 Mass. App. Ct. 625, 630 n. 3 (1980).
[73] *McDonough v. Whalen,* 365 Mass. 506, 513-14. (1974)
[74] M.G.L. c. 231, §§ 6B & 6C.
[75] M.G.L. c. 231, § 6B.
[76] M.G.L. c. 231, § 6C.
[77] M.G.L. c. 229, § 2.