

## Landmark Case Makes It Easier for Condominium Associations to Recover for Construction Defects

By Donna Toman Salvidio, Esq.

A significant new ruling by the Massachusetts Supreme Judicial Court will make it easier and more lucrative for condominium associations to seek redress for construction defects. The case, Wyman vs. Ayer Properties, LLC, concerned a former mill building which was renovated and converted into a mixed-use condominium. [To see a full copy of the decision, 469 Mass. 64 (July 10, 2014), you can visit our website.] Shortly after construction was completed and the units sold, certain defects in the common areas became apparent. The roof and windows began leaking and the masonry facade started crumbling. The trustees of the condominium unit owners' association sued the developer to recover the costs of the repairs.

At trial, the condominium association was only partially victorious against the developer due to the application of a relatively obscure legal concept known as the "economic loss doctrine." The economic loss doctrine was initially intended to limit liability claims in transactions between businesses, but it has historically been the "magic bullet" used by insurance companies to defend condominium developers and limit negligence claims brought against them for faulty construction.

The economic loss doctrine was originally developed in product liability cases but expanded to other industries, including the construction industry. It provides that if the only harm done to the claimant by a defective product (in this case, the "product" is the building) is that it will cost money to fix it, the claimant is entitled to recover only the damages specified in the contract, and not the much larger sums typically awarded for negligence or other harms. The strict application of the economic loss doctrine in prior cases meant a condominium developer could not be held liable for negligent construction unless the claimant also suffered some form of personal injury or property damage beyond the defective product itself.

The problem posed by the application of this doctrine to condominium associations in particular resulted from the unique ownership structure of condominium developments. While the units are private property owned by individuals, the common areas are generally owned by the unit owners' association (typically

a trust) comprised of all the unit owners. Normally, the unit owners' association is created *after* the completion of construction and there is no contractual relationship between such association and the developer, contractors, architects and others who might be responsible for construction defects.

While unit owners who purchased from the developer might be able to recover damages for problems in their units based on their contracts with the developer, the unit owners' association was out of luck if the defects were with common areas such as roofs, elevators, lobbies, parking areas or other amenities. In Wyman, the trial judge ruled that while the condominium association was entitled to the costs to fix the leaky roof and windows (because the leaks caused other damages to the units), the economic loss doctrine barred the condominium association from recovering any part of the \$80,000 repair to the crumbling brick facade on a negligence theory because the damage was only to the building — and since there was no contract between the condominium association and the developer, the condominium association was left with no remedy against the developer.

Recognizing the unfair result and unintended insulation that the application of the economic loss doctrine had provided to developers and contractors from an entire class of negligence claims in the condominium context, the Massachusetts Appeals Court, and now the Supreme Judicial Court, held that the economic loss rule is not applicable to damages caused to the common areas of a condominium as a result of a developer's negligence.

The Wyman case removes a substantial bar that once prevented condominium associations from recovering losses for defective design and construction of common areas. While the costs of pursuing such litigation for small-scale defects may not make financial sense, large-scale condominium developments with significant remediation costs now have a remedy against negligent developers where there once was none. This represents a significant weapon in the arsenal of condominium associations and an erosion of the economic loss doctrine within the construction industry.

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