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## **SJC bars “overreaching” restrictions for condo. owners to sue developers**

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The Massachusetts Supreme Judicial Court (SJC) has ruled that condominium developers can't unreasonably restrict the ability of owners to file suits against them. The court rejected the “poison pill” provisions developers often use to insulate themselves from liability for construction defects, design flaws and other claims condominium owners might pursue against the developers of their communities.

“This is a huge victory not just for the plaintiff in this case, but for all Massachusetts condominium owners, who would have no recourse against developers for what they did, failed to do, or did poorly, if poison pill provisions were enforceable,” said Edmund Allcock, a partner in Marcus, Errico, Emmer & Brooks, P.C., who represented the trustees of Cambridge Point Condominium, the plaintiffs in this suit against Cambridge Point, LLC, the developer of the community.

The trustees challenged a provision in the condominium community's governing documents that required 80 percent of the owners to approve litigation against the developer – “a practical impossibility here,” Allcock said, “because the developer still controls 20% of the units and, as the SJC noted in its decision, ‘developers are unlikely to agree to sue themselves.’” The trustees were trying to file a \$2 million construction defect suit against the developer, which the developer sought to block, arguing that 80% of the owners had not authorized it.

Reversing a lower court ruling favoring the developer, the SJC concluded that it was “overreaching” and “contrary to public policy” for a developer to impose a provision that “for all practical purposes, makes it extraordinarily difficult or even impossible for the trustees to initiate any litigation against the developers regarding the common areas and facilities of a condominium.”

The public policy the court cited, Allcock explained, is the “warranty of habitability” – the right of home owners to ensure the safety and habitability of their residences. “If condominium associations can't sue developers for defects in construction or design, owners lose this essential right,” Allcock said.

“And they might lose that right forever,” he said. “As the court noted in its decision, developers could permanently bar any claims against them by retaining control of an association for six years, when the statute of limitations on those claims would expire.”

Closely watched by real estate developers and the condominium industry, the litigation attracted amicus briefs from the Real Estate Bar Association and the Community Associations Institute of New England, both supporting the condominium trustees.

“Although the SJC decision applies only in Massachusetts, we believe that the theory on which it is based – that owners must be able to pursue legal remedies against developers – should apply to condominiums everywhere,” said Ellen Shapiro, a partner in Goodman, Shapiro & Lombardi, LLC. Shapiro and her partner, Henry Goodman, co-authored the CAI-New England amicus brief. “Developers in many states, not just in Massachusetts, are inserting poison pill provisions in condominium documents,” she said. “We hope courts in other jurisdictions will follow the SJC’s lead and reject them.”

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