Scribbles Squibs # 1 (January 21, 2013): Economic loss doctrine and claims as to condominium common areas.

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Here is a recent appellate court decision chipping away at the robotic application of the economic loss doctrine to construction issues. In this case, the Appeals Court found that such doctrine would not be applicable as to damages caused to common areas of the condominium building itself not having specific application to individual condominium units. Until this decision issued, it was an open question (undecided) under Massachusetts law whether the integrated product rule would be applicable to condominium properties.

The recent decision in the case of Wyman v. Ayer Properties, LLC, just handed down by the Appeals Court, deals with the application of the economic loss doctrine to a case by a condominium association against a developer. The economic loss doctrine has been the bane of those seeking to sue design professionals (among others) for damages. For, that doctrine has fairly consistently held that design professionals are not liable to parties for mere 'economic loss' (loss of money only) but that such claims are only viable in the presence of personal injury or property damage (the mere loss of money not being seen as property damage.) The rule heretofore had also been seen as applicable in negligent construction claims by a condominium association against a developer.

In this case, the Plaintiff trustees of the Market Gallery Condominium Trust sued the developer as to certain issues pertaining to issues involving leaking window frames, a deterioration of the brick masonry façade and a roof that was absorbing water and permitting leakage and damage to insulation under the roof and to four residential units. The building was a vacant mill building that was converted to condominiums. One of the four basic claims against the developer was negligent design and construction of common areas, a situation which had not, heretofore, been recognized as a possible cause of action in Massachusetts as to renovations, at least as to common areas. Damages were awarded at trial as to the leaking window frames and the leaking roof because those two defects directly led to damages to individual units. However, where the deterioration of the brick masonry itself did not affect any individual units, the trial judge did not allow any damage for its correction, even though there was evidence during the eleven day trial that the cost of fixing the masonry would be in excess of eighty thousand dollars. The Defendant, on appeal, argued that the economic loss doctrine precluded the award of any damages because the condominium building was an 'integrated product' and the Plaintiff could not demonstrate damage to *another* property.

The Appeals Court discussed the economic loss doctrine and pointed out that this generally precludes the award of "damages of 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." (Thus, inherent in the trial court's award of damages was the construction that the building, as a whole, could be seen as one property and the individual units could be seen as *other* property. In other words, the trial court saw the units as a second property as compared with the building itself.) Further, the Appeals Court pointed out that this rule

applies to claims of negligence against a builder of houses or other realty structures. As pointed out by the Appeals Court, a component of the rule is that injury or damage must occur to person or property *beyond* the defective product or structure itself. That, failing this, recovery for harm to the product or structure itself falls within the range of contract and warranty claims, not the more uncertain range of tort remedies, such as for negligence. (ED: The problem with this application is that the individual unit owners would not have had a contract with the developer: thus, it would be unlikely that they could make viable contract claims. And, since the units were renovations, rather than new construction, there are no inherent warranty rights given to unit owners unless the builder expressly gives them.)

The Plaintiff had argued that defects of the common area exterior window frames had caused damage to the interior privately owned window sashes and that the common area roof leakage had caused damage to four individual units and other space below the roof. That, as such, the consequential physical damage to separate property satisfied the requirements of the rule as to harm beyond damage to the original product or structure. The Defendant had argued that the condominium building was an integrated product and that the trustees showed no harm to any property beyond that product, thus barring such a claim. The trial court did allow damages as to the window frames and leaky roof, as these affected individual units. But, since deterioration of the masonry façade did not relate to specific individual units but only to the building itself, the rule would not apply as to the costs of remediating this damage and the trial judge, therefore, did not award the Plaintiff any damages with regard to this issue.

The Appeals Court reversed the trial court's decision as to the masonry claim due to the trial court's finding that the deterioration of the common area property damage did not cause further harm to individually owned units as 'other property'. The court said that liability should not hinge on the fortuity of secondary harm (such as damage to an interior unit). Where, as here, there has been a thorough adjudication of fault, causation, harm and measurable damages, an award of damage does not violate the policy of the rule against exposure of the developer to indeterminate consequences. Therefore, in these circumstances, a condominium unit owners' association may recover damages for negligent design or construction of common area property in which damages are reasonably determinable. The Court pointed out that unless this were so, the condominium association would be without a remedy (meaning, not having a recognizable legal claim or method to obtain damages.)

It has always struck this writer as unfair that negligence claims could not be made by an injured party due to a claim of mere economic loss (loss of money only). This case appears to be a significant retreat from this position, at least with regard to the kind of claims made within this case.

Interviewed after the decision came down, the Plaintiff's counsel said that before this decision, if defective workmanship or design of a roof system diminished a roof's life expectancy by 99 percent but caused no harm to other property, a condominium association would have to recourse (would not be able to sue.) Counsel for the developer called the decision "a potentially significant erosion of the rule. We are not aware of any other cases that have interpreted the economic loss rule in this manner", adding that his client would seek 'review' of

the Appeals Court decision by the Supreme Judicial Court. (ED: This is discretionary with the Supreme Judicial Court under our Rules of Civil Procedure, not an automatic right. Namely, there is no inherent right to 'appeal' an adverse determination by the Appeals Court in this type of civil case. However, where this case seems to be a departure from existing law, this is the kind of case that the Supreme Judicial Court typically will review.)

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