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Appeals Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 2017-P-0113

MIDDLESEX COUNTY

TRUSTEES OF THE CAMBRIDGE POINT CONDOMINIUM TRUST,
PLAINTIFFS,

v.

CAMBRIDGE POINT, LLC, NORTHERN DEVELOPMENT, LLC, CDI COMMERCIAL DEVELOPMENT, INC., GIUSEPPE FODERA, FRANK FODERA, FRANK FODERA, JR. AND ANAHID MARDIROS,
DEFENDANTS.

ON APPEAL FROM A DECISION OF THE TRIAL COURT

AMICUS CURIAE BRIEF OF THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB IN SUPPORT OF THE PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Statement of Interest of the Amicus Curiae

This brief is submitted by the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), formerly known as Massachusetts Conveyancers Association, and the Abstract Club (collectively the "Amicus Committee"). REBA is the largest specialty bar in the Commonwealth. It is a non-profit corporation that has been in existence for over one hundred years. It has approximately 2,000 members practicing in cities and towns throughout the Commonwealth.

Through its meetings, educational programs, publications and committees, REBA members keep current with developments in the field of real estate law and practice and share in the effort to improve that practice. REBA works toward the improvement of real estate law and practice through educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases and established legal principles to a wide variety of circumstances practitioners face in valuating title and handling real estate transactions.

The Abstract Club is a voluntary association of experienced lawyers who practice real estate law. It has been in existence for over 100 years and is limited by its by-laws to 100 members.

The Amicus Committee is a joint committee of the two organizations comprised of real estate lawyers with many years of experience. The Amicus Committee, from time to time, files amicus briefs on important questions of law. On several occasions it has been requested to do so by this Court. All Committee members serve without compensation.

The Amicus Committee submits this Brief on behalf of its members and the real estate bar generally, and in particular for those practitioners who recognize that the sustained health of the condominium form of ownership in Massachusetts depends on condominium trustees' being able to exercise the exclusive power provided to them under G.L. c. 183A, § 10(b)(4) to conduct litigation in their discretion as to matters involving the common areas of the condominium, including construction defect claims against the condominium declarant-developer (hereinafter, "declarant"). The Amicus Committee's position is that an anti-litigation provision contained within a

condominium's governing documents is void and unenforceable to the extent that provision prevents the trustees from bringing suit against the declarant contrary to the Massachusetts Condominium Act. The decision of the Trial Court, if upheld, will allow developers to shield themselves from liability by placing poison pill provisions in the condominium documents, thereby vitiating the protections of the Commonwealth's Condominium Act and Consumer Protection Statute. An entity with a fiduciary duty to an association should not be able to intentionally and knowingly insulate itself from liability claims advanced by that association. What's more, an anti-litigation provision prevents recovery for a breach of the judicially-established implied warranty of habitability.

The Amicus Committee urges this Court to reverse the Trial Court's decision and to confirm the long-established practice of condominium trustees fulfilling their exclusive and unrestricted obligations under the Massachusetts Condominium Act to seek judicial redress against declarants for defective common areas of the condominium.

Statement of the Issue Presented for Review

1. Whether an anti-litigation provision contained within a condominium by-law, requiring condominium trustees to obtain an 80 percent unit owner vote (among other things) prior to filing a lawsuit against a condominium developer, is contrary to the Massachusetts Condominium Act.

2. Whether an anti-litigation provision contained within a condominium by-law, which requires condominium trustees to obtain an 80 percent unit owner vote (among other things) prior to filing a lawsuit against a condominium developer is unlawful because it prevents recovery for a breach of the judicially-established implied warranty of habitability.

3. Whether an anti-litigation provision contained within a condominium by-law, which requires condominium trustees to obtain an 80 percent unit owner vote (among other things) prior to filing a lawsuit against a condominium developer is a violation of the declarant’s fiduciary duty to the association it created.

4. Whether an anti-litigation provision contained within a condominium by-law, which requires

condominium trustees to obtain an 80 percent unit owner vote (among other things) prior to filing a lawsuit against a condominium developer violates the Massachusetts Consumer Protection Act.

Statement of the Case

REBA relies upon, and incorporates by reference, the Statement of the Case set forth in the Brief of the Plaintiff-Appellant Trustees of the Cambridge Point Condominium Trust.

Statement of the Facts

REBA relies upon, and incorporates by reference, the Statement of the Facts set forth in the Brief of the Plaintiff-Appellant Trustees of the Cambridge Point Condominium Trust.

SUMMARY OF THE ARGUMENT

The anti-litigation provision contained in the condominium documents, which requires an 80% vote of the unit owners (among other things) prior to the commencement of litigation by the Trustees of the Cambridge Point Condominium Trust (the "Trustees") against the declarant, is inconsistent with the duties of condominium trustees as established by the Massachusetts Condominium Act, G.L. c. 183A (the "Condominium Act"). The Condominium Act provides

exclusive authority to the Trustees to litigate matters involving the common elements. G.L. c. 183A, § 10(b)(4). The Trial Court’s decision places an impermissible barrier to the Trustees’ exercise of this exclusive authority.

The Uniform Condominium Act (“UCA”) and the more-recent Uniform Condominium Interest Ownership Act (“UCIOA,” collectively the “Uniform Acts") explicitly prohibit a declarant from imposing unique limits on the Trustees' power to deal with the declarant, which is exactly what the anti-litigation provision aims to do. Because of the enabling nature of G.L. c. 183A, the Court should look to the Uniform Acts for guidance in the interpretation of the Condominium Act.

Additionally, the poison pill language prevents the association of unit owners from recovering for breach of the judicially established implied warranty of habitability for new condominiums, and is contrary to legislative intent and public policy. Furthermore, a condominium declarant should be viewed as having a fiduciary duty to the condominium association. A provision that prevents the unit owners association from suing the declarant does not reflect the fair

dealing required by the "entire fairness" standard and is a violation of the declarant's fiduciary duty.

Finally, the anti-litigation provision constitutes an impermissible waiver of consumer protection rights in violation of Chapter 93A. The anti-litigation provision in the Cambridge Point governing documents precludes the association from bringing consumer protection claims under Chapter 93A. Massachusetts courts rarely permit waiver of the right to recover under Chapter 93A, and only do so in circumstances not present here. Therefore, the anti-litigation provision interferes with the legislative safeguards of the Consumer Protection Act and is void and unenforceable.

ARGUMENT

I. THE MASSACHUSETTS CONDOMINIUM STATUTE, G.L. c. 183A CONFERS ON THE TRUSTEES THE EXCLUSIVE, UNRESTRICTED POWER TO CONDUCT LITIGATION AS TO THE COMMON AREAS AND FACILITIES OF A CONDOMINIUM.

Pursuant to Condominium Act, G.L. c. 183A, § 10(b)(4), the Trustees have the exclusive power to conduct litigation at their discretion as to any course of action involving the common areas and facilities.

The Condominium Act was enacted in 1963 by Mass. Acts c. 493, § 1 et seq. It was based on the Federal Housing Administration's ("FHA") 1962 model act, the Apartment Ownership Act, which was intended to provide the bare-bones essentials for a condominium statute and designed to "clarify the legal status of the condominium in light of its peculiar characteristics." Grace v. Town of Brookline, 379 Mass. 43, 52 (1979). Most of G.L. c. 183A's salient provisions, including Section 10 which governs the powers and duties of condominium trustees, have not been amended since 1963. Barclay v. DeVeau, 11 Mass. App. Ct. 236, 247 n.4, aff'd 384 Mass. 676 (1981). Chapter 183A is essentially an enabling statute, setting out a framework for the development of condominiums in the Commonwealth, while providing developers and unit owners with planning flexibility. See Queler v. Skowron, 438 Mass. 304, 312 (2002), citing Barclay v. DeVeau, 384 Mass. 676, 682 (1981). Its "general approach" can be contrasted with more sophisticated legislative schemes set forth in later statutes. Barclay, 11 Mass. App. Ct. at 247 n.4.

Section 10(b)(4) of the Condominium Act provides in relevant part that condominium trustees – and only the trustees:

> **shall** have, among [their] other powers, the following rights and powers…to conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities or arising out of the enforcement of the by-laws, administrative rules or restrictions in the master deed.

Id. (Emphasis supplied). As such, the language of Section 10 by its terms grants to the trustees the exclusive right to conduct litigation concerning "common areas and facilities." See Strauss v. Oyster River Condominium Trust, 417 Mass. 442 (1994), quoting G.L. c. 183A, § 10(b)(4). In the instant case, the Cambridge Point Trustees seek redress against the declarant for alleged defective construction of the common areas of the condominium, which falls squarely within their statutory power under G.L. c. 183A, § 10.

Section 1(o) of the Cambridge Point Declaration and By-Laws, as written, would effectively strip this statutorily conferred power from the Trustees and transfer that power to the individual condominium unit owners because (among other things) it requires 80% of the unit owners consent in writing to litigation

within 60 days of notification. Unlike other provisions in the Condominium Act, the Trustees' power to bring suit to seek redress concerning the common areas and facilities of a condominium is not limited in any way, and most certainly is not limited by a unit owner voting requirement. Compare, G.L. c. 183A §§ 17, 19 (requiring approval of 75 percent of condominium unit owners before assessing common expenses or making structural changes to the condominium unit).

If the Legislature had contemplated such a pre-condition to the exercise of the Trustees' power to conduct litigation against the declarant, c. 183A would have said so. See Carpenter's Case, 456 Mass. 436, 446 (2010) (holding that construction of a statute is an exercise in determining legislative intent, not an exercise in freelance rule making). See also Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513 (1975) (a "statute must be interpreted according to the intent of the Legislature"). In contrast, the Legislature chose to limit condominium trustees' authority in certain circumstances, specifically in G.L. c. 183A, §§ 17 and 19, supra. The fact that the Legislature chose not do so in G.L.

c. 183A, § 10(b)(4) indicates legislative intent to ensure the trustees' power remain unrestricted and unfettered. See also Berish v. Bornstein, 437 Mass. 252, 263 (2002) (noting the unique hybrid statutory nature of condominium ownership conferred absolute power upon condominium trustees to bring litigation for common area construction defects.) Accordingly, the anti-litigation provision inserted into the governing condominium documents by the Cambridge Point declarant contravenes the consistent unrestricted power conferred on the Trustees to conduct litigation under G.L. c. 183A, § 10(b)(4).

The Defendants contend that G.L. c. 183A provides "flexibility" for developers and owners and, as such, unless expressly prohibited by legislative mandate, developers and unit owners may contract in the governing condominium documents as to the details of the management of the condominium. However, a developer's right to contract in the governing condominium documents as to the details of the management of the condominium is not and cannot be unlimited. The declarant cannot bind the association of unit owners because the association did not negotiate or contract with the declarant. This type of

poison pill provision directly conflicts with the broad and exclusive power conferred on condominium trustees under the Condominium Act.

II. WITH UCA AND UCIOA AS GUIDANCE, THIS COURT SHOULD CONCLUDE THAT THE ANTI-LITIGATION PROVISION VIOLATES PUBLIC POLICY AND MASSACHUSETTS LAW.

The Uniform Acts prohibit a declarant from placing poison pills in a condominium's governing documents to shield themselves from liability for defective common areas. Massachusetts Courts have long looked for guidance from extrinsic sources for interpretation of the Condominium Act such as the UCA and the more-recent UCIOA, given the enabling nature of G.L. c. 183A. See e.g., Woodvale Condo. Trust v. Scheff, 27 Mass. App. Ct. 530, 533 n.3, review denied, 405 Mass. 1205 (1989) (citing to UCA in support of its finding that those who submit real estate to condominium regime of statute may impose reasonable restrictions on use of units); Drummer Boy Homes Ass'n, Inc. v. Britton, 474 Mass. 17, 28 (2016) (referring to Appellate Division's reliance on UCA and noting that the Acts do not have provisions akin to G.L. c. 183A, § 6(c)); Barclay, 384 Mass. at 683, 685 n.17 (holding "portions of the [UCA]...may present useful guidelines to a trial judge in determining the

reasonableness of developer control..."); Sewall Marshal Condo. Ass'n v. 131 Sewall Ave. Condo. Ass'n, 89 Mass. App. Ct. 130, 135 n.6 (2016) (noting the SJC referred to UCA as "useful guidelines to a trial judge") (internal citation omitted); First Main St. Corp. v. Bd. of Assessors of Acton, 49 Mass. App. Ct. 25, 29–30 (2000) (same); Podell v. Lahn, 38 Mass. App. Ct. 688, 690 (1995) (comparing G.L. c. 183A, § 5(a) with UCA § 2-107); Noble v. Murphy, 34 Mass. App. Ct. 452, 456 & n.5 (1993) (citing to UCA in support of finding that condominium by-law restriction was valid).

The Uniform Acts prohibit poison pills and other unconscionable agreements or terms of contract. See UCA, § 1-112 (1980); UCIOA, § 1-112 (2014). The sections of the Uniform Acts governing unconscionability are modeled after Section 3-203 of the Uniform Commercial Code ("UCC"), which is intended to allow courts to pass directly on the unconscionability of a contract or particular clause therein and make a conclusion of law as to unconscionability. See UCC § 2-302, comment 1 (2016). Under § 2-302, a court, in its discretion, "may refuse to enforce the contract as a whole if it is permeated

by the unconscionability," or "it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." UCC § 2-302, comment 2 (2016).

Additionally, the Uniform Acts require that every contract or duty governed by the Uniform Acts "imposes an obligation of good faith in its performance or enforcement." See UCA, § 1-113 (1980); UCIOA, § 1-113 (2014). The basic principle underlying the Uniform Acts is that good faith is **required** in the performance and enforcement of all condominium agreements and duties. See UCA, § 1-113, comment (1980); UCIOA, § 1-113 comment (2014).[1]

The most recent iteration of UCIOA, which incorporates UCA, rejects poison pill provisions and affirms the trustees' unrestricted authority to

[1] Both § 1-113 of the UCA and UCIOA, respectively, are based upon § 2-103 of the UCC, which defines "good faith" as "honesty in fact and the observance of reasonable standards of fair dealing in the conduct or transaction involved." See UCC § 2-103 (2016).

institute and maintain litigation.[2] Section 3-124 of the UCIOA provides that:

> [s]ubject to the other provisions of this section, ***the determination of whether and when the association may institute a proceeding described in this section may be made by the executive board. The declaration may not require a vote by any number or percent of unit owners as a condition to institution of a proceeding***."

Id. (Emphasis supplied). UCIOA unambiguously prohibits condominium documents from including the type of anti-litigation provision at issue here, requiring a supermajority vote of unit owners prior to the Trustees' initiation of litigation against a declarant/developer. Several states have instituted provisions similar to § 3-124 of the UCIOA, two of which are located here in New England. See Conn. Gen. Stat. Ann. § 47-261f(d); Vt. Stat. Ann. tit. 27A, § 3-124(d); and Del. Code Ann. tit. 25, § 81-321(10).

The official comments to UCIOA state that § 3-102(b) was amended in 2008 specifically "to focus on

[2] In 1982, the UCA, UCIOA and a third uniform act, the Uniform Planned Community Act, were consolidated into a new version of UCIOA, and the Uniform Law Commission thereafter ceased revisions to the UCA. See Daniel Goldmintz, Lien Priorities: The Defects of Limiting the "Super Priority" for Common Interest Communities, 33 Cardozo L. Rev. 267, 273 (2011).

the extent to which a declarant may insert provisions into a declaration designed to impede the association's future flexibility and discretion in managing its affairs." UCIOA, § 3-102 comment 14 (2014). The comments further note that "[t]he amended text preserves the basic rule in the earlier [versions of the] Act that ***prevents the declarant from imposing unique limits on the association's power to deal with the declarant***." Id. (emphasis supplied).[3] Importantly, the anti-litigation provision here at issue applies only to litigation against ***the***

[3]The Uniform Acts also expressly include provisions which govern a declarant's liability to the unit owners association for its torts, in connection with the common areas and any part of the condominium that the declarant is responsible to maintain. See UCA, § 3-111 (1980); UCIOA, § 3-111 (2014).These provisions recognize the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control. See UCA, § 3-111 comment 2 (1980); UCIOA § 3-111, comment 2 (2014). As such, the Acts provide that "any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates." See UCA, § 3-111 (1980); UCIOA, § 3-111 (2014). In other words, the Acts ensure that "the decision to bring such an action can be made by an executive board ***free from the influence of the declarant.***" UCA, § 3-111 comment 2 (1980); UCIOA § 3-111, comment 2 (2014) (emphasis supplied). More than fifteen states have adopted this tolling provision or have employed similar provisions to protect condominium associations' right of action against a declarant.

declarant. The Cambridge Point By-Laws do not require an 80% voting majority for suits against unit owners, reinforcing the declarant's intent to insulate itself from liability.[4]

The Massachusetts statute, as a first generation enabling statute, does not expressly establish these rights of a unit owners association to seek redress against declarants, but judicial decisions have done so. In Massachusetts, condominium trustees regularly initiate actions against developers for defects and failures in condominium common areas and facilities. See e.g., Fitzsimmons v. Sturdy Oak Construction of Canton, Inc., 68 Mass. App. Ct. 1108, 1108 (2007) (defective workmanship and materials); Libman v.

[4] See e.g., Pennsylvania (68 Pa. Stat. and Cons. Stat. Ann. § 3311); Nevada (Nev. Rev. Stat. Ann. § 116.3111); Tennessee (Tenn. Code Ann. § 66-27-411); Colorado (Colo. Rev. Stat. Ann. § 38-33.3-3.11); Nebraska (Neb. Rev. St. § 76-819); Minnesota (M. Stat. § 515A.3-111); North Carolina (N.C. Gen. Stat. § 47C-3-111); New Mexico (N. M. Stat. § 47-7C-11); Kentucky (Ky. Rev. Stat. § 381.9183); West Virginia (W. Va. Code § 36B-3-111); Delaware (Del. Code tit 25, § 81-311); Hawaii (Haw. Rev. Stat. § 514B-141); Maine (Me. Rev. Stat. tit. 33 § 1603-111); Virginia (Va. Code § 55-468); Rhode Island (34 R.I. Gen. Laws § 34-41-3.07, time share); Alaska (Alaska Stat. § 34.08.420); Washington (Wash. Rev. Code § 64.34.344); Arizona (Ariz. Rev. Stat. § 33-1251); Missouri (Mo. Stat. § 448.3-111); Wisconsin (Wis. Stat. § 707.34); Vermont (Vt. Stat. tit. 27A § 3-111); and Alabama (Ala. Code § 35-8A-311).

Zuckerman, 33 Mass. App. Ct. 341, 341 (1992) (defective materials and installation of siding); Glickman v. Brown, 21 Mass. App. Ct. 229 (1985) abrogated by Cigal v. Leader Dev. Corp., 408 Mass. 212 (1990) (defective common heating system); Diggs v. Wilmington Whispering Pines, LLC, No. 13-03039, 2014 WL 861324 at *1 (Mass. Super. Feb. 5, 2014)(Curran, J.) (developer's failure to pay common charges); Berish v. Borenstein, No. 88-00372, 2006 WL 2221924 at *1 (Super. Ct. May 22, 2006)(Connon, J.) (numerous construction defects); Katz v. Carriage Hill, LLC, No. 05-0963, 2005 WL 2462039 at *1 (Mass. Super. Aug. 22, 2005) (Agnes, J.) (numerous construction defects); Harris v. McIntyre, No. 94-3597, 2000 WL 942559, at *2 (Mass. Super. Jun. 27, 2000) (Gants, J.) (improper and deficient construction); Arthaud v. Brignati, No. 980800, 1999 WL 674328 at *1 (Mass. Super. Aug. 6, 1999) (McDonald, J.) (defective construction); Gateway Condominium Trust v. Clinton, No. 94-1931, 1996 WL 655784 at *1 (Mass. Super. Nov. 7, 1996) (Welch, J.) (seeking restitution for damages to condominium complex when window frames separated from veneer exposing condominium units to water and air seepage); Hoover v. Newpro Development, Inc., No. 917417, 1993

WL 818641 at *1 (Mass. Super. Oct. 1, 1993) (Dortch, J.) (numerous defects and deficiencies in the condominium's common elements). These actions by trustees to recover for common area defects for the benefit of the homeowners association may not have proceeded if their declarants had included a poison pill provision, thereby undermining an essential consumer remedy.

III. THE ANTI-LITIGATION PROVISION PREVENTS RECOVERY FOR A BREACH OF THE JUDICIALLY ESTABLISHED IMPLIED WARRANTY OF HABITABILITY.

The poison pill language in the Cambridge Point governing documents prevents the association of unit owners from initiating litigation for breach of the implied warranty of habitability and should be found unlawful. It is well established that the implied warranty of habitability applies to newly constructed homes and condominiums. Albrecht v. Clifford, 436 Mass. 706 (2002); Berish v. Bornstein, 437 Mass. 252 (2002). In adopting the implied warranty of habitability for the sale of new homes and condominiums by builder-vendors, the Supreme Judicial Court of Massachusetts highlighted a number of important public policy considerations. Specifically, the "implied warranty assures that consumers receive

that for which they have bargained, an objectively habitable home." Albrecht, 436 at 709. As explained in Albrecht, the implied warranty of habitability protects purchasers of new homes and condominiums from:

> [s]tructural defects that are nearly impossible to ascertain by inspection until after the home is built… and it imposes the burden of repairing latent defects on the person who has the opportunity to notice, avoid, or correct them during the construction process.

Id. at 710 (internal citations omitted). The Supreme Judicial Court went on to explain that the scope of the warranty should be determined on a case by case basis, but cautioned that "a home that is unsafe because it deviates from fundamental aspects of the applicable building codes, or is structurally unsound, or fails to keep out the elements because of defects of construction, would breach the implied warranty we adopt today." Id. at 711.

In Berish, the Supreme Judicial Court extended the protections of the implied warranty of habitability to condominiums, and held that the organization of unit owners could recover against a vendor builder for defects in the common areas that implicate the habitability of the individual units.

Berish 437 Mass. at 264. The Berish decision established five factors for a breach of the implied warranty of habitability claim in newly constructed condominiums:

> (1) An organization of unit owners as defined by G.L. c. 183A, § 1; (2) the common area of the condominium development contains a latent defect; (3) the latent defect manifested itself after construction of the common area was substantially completed; (4) the defect was caused by the builder's improper design, material, or workmanship; and (5) the defect created a substantial question of safety as to one or more individual units, or made such units unfit for human habitation.

Berish 437 Mass. at 266.

Since adoption of the implied warranty of habitability in 2002, Massachusetts courts regularly hold developers responsible to condominium associations for breach of the implied warranty of habitability for the types of water leaks alleged by the Cambridge Point Trustees. See Kosanovich v. 80 Worcester St. Assocs., LLC, 2014 Mass. App. Div. 93 (Dist. Ct. 2014) (roof leaks due to improper installation of a skylight constitutes a breach of the implied warranty of habitability); Darmetko v. Boston Housing Authority, 378 Mass. 758 (1979) (a roof that leaked water into plaintiff's closet and accumulated

on living room floor constituted a breach of the implied warranty of habitability).

Here, the plaintiffs' claims implicate and allege a breach of the implied warranty of habitability and the complaint alleges each element of the Berish test.[5] The anti-litigation provision inserted into the governing documents by the declarant seeks to deprive the Trustees of their right to seek recovery for breach of the implied warranty of habitability and contravenes the public policy considerations that Berish and Albrecht sought to protect.

IV. THE INCLUSION, BY A DECLARANT, OF A PROVISION IN CONDOMINIUM DOCUMENTS THAT EFFECTIVELY PREVENTS THE TRUSTEES FROM SUING THE DECLARANT IS A VIOLATION OF THE DECLARANT'S FIDUCIARY DUTY TO THE CONDOMINIUM ASSOCIATION AND SHOULD NOT BE ENFORCED.

A condominium declarant should be viewed as having a fiduciary duty to the condominium association

[5] Plaintiffs allege that they are an organization of unit owners; they allege that the common area of the condominium development are suffering from latent water leaks and other damage; the latent water damage, among other things, manifested itself after substantial completion of construction of the common area; the defects causing the alleged water damage was caused by defendant-developer's improper design, material, and/or workmanship; and the alleged water damage creates a substantial question of safety as to one or more individual units making them unfit for human habitation.

it creates. While a declarant must have a right to include provisions in a condominium's governing documents that are beneficial and reasonably protective of its interests, a provision that prevents the condominium association from suing the declarant does not reflect the fair dealing required by the "entire fairness" standard and, therefore, should not be enforced.

A. **A Condominium Declarant Should Be Viewed As Having A Fiduciary Duty To The Condominium Association It Creates**.

A condominium declarant is solely responsible for the creation of the condominium association and the terms of the governing documents under which it will operate. While an open question in the Commonwealth, there are compelling reasons to impose upon a condominium declarant a fiduciary duty to the condominium association.

It is generally accepted by commentators and courts throughout the country that a developer of a condominium stands in a fiduciary relationship to the condominium association being created and effectively marketed to third parties. See Vincent M. DiLorenzo, Law of Condominiums and Cooperatives, § 2.04 (Warren,

Gorham & Lamont 1990); Wayne S. Hyatt & James B. Rhoads, Concepts of Liability in the Development & Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915, 917-923 (1976).[6]

Under the promoter-based theory of fiduciary duty, the developer of a condominium owes a duty to the corporation - or in the circumstance of a condominium, the association - to properly create the condominium. That requirement must extend not only to applicable building and sanitary codes, and the general requirement that the common area be constructed in a good and workmanlike manner, but to the provisions in the governing documents that control whether an association will have a fair opportunity to seek redress in the event the declarant fails to comply with its obligations.

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[6] As noted by DiLorenzo, supra, courts have recognized a fiduciary duty arising out of a developer's status as promoter. See, e.g., Goddard v. Fairways Dev. Gen. Partnership, 426 S.E.2d 828, 832 (S.C. Ct. App. 1993) (recognizing that developer of an association "should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations"); Ireland v. Wynkoop, 539 P.2d 1349, 1357 (Colo. App. 1975) (acknowledging that association's promoter held a fiduciary position); Shore Terrace Co-op., Inc. v. Roche, 268 N.Y.S.2d 278, 280 (N.Y. App. Div. 1966).

The Court of Appeals of South Carolina in Goddard v. Fairways Dev. Gen. Partnership, supra, specifically recognized that the developer of a condominium has a fiduciary duty to the association it creates. 426 S.E.2d at 832-833. The Goddard Court based its analysis on the comparison of developers to corporate promoters as follows:

> The appellants also argue that the Developer had a responsibility to insure that the common areas were in good repair at the time they were conveyed to the Association and that the Association had sufficient funds to maintain the common areas. We find that this argument has merit. As we view the facts in this case, the Association was not effectively organized until 1987, when the deed to the common areas was recorded. This appears to have been the intention of the Developer also.[7]
>
> …
>
> In the case of Duncan v. Brookview House, Inc., 262 S.C. 449, 205 S.E.2d 707 (1974), our Supreme Court held that the promoters of a corporation are fiduciaries to each other and

[7] Further: "The question of whether the Developer stood in a fiduciary relationship to the villa owners prior to the time the Association was effectively organized and the common elements were conveyed to it was not specifically discussed or ruled upon by the master. 'A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.' Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." Id. at 832, quoting Island Car Wash, Inc. v. Norris, 358 S.E.2d 150, 152 (S.C. Ct. App. 1987).

> to the corporation they are creating. Id. at 456, 205 S.E.2d at 710. Here, we think there is a corollary between the promoters of a corporation and the developers of a PUD. Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations. See Julia J. Young, Comment, Areas of Dispute in Condominium Law, 12 Wake Forest L. Rev. 979, 984 (1976) (comment to Wayne S. Hyatt & James B. Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915 (1976)).

Id. (footnote omitted). While Goddard did not specifically involve a question regarding the terms of the governing documents, it does recognize a fiduciary relationship between the declarant and the association.

There is support in the Commonwealth for the contention that a condominium declarant does, in fact, have the fiduciary duties of a promoter. While not precedent, the Housing Court explicitly held that the developer of a condominium stands in a fiduciary relationship to the unit owners analogous to that of a corporate promoter. Miller v. Hurwitz, Boston Division of the Housing Court, Civil Action No. 17143 (1985)("[A]lthough no appellate decision in this Commonwealth has focused on the duty owed by

condominium [developers] to members of the condominium association, the position of the [developers] is analogous to the position of a corporate promoter vis a vis corporate investors."); see Commercial Wharf East Condominium Ass'n v. Waterfront Parking Corp., No. 117161, 1988 WL 1103817, at *18 (Mass. Land Ct. Oct. 19, 1988) (Sullivan, J.) (recognizing Justice King's decision in Miller v. Hurwitz and position that developer is analogous to corporate promoter), supplemented by, No. 117161, 1988 WL 1107855 (Mass. Land Ct. Nov. 30, 1988), aff'd, 407 Mass. 123 (1990). The position of a corporate promoter vis-à-vis corporate investors, as referenced in the Miller v. Hurwitz decision in the context of a condominium developer, was established by the Supreme Judicial Court in Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159 (1909), as follows:

> It is now established without exception that a promoter stands in a fiduciary relation to the corporation in which he is interested, and that he is charged with all the duties of good faith which attach to other trusts. In this respect he is held to the high standards which bind directors and other persons occupying fiduciary relations.[8]

[8] Further, in Old Dominion: "The fiduciary relation must in reason continue until the promoter has completely established according to his plan the being which he

Id. at 177-178 (emphasis added). In other circumstances, Massachusetts courts have consistently compared condominiums to corporate entities and analogized the respective duties of the various condominium players to their counterparts in the corporate arena. For instance, the duties of a condominium trustee to the condominium association unit owners have been consistently equated to the duties owed by a corporate officer or director to a corporation's shareholders. Cigal v. Leader Dev. Corp., 408 Mass. 212, 219 (1990) (the duties of a trustee of condominium trust to condominium unit

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has undertaken to create. His liability must be commensurate with the scheme of promotion on which he has embarked. If the plan contemplates merely the organization of the corporation his duties may end there. But if the scheme is more ambitious and includes beside the incorporation, not only the conveyance to it of property but the procurement of a working capital in cash from the public then the obligation of faithfulness stretches to the length of the plan. It would be a vain thing for the law to say that the promoter is a trustee subject to all the stringent liabilities which inhere in that character and at the same time say that, at any period during his trusteeship and long before an essential part of it was executed or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of director or stockholder, by his own act alone, absolve himself from all past, present or future liability in his capacity as promoter." Id. at 177-178 & 188.

owners same as duties owed by corporate office to shareholders).[9]

Under the promoter-based theory of fiduciary duty, the developer of a condominium owes a fiduciary duty to the condominium entity it creates. As such, the duty to deal fairly with the association should include preserving - or at least not interfering with - the association's ability to sue for, inter alia, construction defects.

B. **A Declarant's Fiduciary Duty To The Condominium Association Should Impose A Heightened Duty Of Fair Dealing And Good Faith**.

In this context, where a declarant is a fiduciary and is essentially on both sides of the issue – on the one hand, acting as declarant seeking to limit its

[9] See also Cote v. Levine, 52 Mass. App. Ct. 435, 439 (2001) (the governing body of a condominium association is the equivalent of the board of directors of a corporation and the unit owners are the equivalent of shareholders); Harris v. McIntyre, No. 94-3597, 2000 WL 942559 (Mass. Super. Ct. June 27, 2000) (Gants, J.) (court applying same standard of conflict disclosure to developer-appointed condominium trustee as it would apply to conflicts between corporate officer and corporation). This has been the case in the trial court even where the form of the governing body is a trust. Cote, 52 Mass. App. Ct. at 439; Gibbs v. Macari, No. 970396B, 1997 WL 1261225 (Mass. Super. Ct. Nov. 21, 1997) (Butler, J.) (condominium unit owners equivalent of corporate shareholders).

exposure to claims, and, on the other hand, responsible for drafting and recording the governing documents that will establish (or eliminate) the trustees' ability to pursue claims against the declarant – the declarant should have the burden of establishing the entire fairness of the governing documents. See Coggins v. New England Patriots Football Club, Inc., 397 Mass. 525, 531 (1986).

If a provision in the governing documents is not fair in its entirety, if it insulates the declarant from its own wrongdoing, to the advantage of the declarant and to the detriment of the association, it should be unenforceable as against public policy. See Geller v. Allied-Lyons PLC, 42 Mass. App. Ct. 120, 123 (1997).

C. **A Poison Pill Provision That Effectively Prevents An Association From Suing The Declarant Does Not Satisfy The Entire Fairness Standard**.

The "poison pill" provision inserted into the governing documents by the declarant effectively prevented the association from suing the declarant unless the declarant voted to allow the association to sue it. A provision that empowers a declarant to control whether or not the association can sue it is

simply, and utterly, unfair. An entity with a fiduciary duty to an association should not be in a position to intentionally and knowingly insulate itself from liability claims advanced by that association. While a developer can, and should, be allowed to include provisions in governing documents that allow it to control the association during the marketing phase, and otherwise reasonably assist the declarant in obtaining a return on its investment, a provision that immunizes the declarant from wrongdoing is altogether different. A declarant is not engaged in wrongful conduct toward the association by incorporating reasonable business terms into the governing documents. However, the poison pill here at issue prevented the association from seeking redress from the declarant for the declarant's wrongdoing. That unilateral and intentional action by the declarant, when analyzed under the entire fairness standard, cannot be sustained. The inclusion of the poison pill provision in the governing documents is fundamentally unfair and should not be enforced.

V. THE ANTI-LITIGATION PROVISION CONTAINED IN THE CONDOMINIUM'S GOVERNING DOCUMENTS PREVENTS RECOVERY UNDER MASS. G.L. c. 93A AND IS THEREFORE VOID AND UNENFORCEABLE.

Allowing poison pills in condominium governing documents would undermine the consumer protection of Chapter 93A. Chapter 93A of the Massachusetts General Laws makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A, § 2(a). Chapter 93A also confers upon the Attorney General the authority to promulgate rules and regulations defining acts and practices that violate the statute. See G.L. c. 93A, § 2(c). See also Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 771–772, (1980) ("That the Legislature intended the Attorney General's regulations to set standards, the violations of which would constitute violations of c. 93A, is consistent with the overall purpose of c. 93A.").

Regulations established by the Attorney General protect consumers against the very types of defects alleged by the Cambridge Point Trustees. Specifically the regulations provide that an act violates G.L. c. 93A, § 2 if "[i]t fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political

subdivision thereof intended to provide the consumers of this Commonwealth protection." 940 Code Mass. Regs. § 3.16(3). Developer-builders are prohibited from violating "the building laws of the commonwealth or of any political subdivision thereof." Downey v. Chutehall Const. Co. Ltd., 88 Mass. App. Ct. 795, 799 (2016). Thus, in Massachusetts, a building code violation is a per se violation of the Consumer Protection Act "if the conduct leading to the violation is both unfair or deceptive and occurs in trade or commerce." Klairmont v. Gainsboro, 465 Mass. 165, 174 (2013).

Massachusetts courts have been hesitant to permit a consumer's waiver of rights established by Chapter 93A. In Spence v. Reeder, 382 Mass. 398, 413 (1981), the Trial Court held that "A statutory right may not be disclaimed if the waiver could do violence to the public policy underlying the legislative enactment." The relevant test for whether waiver of a Chapter 93A right is permissible is whether the waiver would frustrate the public policies of the statute. Canal Electric Co. v. Westinghouse Electric Corp., 406 Mass. 369, 377 (1990). Here, there can be no doubt that permitting the declarants to shield themselves from

actions seeking redress for construction defects would fundamentally frustrate the purpose of Chapter 93A.

Downey v. Chutehall, 88 Mass. App. Ct. 795, 800 (2016), is instructive. In Downey, the Massachusetts Appeals Court considered a contractor's argument that his violation of the relevant building code was waived when the homeowner requested that work be done in a manner that violated the building code. The Appeals Court rejected the contractor's reliance on the alleged waiver because a waiver of the building code and Chapter 93A would frustrate public policy. Id. at 800.[10] Specifically, the Appeals Court declared that,

> To permit a waiver by a homeowner of his or her right to compel a contractor to comply with the contractor's obligations under the building code would permit, even encourage, contractors, and perhaps consumers, to waive provisions of the building code on an ad hoc basis, in the hope of saving money in the short-run, but endangering future homeowners, first responders, and the public in general.

[10] The Appeals Court explained that the building code was developed to, "insure public safety, health and welfare insofar as they are affected by building construction...to secure safety to life and property from all hazards incident to the design, construction ...use or occupancy of buildings, structures or premises." Id.

Id. Accordingly, in Cambridge Point as in Downey, the poison pill waiver should not provide a defense for the declarant's delivery of defective housing and failure to comply with the building code.

The anti-litigation provision in the Cambridge Point governing documents constitutes a forcible waiver of building code violations and the right to recovery under Chapter 93A by the association of unit owners. Only the Trustees, on behalf of the association of unit owners, have authority to conduct litigation relating to the common areas, but the homeowners association was not constituted or able to bring litigation until after turnover of management and control of the association from the initial declarant trustee. The Trustees never contracted with the developer-seller, and therefore had no opportunity to negotiate the contract or warranties relating to the common area. The poison pill language in the governing documents constitutes a waiver of consumer protection rights because it does not allow Trustees to recover for building code violations on behalf of the unit owners. Massachusetts case law and public policy do not permit this waiver of consumer protection rights. Therefore, this Court should find

that the anti-litigation provision is void and unenforceable.

CONCLUSION

For the foregoing reasons, REBA and the Abstract Club urge that the decision of the Trial Court (Krupp, J.) dated November 30, 2016 be reversed, and the matter remanded for further proceedings.

CERTIFICATION

The undersigned counsel certify pursuant to Mass. R. App. P. 16(k), that this Brief complies with the rules of the Court that pertain to the filing of briefs.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that on April 24, 2017, I filed the Amicus Curiae Brief of the Real Estate Bar Association for Massachusetts, Inc. and the Abstract Club in Support of the Plaintiff-Appellant through the Electronic Filing Service Provider (Provider) for electronic service and it is my understanding that such service will be made by that system to the following registered users. I hereby certify that to my knowledge there are no non-registered users requiring conventional service.

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