

Court Limits Enforceability of Condominium Indemnification Provision

In recent years, the Massachusetts Superior Courts have issued decisions narrowing the general enforceability of indemnification clauses applicable to certain condominium trustees, asserting that they are contrary to public policy.¹ At issue has been the enforcement of a clause commonly found in Massachusetts condominium trust documents — one which precludes claims by successor condominium trustees against the original trustee of the condominium selected by the developer. The Superior Court has found that such broadly worded indemnity clauses cannot be used to shield the original trustee from liability for an alleged breach of duty. While this issue has not yet been addressed by the Massachusetts appellate courts, the Superior Court rulings are reflective of a trend limiting the scope of indemnity which commercial parties may utilize in their contracts.

Claims against initial condominium trustees for defective or incomplete construction are a common refrain in the Massachusetts courts. The genesis of such claims rests with the creation of the condominium documents. The condominium developer, as declarant, creates the master deed for the condominium and declaration of trust for the condominium trust. The developer (or its representative) then serves as the original trustee of the condominium trust. After a certain number of units are sold, unit owners of the condominium become elected or appointed as trustees. They then assert that there were defects in the condominium's common areas and facilities. Litigation ensues, including claims against the original trustee for deficient conditions and failing to

pursue claims against the developer and those responsible for the construction of the condominium with respect to alleged defects.

Within the declaration of trust created by the developer is usually an indemnity provision stating:

No trustee appointed or elected as hereinbefore provided shall under any circumstances or in any event be held liable or accountable out of his personal assets or be deprived of compensation by reason of any action taken, suffered or omitted in good faith or be so liable or accountable for more money or other property than he actually receives, or for allowing one or more of the other trustees to have possession of the trust books or property, or be so liable, accountable or deprived by reason of honest errors of judgment or mistakes of fact or law by reason of the existence of any personal or adverse interest or by reason of anything except his own personal and willful malfeasance.

The trustees and each of them shall be entitled to indemnity both out of the trust property and by the owner(s) of the lands subject to this declaration, against any liability incurred by them or any of them in the execution hereof, including without limiting the generality of the foregoing, liabilities in contract and in tort and liabilities for damages, penalties and fines.

In the most recent case addressing this issue, based on an indemnity provision, the original trustee brought a claim

against the condominium unit owners seeking indemnity for the breach of fiduciary duty claims asserted against it. The unit owners sought to strike the claim. The court rendered its decision on what it considered a purely legal question: Whether the indemnification clause contained in the declaration of trust was void as a matter of public policy.

The court noted that under Massachusetts law, “exculpatory clauses” such as the indemnity provision at issue are generally held to be enforceable, absent overreaching or fraud.² That is because “individuals and legal entities enjoy a freedom to contract — a freedom into which we should be loath to interfere.”³ However, the right to contractual indemnity in Massachusetts is not absolute.⁴ “It is ‘universally accepted’

¹ **Board of Trustees of Gates of Greenwood Home Owners' Trust v. Gates of Greenwood, LLC** (Middlesex Superior Court, Mass., 2014).

² **Marsman v. Nasca**, 30 Mass.App.Ct. 789, 799–800 (1991) (“Although exculpatory clauses are not looked upon with favor and are strictly construed, such provisions inserted in the trust instrument without any overreaching or abuse by the trustee of any fiduciary or confidential relationship to the settlor are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary.” [Internal quotations omitted]).

³ **Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.**, 422 Mass. 318, 320 (1996).

that public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced.”⁵ Thus, the court considered whether it believed that denying enforcement of the contractual term was necessary to protect some aspect of the public welfare.⁶

In reaching its determination, the court noted that in two other instances where the developer drafted the condominium documents and served as the original trustee, justices of the Superior Court had found exculpatory clauses in the condominium trust documents to be void as violative of public policy.⁷ In those cases, the exculpatory provision held that a trustee would not be personally liable except for the trustee’s own willful malfeasance. The clause at issue in this case was even broader, entitling trustees to indemnity for “any liability incurred by them.”

Quoting from one of the prior rulings, the court noted that in these instances, the developer would have two competing duties of loyalty: one to the condominium trustee and one to the

developer. Where that may occur, there is a “need for careful judicial scrutiny when a developer totally dominates the [t]rust and effectively attempts to act as its fiduciary.”⁸

The court found that given this conflict, exculpatory clauses enacted by the developer to protect the officers it selects to manage the trust from liability cannot survive such scrutiny.

The court reasoned that if such

provisions were enforceable, subsequent trustees would have no recourse against a trustee selected by the developer if he continually favored the developer’s interests over those of the trust. “For all practical purposes, this provision would diminish the duty of loyalty owed by the developer-sponsored [t]rustee to the unit owners to little more than a duty not to steal. Given the conflicting loyalties that are inherent when a developer-sponsored [t]rustee is responsible for protecting the interests

⁴ For instance, Massachusetts places statutory restrictions on indemnity provisions on landlord/tenant agreements and owner/contractor agreements.

⁵ *Feeney v. Dell, Inc.*, 454 Mass. 192, 199–200 (2009).

⁶ *Feeney v. Dell, Inc.*, 454 Mass. at 200, quoting *Beacon Hill Civic Ass’n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 321 (1996).

⁷ *Knowles v. Classic Bldgs., LLC*, No. HDCV2009–00245 slip op. at 4–6 (Mass.Super. November 8, 2012) (Josephson, J.); *Harris v. McIntyre*, 2000 Mass .Super. LEXIS 181 at *32–*35 (Mass.Super. June 27, 2000) (Gants, J.).

⁸ *Harris v. McIntyre*, 2000 Mass .Super. LEXIS 181 at *33–*34 (Mass.Super. June 27, 2000) (Gants, J.), citing *Raven’s Cove Townhomes, Inc. v. Knappe Dev. Co.*, 171 Cal.Rptr. 334 (1981), and *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass’n, Inc.*, 441 A.2d 956, 964 (D.C.Ct.App.1982).

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of unit owners, this enfeebled duty of loyalty is inadequate as a matter of public policy.”⁹

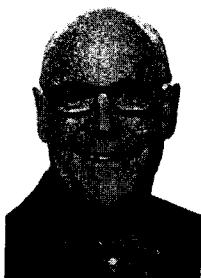
In the case noted herein, the indemnity applied to any liability incurred by the trustee. Given the limitless scope of the indemnity provision at issue, the court found it to be an unsupportable limitation on trustee liability. However, even if the provision merely exempted claims for intentional misconduct from the indemnity obligation, that would still not be enforceable.¹⁰ The court determined that in those cases, not only would the trust have no recourse against trustee for unintentional misconduct, but the trust would also be unlikely to challenge even a trustee’s willful malfeasance out of fear that it or the unit owners would bear the ultimate financial burden. Therefore, as the trustee’s competing interests cannot be reconciled, as matter of public policy the indemnity provision cannot be enforced.

While these rulings focus on the issue of competing interests for the trustee between the developer and the condominium association, the rule they espouse is not limited to such cases. Rather, it could be deemed applicable to any situation in which a trustee’s judgment is challenged based on an assertion of competing interests. As such, it arguably expands the potential liability of anyone serving as a condominium trustee. Given the heavily litigious nature of many condominium developments, insurers issuing general liability and directors and officers policies to condominium trusts may now be compelled to defend lawsuits against trustees which were previously precluded by provisions in the condominium documents. ■

⁹ **Harris v. McIntyre**, 2000 Mass .Super. LEXIS 181 at *33-34.

¹⁰ **Cf. Board of Trustees of the Sea Grass Village Condo. v. Bergquist**, 2009 WL 1900424 at *6 (Mass.App.Div. June 25, 2009) (finding trial judge did not err in refusing to award condominium trust defense costs despite clause allowing trust to recover attorneys fees and costs in regard to any claim brought by a unit owner noting the “potentially jarring and unfair effect” of the clause).

executive suite



Peter Hutchinson

Narragansett Bay Insurance Company (NBIC) has named **Peter Hutchinson** as the company’s assistant vice president, Rhode Island and Massachusetts territory manager. He will be responsible for developing and maintaining partnerships with NBIC’s agents and industry associations, driving profitable growth and ensuring exceptional service delivery in R.I. and Mass.

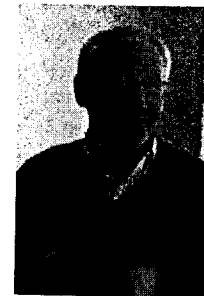
“We are thrilled to welcome Peter to the NBIC leadership team. He has a proven track record of forging successful agency partnerships throughout Rhode Island and Massachusetts. His work experience, combined with his extensive knowledge of our agency partners, product lines and target market, makes him the ideal fit to lead our efforts in Rhode Island and Massachusetts,” said Tim Moura, NBIC’s senior vice president of marketing, agency and client services.

Hutchinson has 25 years of experience in the insurance industry, having led territory development and management strategies for UPC Insurance, Safeco and Commerce Insurance. He attended Westfield State College and holds a Certified Insurance Counselor designation (CIC).

Headquartered in R.I, Narragansett Bay Insurance Company offers specialty insurance services and products to homeowners through its network of independent agents along the Eastern Seaboard and actively seeks to insure coastal homeowners.

Independent insurance agency Gowrie Group announced that **Steve Schram** has joined the firm as a senior vice president and leader of the family risk

management practice area. Schram will be responsible for bringing Gowrie’s insurance solutions and risk management services to individuals, families and organizations throughout New England and beyond.



Steve Schram

Previously, Schram was chairman and managing partner for DPS Development, a luxury real estate company. He spent many years as president of the Boston Celtics Limited Partnership, a New York Stock Exchange Company, vice chairman of the Boston Celtics basketball team and served on the NBA board of governors. In addition, Schram held senior positions at Brookwood Investments, Morgan Stanley & Co., and was a member of the U.S. Senate.

“I’m thrilled to have joined Gowrie Group and serve as a risk manager to protect families’ assets and manage their exposure to risk. I work with affluent families, family offices, hedge funds and private equity groups to bring clients the most up-to-date ideas and optimized solutions,” Schram explained.

“We are excited to have brought Steve on board to lead the development of our family risk management sector. He has a vision for program development and really understands risk management,” said John Fisher, partner and president of Gowrie Group’s personal insurance divisions.

Schram has served on more than 20 corporate boards of companies and nonprofits, including the National Fish & Wildlife Foundation and the Boston Private Bank. He is a trustee and former commodore of Shelter Island Yacht Club. Schram graduated from the University of Wyoming and has an MBA and MAAP from Duke University. He will operate out of Gowrie’s Darien, Conn., office.