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Condo owners lose key remedy for construction problems

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DENNIS RODKIN

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A recent Illinois Supreme Court ruling blocks a route condo owners have used for decades to seek financial recovery for defects in construction, attorneys say.

In its Dec. 28 opinion on a **case between an Evanston condo association and a manufacturer of aluminum windows and doors,** the court ruled there is no implied warranty on a subcontractor's work for a contractor. That is, the Evanston homeowners can't pursue the aluminum company to cover the cost of repairs unless there was a written contract between them—which there wasn't.

"The decision wiped out a 35-year-old doctrine that gave consumers a right of recours if there were defects in the construction" of their buildings, said David Hartwell, an attorney at Keough & Moody, a law firm in Chicago and Naperville that specializes in community associations, or condominium boards.

"It's a significant change," Hartwell said. For about three years, he was representing a South Loop condo board in a case against a subcontractor over at least $2 million in construction defects. Within days of the Supreme Court decision being handed down, he said, the subcontractor filed to have the case dismissed.

The condo board, Hartwell said, "has no other route left" to recovering the cost of repairs. "They were utterly dumbfounded when I told them." Hartwell declined to disclose further details of the case.

Two other attorneys who handle construction defect cases—Mike Kim, principal of Chicago firm Michael C. Kim Associates, and David Lewin, who chairs the condominium law practice group at Chicago firm Querrey & Harrow—both told Crain's the December decision will have a significant impact, particularly on high-rise condo associations, where the cost to fix construction defects can run into the millions of dollars.

Lewin said another other condo board in the city is spending at least $1.3 million to correct poor construction, though he could not disclose details.

When condo boards find defects in construction years after a building is complete, they often can't sue the original developer to cover the cost, the attorneys said, because developers typically create a limited liability company for each project that shuts down when the project is complete. The general contractor that was hired by the

developer "pushes liability down to the subcontractor," Lewin said, "who are usually th ones who end up paying the loss."

Since 1983, Illinois construction defect cases have relied on "Minton," shorthand for a decision by an Illinois appellate court that indicated subcontractors have an implied warranty with the eventual homebuyers that the property will be habitable.

With the December Supreme Court decision, known as "Sienna," the doctrine established by Minton 35 years ago "is over," Kim said. "It's a major reversal of what's been going on in the courts for years regarding subcontractors being held responsible under an implied warranty of habitability."

None of the attorneys could provide a solid count of how many cases have used Minton or how many construction defect cases there are pending that might be affected by the reversal. However, all said the change removes an important route of legal recourse for condominium owners.

"There are workarounds and other things we'll be able to do," Kim said. "It doesn't necessarily mean you cannot pursue a subcontractor, but there's no question that the Illinois Supreme Court has put its foot down on a consumer protection that has been available since the 1980s."

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