INSIDE THE LAW

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ARE BROKERS LIABLE FOR FALSE INFORMATION PROVIDED BY THE SELLER?

by Andrew J. Kadets, Esq
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In 2013, the Massachusetts Supreme Judicial Court issued its most recent decision concerning the liability of real estate brokers for providing inaccurate information to a Buyer in the sale of real property. In *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795 (2013), the Massachusetts Supreme Judicial Court ("SJC") held that a broker may be liable for disclosing inaccurate information provided by a Seller – even if the broker did not know it was inaccurate.

The relevant facts in *DeWolfe* are that the Seller of a property in Norwell, MA, informed his listing broker, Hingham Centre, Ltd., that the property was zoned for "Residential Business B" or "Business B." Relying on this information, Hingham Centre, Ltd., advertised the property as being zoned for "Business B." Daniel DeWolfe ("DeWolfe") purchased the property with the intention of operating a hair salon on the premises. However, the zoning information ultimately proved to be false as the property was not actually zoned for business at all. Thus, after purchasing the property, DeWolfe found that he was unable to operate a hair salon on the property.

When DeWolfe sued the selling broker for misrepresentation, the trial court made a definitive ruling of the law ("summary judgment") in favor of the broker, Hingham Centre, Ltd. The trial court held that, as a matter of law, the broker cannot be found liable because the broker relied upon information provided by the Seller. Thus, the case against Hingham Centre, Ltd., never reached a jury. DeWolfe appealed the trial court's decision, and the SJC issued its ruling in favor of DeWolfe's appeal. In its ruling, the SJC held that a broker may rely on Seller-provided information only where "it is reasonable in the circumstances" to do so. But where such reliance is unreasonable, a broker may be found liable for misrepresentation.

It is important to note that the SJC did *not* find the broker definitively liable in *DeWolfe*. Rather, the *DeWolfe* court simply ruled that a broker cannot escape liability simply by relying on Seller-provided information. The SJC held that the trial courts must examine each case on the basis of its own facts to determine whether the broker's reliance was reasonable under the circumstances. The court in *DeWolfe* noted that the property was surrounded by only residential properties and that "*Residential* Business B" was a not an actual zoning classification in Norwell. Thus, the court felt that a jury certainly could find that the broker acted unreasonably in relying upon the Seller's information (which determination is a finding of fact to be decided at trial by a judge or jury). As such, the SJC sent the case back to the trial court for a factual determination on whether the broker was unreasonable in failing to verify the Seller's information.

In its ruling, the SJC held that a broker may rely on Seller-provided information only where "it is reasonable in the circumstances" to do so.

So what can we learn from this case?

1. **Real Estate Brokers** – The *DeWolfe* ruling does not represent a dramatic shift in the law concerning broker liability. Rather, it serves as the SJC's written confirmation that real estate brokers have *always* been required to act reasonably in relying on Seller-provided information when marketing a property. However, with this recent decision in place, real estate brokers must be more diligent than ever in verifying information provided to them by Sellers. Certainly, *DeWolfe* seems like a relatively obvious case. The zoning was a critical aspect of the sale, and the zoning information was easily verifiable through public records. This was a representation that should have been verified by the broker in light of the residential nature of the surrounding area. But, there is no bright line test for "reasonable" conduct. It is a factual determination that may be different in each case. Thus, I would recommend the following:

   (a) Verify *any* information that is publicly available (e.g., zoning, permits, taxes).

(b) If an aspect of the property is particularly important to the sale, but the information is not publicly available, ask the Seller for verification of the asserted fact.

(c) Trust your instincts. If a representation seems inconsistent with what you see, do not accept it as true. Ask for more information.

(d) Use indemnity language. The law does not prohibit a broker from requiring a Seller to indemnify the broker for inaccurate information provided by the Seller. Is your office having the Seller execute an agreement indemnifying you for inaccurate information? Does your listing agreement provide indemnity for false information? Review the language that your office is using, and see if it protects you.

2. **Buyers** – Notably, the SJC in *DeWolfe* did not discuss the fact that the zoning information could have been very easily verified by the Buyer at Town Hall. And whereas the zoning classification was essential to DeWolfe's purchase, it is difficult to see why he did not verify this information. Although the ability of the Buyer to verify information through public records has been used as a defense in other cases, the SJC makes no reference to this potential defense in DeWolfe. Thus, going forward after DeWolfe, it does not appear to be an effective defense. But I would argue that it remains a factor for a trial court to consider. *Always* do your own due diligence. Do not rely on the Seller or the Seller's broker for critical information about a property.

3. **Sellers** – Except in certain statutorily required situations (e.g., lead paint), Sellers are not obligated to disclose any defects about a real property. The *DeWolfe* ruling did not change the fact that Massachusetts is a "caveat emptor" (or "let the Buyer beware") state in regard to real estate. But if you do represent any information as a Seller, you must speak accurately and cannot speak in half-truths. Make sure that your broker has verified important representations about your property. You may be liable for your broker's representations, even if they did not come from you.

If you have any questions or would like a copy of the Supreme Judicial Court's decision in *DeWolfe v. Hingham Centre, Ltd.*, please feel free to contact me at 508.532.3520. **FT**

OUI DOS AND DON'TS

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"Use a little wine for thy stomach's sake and thine own infirmities." – St. Paul

This is written for those who, on occasion, enjoy a beverage away from home and must return there via a motor vehicle. Getting stopped by the police can happen to anyone. A cautionary tale comes to mind. I recall sitting by a window at the Firehouse Café in Worcester years ago with two friends, one a veteran state police trooper and the other a long-standing member of the "drink-and-drive society" who had never been stopped on suspicion of driving under the influence. As we watched some near accidents during rush hour at Exchange and Commercial streets (this was back when it was a four-way intersection and the convention center was little more than a dream), the trooper offered a warning: "Let's say that after you leave here today, you stopped at the stop sign completely, looked both ways, and proceeded into the intersection, and you were hit by another car that ignored completely the stop sign. The focus of the police would be on you because of the smell of alcohol." What follows are 10 items of advice in case you are unlucky.

1. **Know where your license and registration are kept.**
   Police are very watchful for their own safety, and whenever they get a whiff of alcohol emanating from a motorist, the investigation begins. In an OUI investigation, the first moments of interaction may be crucial. The police receive training in the form of a U.S. Department of Transportation manual entitled *DWI Detection and Standardized Field Sobriety Testing*. The manual instructs trainees about pre-exit interview techniques that "apply the concept of divided attention" and include "asking for two things simultaneously" such as the driver's license and vehicle registration. The situation becomes even more complicated for the driver if, while he or she is looking for the requested documents, the police officer engages in the second technique of "asking interrupting or distracting questions" or the third technique of "asking unusual questions." If the driver knows where the right documents are, smoothly finds them without hesitation, and is able to hand them to the police officer, a potential crisis may be averted.

2. **Be polite and respectful to police and other first responders.**
   They have a job to do and don't need to listen to a lot of nonsense. The more attitude you project, the greater the likelihood you may not be going home anytime soon.

3. **Say as little as possible while being polite and respectful.**
   The inquiry is entirely subjective and guided by the police officer's sense of fairness. Slurred speech, admissions of drinking, or inconsistent responses are among the indications police are watching for as well as nonresponses to questions asked while a license and registration are sought. The police may ask you to recite the alphabet from E to R or count backwards from 65 to 47; one takes those tests at their peril.

4. **If you're questioned while seated in the car or after being asked to step from it, state that you would like a lawyer present before answering any questions.**
   The police are not obligated to warn of Miranda rights until you are in custody. Although you may be detained while the investigation proceeds, the police are free to ask questions that usually result in incriminating replies. By asking for a lawyer and invoking your right to silence, you eliminate a potentially powerful and harmful source of evidence.

5. **If you're asked to step from the motor vehicle, do so carefully.**
   You must step from the motor vehicle and walk where directed. If you have health issues making such an event difficult for you and can state them succinctly, do so. The police are now actively searching for evidence of OUI. This is known in the manual as "the exit sequence," as in, "How the driver steps and walks from the vehicle and actions or behavior during the exit sequence may provide important evidence of impairment."

6. **Refuse politely to perform any field sobriety tests.**
   Field sobriety tests are the heart of any OUI prosecution. Although the horizontal gaze nystagamus test is always given, the result is inadmissible without expert testimony. I have never heard of a suspect closing his or her eyes and politely refusing to participate. To do so, however, would eliminate a test police always use to support probable cause to arrest. These tests are subjective, both in the officer's choice of tests to be performed and in his or her grading of your performance. The police are looking for "clues" that suggest you are under the influence. Most police reports focus on clues that are observed and neglect to mention the clues that did not occur. The police also tend not to tell the suspect shortly after each test is performed whether he or she has passed or failed the test. One case tried years ago demonstrates

You will never talk your way out of an OUI arrest. The less you talk, the less evidence you provide to the police.

these tests' importance to the prosecution: A young man led the police on a not-so-merry chase from Route 190 onto Route 290 before he was pulled over at Brosnihan Square in Worcester. The trooper, enraged, seized the motorist, pulled him out of the car, and arrested him for OUI. A breathalyzer test was refused. The jury found him not guilty because of the absence of evidence.

7. **Refuse politely to explain your decisions.**
   You will never talk your way out of an OUI arrest. The less you talk, the less evidence you provide to the police.

8. **Do not take any breath test at the scene.**
   It cannot be offered into evidence and helps the police officer's quest for probable cause to make the arrest.

9. **Do not take a breathalyzer.**
   The only exceptions are that you know you can pass it or that your license requires it. As for passing it, do not be guided by how you feel or by barroom bathroom charts that feature estimates as to weight, number of drinks consumed, and time period of consumption necessary for a result lower than .08 test result. There are too many other physiological factors that will have greater bearing on results. People who have a commercial driver's license must take the breathalyzer test or face a year's loss of that particular license.

10. **Realize that you may be videotaped or audiotaped at the scene, in the cruiser, in the station, while using a telephone to make your statutory call, and in your cell.**
    Surveillance cameras are becoming a fact of life. There have been cases where suspects are videotaped at the scene, in the cruiser, at the station, and in a cell. More likely, the videotaping will occur during booking at the station. Booking questions must be answered. The camera is trained on you; speak clearly, stand straight and still, and be polite. The better you look and sound, the less you sway and mumble, the better the evidence will be at trial.

These are some thoughts from a trial lawyer who has spent over three decades before the bar prosecuting and defending persons charged with OUI. **FT**

HANDLING CONDOMINIUM FEE DELINQUENCIES IN YOUR ASSOCIATION

by Tucker Dulong
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A fundamental aspect of condominium unit ownership is the requirement to pay a proportionate share of the condominium's common area charges. Common area charges generally include the cost of items such as landscaping, snow removal, maintenance, management fees, master insurance premiums, and common utilities, among others.

The failure of one or more unit owners to pay their share of assessed common area charges can result in a serious disruption to the operation of the condominium association. If the association is not receiving all the income necessary to meet its budgetary requirements, over time it will be forced to reduce spending, which will very likely include the deferral of expenditures for maintenance and repair items. In extreme cases, condominium buildings and grounds could fall into disrepair, adversely affecting the value of the individual units in the development.

Delinquencies can also create issues for those seeking to obtain mortgage financing. Underwriting requirements for most residential mortgage lenders dictate that new loans conform to the requirements of Fannie Mae and Freddie Mac. However, new mortgages on condominium units are deemed ineligible for sale to Fannie Mae or Freddie Mac where more than 15% of the units in the condominium project are 30 or more days past due. While it will take a number of delinquent units to reach this threshold in a larger development, it may take only one or two delinquent units to account for 15% of a small development. Once this threshold is reached, even if a unit owner is current with respect to payment of common area charges for his or her unit, the owner may find it virtually impossible to refinance. Furthermore, unit owners will likely find it substantially more difficult to sell their units, as mortgage financing may be unavailable to prospective buyers.

In order to avoid these issues, it is imperative that a condominium association act swiftly and decisively to obtain payment of delinquent common area charges, and Massachusetts law provides an effective means to do so. The relevant statutory provisions appear in the Massachusetts Condominium Act,

Under the Act, the association can begin serving the statutory delinquency notices as soon as a unit owner's delinquency reaches 60 days past due.

General Laws Chapter 183A. When common area charges are assessed, the Act provides that the amounts assessed become an automatic lien against the unit until paid. Furthermore, this lien has a limited priority over any mortgages covering the unit. And if the association gives certain delinquency notices to the unit owner and his or her mortgagee prior to commencing court action to enforce the lien, the priority will also extend to the attorney's fees and other collection costs that the association incurs. This protects the association against incurring out-of-pocket expenses and also provides a powerful incentive for lenders holding mortgages on condominium units to quickly pay the arrearages accrued by their borrowers. Otherwise, the association could foreclose its lien and wipe out the lien of the mortgagee in the process. However, only that portion of the delinquent common area charges for the six-month period immediately preceding commencement of the court action are entitled to priority over an existing mortgage. Therefore, the mortgage holder can regain its priority position by simply paying the past six months of common area charges, attorney's fees, and collection costs.

The lesson for condominium associations is that it pays to act quickly. Under the Act, the association can begin serving the statutory delinquency notices as soon as a unit owner's delinquency reaches 60 days past due. An association that acts promptly can generally complete the notice process, thereby achieving a priority position for its collection costs, and file an enforcement action well before the unit owner falls six months in arrears. This affords the association the best chance of receiving payment in full while also avoiding collection expenses, particularly attorney's fees and related costs, which the unit owner's mortgagee would be obliged to pay. However, if an association is not proactive, there exists a risk that the mortgagee will refuse to pay any arrearages exceeding six months of common area charges, leaving the association to absorb the loss.

For further information or questions regarding the collection of delinquent condominium fees affecting your association, I encourage you to call me directly at 508.532.3519. **FT**

FIRM **NEWS**

Tucker Dulong, Esq. & Lisa Neeley, Esq. Named Officers

Fletcher Tilton PC is pleased to announce that Attorneys Tucker Dulong and Lisa M. Neeley have been named officers of the firm.

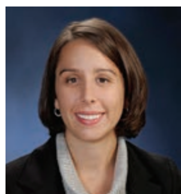
About Attorney Tucker Dulong

Tucker's practice focuses on commercial and residential real estate transactions, including mortgage lending, conveyancing and leasing. His clients benefit from his extensive expertise in residential short sale transactions. Attorney Dulong's clients include both major and community banks, large mortgage lenders, individuals and developers. Attorney Dulong also has experience in civil litigation.

A dedicated volunteer, Attorney Dulong is a member of the Board of Directors of Big Brothers Big Sisters of Central Mass/Metrowest, and is a member of the Framingham Rotary Club.

Attorney Dulong is a graduate of Vanderbilt University with a B.A. in Economics, and earned his J.D., *magna cum laude*, from Suffolk University Law School.

About Attorney Lisa M. Neeley



Lisa M. Neeley focuses her practice on a variety of elder law, estate, and special needs planning matters. Her clients include individuals and families.

Attorney Neeley is deeply committed to serving the needs of her clients. She presently serves on an advisory board for a local nursing home, and regularly speaks to clients and groups regarding legal issues that will impact them in both their pre-retirement and retirement years.

She earned her B.A., *cum laude*, graduating in three years from Assumption College and her law degree, cum laude, from New England School of Law in Boston. She is a member of the National Academy of Elder Law Attorneys (NAELA) and the Massachusetts and Worcester County Bar Associations.

Alex M. Rodolakis to Head the Firm's Hyannis Office

Fletcher Tilton PC announces Alex M. Rodolakis has joined the firm and will head up our Hyannis office. Attorney Rodolakis devotes his practice to corporate and commercial matters. He has substantial experience in corporate governance, commercial litigation and transactional matters, and has also represented troubled businesses and individuals in all facets of workouts and bankruptcy.

Prior to joining the firm, he was partner at Gilman, McLaughlin & Hanrahan, LLP. His areas of practice include Commercial Law, Bankruptcy, Workouts and Financial Restructuring, Commercial Collection, Commercial Lending, Corporate Law and Business Litigation.

Attorney Rodolakis is a graduate of Tufts University and Boston University School of Law. He was admitted to the Massachusetts Bar in 1994.

Attorney Rodolakis is currently an advisory board member of Big Brothers, Big Sisters of Cape Cod & the Islands, he has been a member of the Zoning Board of Appeals for the town of Barnstable since 2008, and is on the Board of Directors for Coastal Community Capital.

You may contact Attorney Rodolakis at 508.778.1100 or at our office at One Financial Place, 297 North Street, Suite 327, Hyannis, MA 02601.

Fletcher Tilton PC Welcomes Attorney David Motameni

Attorney Motameni, a Northborough native, was recently hired to work in the firm's Worcester office. Attorney Motameni is an Associate with the firm who focuses his practice on all areas of corporate and business law. He represents clients on transactional matters ranging from entity formation and corporate governance to mergers and acquisitions, as well as related commercial transactions. His experience also includes practices closely related to corporate law, such as employment law.

Attorney Motameni received his juris doctor from Tulane University Law School, where he served as a member of the Business Law Society. He received a B.S. in Business Administration with dual concentrations in Finance and Business Law from Boston University. Attorney Motameni is admitted to practice in the Commonwealth of Massachusetts.

To contact Attorney Motameni, you may call him at 508.459.8210 or email him at dmotameni@fletchertilton.com.

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