# INSIDE THE LAW

Fall 2014

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# LANDMARK CASE MAKES IT EASIER FOR CONDOMINIUM ASSOCIATIONS TO RECOVER FOR CONSTRUCTION DEFECTS

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A significant new ruling by the Massachusetts Supreme Judicial Court will make it easier and more lucrative for condominium associations to seek redress for construction defects. The case, Wyman vs. Ayer Properties, LLC, concerned a former mill building which was renovated and converted into a mixed-use condominium. (To see a full copy of the decision, find this article in our Real Estate Knowlege Library) Shortly after construction was completed and the units sold, certain defects in the common areas became apparent. The roof and windows began leaking and the masonry facade started crumbling. The trustees of the condominium unit owners' association sued the developer to recover the costs of the repairs.

At trial, the condominium association was only partially victorious against the developer due to the application of a relatively obscure legal concept known as the "economic loss doctrine." The economic loss doctrine was initially intended to limit liability claims in transactions between businesses, but it has historically been the "magic bullet" used by insurance companies to defend condominium developers and limit negligence claims brought against them for faulty construction.

The economic loss doctrine was originally developed in product liability cases but expanded to other industries, including the construction industry. It provides that if the only harm done to the claimant by a defective product (in this case, the "product" is the building) is that it will cost money to fix it, the claimant is entitled to recover only the damages specified in the contract, and not the much larger sums typically awarded for negligence or other harms. The strict application of the economic loss doctrine in prior cases meant a condominium developer could not be held liable for negligent construction unless the claimant also suffered some form of personal injury or property damage beyond the defective product itself.

The problem posed by the application of this doctrine to condominium associations in particular resulted from the unique ownership structure of condominium developments. While the units are private property owned

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by individuals, the common areas are generally owned by the unit owners' association (typically a trust) comprised of all the unit owners. Normally, the unit owners' association is created *after* the completion of construction and there is no contractual relationship between such association and the developer, contractors, architects and others who might be responsible for construction defects.

While unit owners who purchased from the developer might be able to recover damages for problems in their units based on their contracts with the developer, the unit owners' association was out of luck if the defects were with common areas such as roofs, elevators, lobbies, parking areas or other amenities. In Wyman, the trial judge ruled that while the condominium association was entitled to the costs to fix the leaky roof and windows (because the leaks caused other damages to the units), the economic loss doctrine barred the condominium association from recovering any part of the $80,000 repair to the crumbling brick facade on a negligence theory because the damage was only to the building — and since there was no contract between the condominium association and the developer, the condominium association was left with no remedy against the developer.

Recognizing the unfair result and unintended insulation that the application of the economic loss doctrine had provided to developers and contractors from an entire class of negligence claims in the condominium context, the Massachusetts Appeals Court, and now the Supreme Judicial Court, held that the economic loss rule is not applicable to damages caused to the common areas of a condominium as a result of a developer's negligence.

The Wyman case removes a substantial bar that once prevented condominium associations from recovering losses for defective design and construction of common areas. While the costs of pursuing such litigation for small-scale defects may not make financial sense, large-scale condominium developments with significant remediation costs now have a remedy against negligent developers where there once was none. This represents a significant weapon in the arsenal of condominium associations and an erosion of the economic loss doctrine within the construction industry. **FT**

# MASSACHUSETTS PASSES LEGISLATION REQUIRING COVERED EMPLOYERS TO PROVIDE DOMESTIC VIOLENCE LEAVE FOR EMPLOYEES

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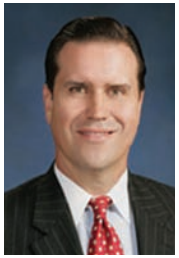

In August 2014, Massachusetts Governor Deval Patrick signed into law a new domestic violence leave law for employees. Covered employers, those who have fifty or more employees, must now allow employees to take off up to fifteen work days per twelve-month rolling year when domestic violence has been perpetrated against them or members of their family.

## DOMESTIC VIOLENCE AND LEAVE USES DEFINED

Under the new law, "domestic violence" is defined as abuse perpetrated against the employee or a member of the employee's family by a current or former spouse of the employee or the employee's family member; a person who has a child in common with the employee or a member of his or her family; a person who is currently cohabiting or who has cohabitated with the employee or a member of his or her family; a person who is related by blood or marriage to the employee; or a person with whom the employee or the employee's family member has or had a dating or engagement relationship. "Abuse" is defined to include, among other actions, attempting to cause or causing physical harm; placing another in fear of imminent serious physical harm; causing another to engage involuntarily in sexual relations by force or threat of force; depriving another of medical care, housing, food, or other necessities of life; or restraining the liberty of another.

Assuming the above eligibility for domestic violence leave access has been met, employees seeking to access domestic violence leave must use their accrued paid leave to tend to matters relating to the abuse. Approved reasons for taking domestic violence leave include pursuing medical attention, counseling, victim services, or legal assistance; obtaining a protective order from a court; appearing in court on matters related to the domestic violence, including meeting with the district attorney or other law enforcement official; attending a child custody proceeding; and tending to any other issues which are directly related to the domestic violence.

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Provided that the employee works for a covered employer and the benchmarks for accessing domestic violence leave have been met, the next questions become: how does one access the leave, and what are the logistical issues associated with doing so?

## ACCESSING ENTITLED LEAVE

While employees may not be denied leave if they meet the above criteria entitling them to domestic violence leave, the new law requires employees who accesses domestic violence leave to first use accrued paid leave days they have on the books (e.g., vacation, sick, personal) for the domestic violence leave before being entitled to access these days as unpaid. Only if employees have already exhausted all of their accrued paid leave days will they then be allowed to access whatever remainder of their domestic violence leave days exist, unpaid. For example, if an employee has ten accrued vacation days, one sick day, and one personal day remaining and the employee needs to take domestic violence leave for, say, four days, those days would be taken first from the days which are most applicable. Assuming the employee is not the one who was subjected to domestic violence, that would mean the days taken would be either vacation or personal and would be paid, since the employee has paid leave days on the books. If the employee is ill or injured as a result of domestic violence, he or she should be able to use accrued sick days. Assuming the employee provides the requisite amount of notice to access the domestic violence leave, the employer cannot deny the employee access to using accrued paid leave, regardless of whether the employer may have a policy prohibiting more than a certain number of employees from being out, e.g., on paid vacation or personal leave, at any one time. Next, assuming that employees who need to access domestic violence leave have no vacation or personal days on the books, they may next access their accrued sick leave days even if they are not actually sick. This is because

all the other categories of paid leave have already been exhausted. Finally, assuming that employees needing domestic violence leave have no paid accrued leave time whatsoever to access, they will have all of their domestic leave time unpaid. For people who are familiar with the Family and Medical Leave Act (FMLA) and how an employee accesses FMLA leave, it is believed that the new Massachusetts domestic violence leave law is very similar to the manner in which FMLA days are accessed. As with the FMLA, the rolling year concept prevents the employee from taking off fifteen days for domestic violence in, say, December of one year and then seeking to access fifteen more domestic violence days just one month later in January of the immediately following calendar year. Another aspect similar to the manner in which FMLA is accessed is that an employer may agree, upon a request to do so by an employee, to allow the employee to access domestic violence leave days as unpaid rather than drawing down paid leave days which the employee might prefer to preserve. Whether to agree to such a request is exclusively the employer's prerogative.

Regarding how much advance notice employees must give their employer to access domestic violence leave, the law does not specify a particular number of days. Rather it provides that employees must provide as much advance notice of their need to access leave as required by their employer's leave policy unless the need for accessing the domestic violence leave occurred inside the required notice period, in which case the employee should give as much advance notice as is reasonably possible. In the case of imminent danger, the law allows for employees to take domestic violence leave without giving advance notice if doing so was not possible due to imminent danger to the health or safety of the employee or a member of their immediate family. Whenever imminent danger

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*Employers may require the employees to produce documentation which establishes that they are entitled to domestic violence leave.*

necessitated an employee's taking domestic violence leave without giving their employer advance notice of the leave, the employee nonetheless must notify the employer of having taken domestic violence leave no later than three workdays following the start of their domestic violence leave. If employees are unable to contact their employer within the first three days of taking leave due to imminent danger, the law does allow for the imminent danger notification to come from a member of the employee's immediate family and/or certain professionals who are assisting the employee with their domestic violence issues.

## ADDITIONAL LOGISTICS

Having established who is entitled to domestic violence leave and how he or she may access it, I will now briefly highlight a few other provisions of the law of which all covered employers should remain mindful.

1. Employers may require the employees to produce documentation which establishes that they are entitled to domestic violence leave. By way of illustration, domestic violence documentation includes such things as a police report, court documents, medical documents, and/or other documents which establish the ability to access domestic violence leave. In the event the employee does not provide documentation prepared by a third party, they may alternatively provide a sworn statement in writing detailing why they need domestic violence leave, which is signed under the pains and penalties of perjury.

2. Employers must restore an employee who accesses domestic violence leave to their prior position or an equivalent position.

*All information relating to an employee's taking domestic violence leave must be kept confidential.*


3. All information relating to an employee's taking domestic violence leave must be kept confidential.

4. An employer may not discipline an employee for taking an unscheduled unauthorized absence if the employee produces the necessary documentation within thirty days of the last day on which the employee was absent, which establishes that the unscheduled unauthorized absence (e.g., no call/no show for two days) was due to domestic violence issues which would have otherwise entitled them to take that day off. Given that an employer may wish to discipline or discharge an employee promptly upon their taking off a day which was unauthorized at the time, the thirty-day window afforded to an employee to produce the document may, obviously, create difficulty for an employer who metes out a punishment and the employee/former employee then produces the requisite documentation within the thirty-day window for doing so. One possible way to address this problem would be to ask the employee if their absence was due to a domestic violence issue before the punishment is meted out. If they say yes, request that the employee produce sufficient documentation before the initial thirty days, since the unapproved leave concluded has been exhausted. If they timely produce sufficient documentation, no punishment is warranted. If they fail to produce the documentation within that initial thirty days, the employee may be disciplined at that time. Do note that if an employee suffers adverse employment action in violation of the domestic violence law, they may bring a civil action against the employer for lost wages, among possible other things. They will recover treble damages for lost wages and attorney's fees if they prevail. Additionally, the AG's office is authorized to enforce the law.

5. The new law requires employers to affirmatively notify Massachusetts employees of their ability to access domestic violence leave. We suggest that the best approach is to prepare a domestic violence leave policy which captures all the key points in the law and add it to one's company employee handbook and simultaneously provide each employee with a copy of the new policy. Additionally, an employer may wish to post a summary of the new law in a conspicuous place where other statutory rights are posted.

## ACTION ITEMS

All Massachusetts employers should promptly prepare a detailed domestic violence leave policy which captures the elements of the newly enacted domestic violence leave law. Employers should then provide each employee with a copy of the employer's new domestic leave policy and should additionally, not alternatively, consider placing a copy of the policy or the law in a conspicuous place in the workplace where it is viewable during the workday. Employers should do these action items now. To the extent you would like Fletcher Tilton to prepare a domestic violence leave policy for your company or organization, or if you have any further questions, please contact Attorney Bartulis. **FT**

*All Massachusetts employers should promptly prepare a detailed domestic violence leave policy which captures the elements of the newly enacted domestic violence leave law.*

# FIRM NEWS

## Congratulations to Our Own Geoffrey Misilo!

Congratulations go out to **Geoff Misilo, Esq.** for his work as Chair of the Arc's Government Affairs Committee in getting legislations passed recently that will provide for national criminal background checks for all persons working/volunteering in settings with individuals with intellectual disabilities. *Press release from The Arc below:*

### NATIONAL CRIMINAL BACKGROUND CHECK (H4125):

*The National Criminal Background bill was originally filed by former Representative and current Boston Mayor Martin Walsh. This would require that anyone who has potential for unsupervised contact with a client of DDS submit their fingerprints to be checked against a national criminal database. The bill would extend to DDS and its vendor agencies.*

*Currently, DDS and vendor agencies are required to conduct statewide CORI checks, but no national check, which means that an applicant's criminal record outside of MA may not be identified. The bill now comports with federal regulations and is patterned after a similar law passed to protect students up to age 22. The disability bill would use the same statewide infrastructure and nationally accredited vendor that is in place for the education law. Thank you to MA Down Syndrome Congress for its coordinating efforts on this bill. An active committee worked on the bill and included members from various groups - including two from The Arc, Paul Willenbrock and Geoff Misilo, and Tara Zeltner from ADDP.*

## FLETCHER TILTON WELCOMES MICHELLE LABBE AND MEREDITH GREENE TO THE FIRM

**Michelle M. Labbe, Esq.**, is an Associate of the firm and concentrates her practice in commercial and residential real estate. Her experience includes the representation of buyers, sellers and lenders in residential and commercial real estate transactions, as well as the formation and maintenance of business entities.

Prior to joining Fletcher Tilton, Ms. Labbe was an associate at a firm in Boston where she focused on real estate and corporate matters.

Ms. Labbe received her J.D., *cum laude*, from Suffolk University Law School, and a B.A., *magna cum laude*, from Clark University. She is admitted to practice law in the Commonwealth of Massachusetts and the State of Rhode Island.

We are pleased to announce that Attorney **Meredith Greene, Esq.**, has joined Fletcher Tilton as an Associate in our Special Needs Planning and Advocacy Practice Group. As an attorney and a mother to a child with special needs, Meredith brings both competence and passion to her work. She has a background in civil litigation, estate planning and special education. Meredith is a parent-mentor at Minuteman Early Intervention, trained as a parent advocate through the Federation of Children with Special Needs and is a member of the National Academy of Elder Law Attorneys, the Council of Parent Attorney and Advocates, and the Special Needs Advocacy Network. Additionally Meredith is an active participant in the Williams Syndrome Association and Operation House Call through the Arc of Massachusetts, Inc.

Attorney Greene is a graduate of Suffolk University Law school and is licensed to practice law in the Commonwealth of Massachusetts.

## HUDSON HOAGLAND SOCIETY HONORS WARNER FLETCHER

The Hudson Hoagland Society honored longtime Worcester Foundation for Biomedical Research (WFBR) board member and benefactor Warner S. Fletcher at this year's annual meeting. The Foundation's award, given to someone who has *"demonstrated an exceptional commitment to the advancement of basic science research,"* was presented to Warner by Chancellor Michael F. Collins and Thoru Pederson, PhD, professor of biochemistry and molecular pharmacology and scientific director of the WFBR when it merged with UMass Medical School in 1997.

Warner Fletcher has been a longtime Worcester Foundation trustee and donor, Warner has been a devoted patron of the biomedical research, discovery and innovation taking place in Worcester. In addition to serving on the WFBR board of trustees since 1980, he was a member of the Hudson Hoagland Society Executive Committee from 1986-2005, serving as its chair from 1987-1994.

***Congratulations Warner!***

Chancellor Michael F. Collins, Warner Fletcher and Thoru Pederson, PhD

## KIRK CARTER ELECTED PRESIDENT OF MUSIC WORCESTER, INC.

Fletcher Tilton Attorney **Kirk A. Carter** was elected President of Music Worcester, Inc. at the organization's annual meeting that was held on Wednesday September 22nd at Mechanics Hall. Music Worcester is the presenter of the nation's oldest music festival which has been bringing world-renowned orchestras and guest soloists, chamber music, ballet, world music and dance, jazz and choral masterworks to Worcester since 1858. Music Worcester, Inc. has made "a tradition of excellence" its hallmark and The Worcester Music Festival has been recognized by the Library of Congress. To learn more about Music Worcester, visit *MusicWorcester.org*.

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## 2015 BEST LAWYERS IN AMERICA

The 21st edition of The Best Lawyers in America has been released and we'd like to congratulate those attorneys from Fletcher Tilton that made this prestigious list:

| | |
|---|---|
| **Richard C. Barry, Esq.** | Trusts & Estates |
| **Phillips S. Davis, Esq.** | Corporate Law |
| **Mark L. Donahue, Esq.** | Real Estate Law |
| **Dennis F. Gorman, Esq.** | Tax Law and Trusts & Estates |
| **Frederick M. Misilo, Esq.** | Elder Law |

Inclusion in Best Lawyers is based on an exhaustive and rigorous peer-review survey comprising more than 5.5 million confidential evaluations by top attorneys. Best Lawyers has been regarded as the most credible and definitive guide to legal excellence in the United States.

PRACTICE GROUP
# SPOTLIGHT

## TAXATION PRACTICE GROUP

*David C. Guarino, Esq. & Cory J. Bilodeau, Esq., Co-chairs*

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The Tax Group at Fletcher Tilton PC is an important part of the firm's legal practice. The group's tax attorneys work to optimize our clients' tax results without losing sight of their business objectives, and help to guide our clients through their personal and business transactions. The tax law is becoming more complicated and more dispute-oriented, with the IRS and states increasing their audit activities and taking more aggressive positions. Our tax attorneys have earned advanced degrees in taxation, business, and accounting, and have used their degrees to develop the technical expertise to navigate this complex area. They frequently collaborate with accountants and other professionals to quantify and explain tax options.

### TAXPAYER RESOLUTION SERVICES INCLUDE:

**Assessment Issues:**

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- Settlement Conferences and Appeals

**Collection Issues:**

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- Offers in Compromise/ Settlement
- Prevention of Property Seizure
- Collection Appeals
- Release of Tax Liens and Levies

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- Trust Fund Penalties

**Divorce and Innocent Spouse:**

- Alimony/Property Settlement Matters
- Innocent Spouse Claims

**Civil and Criminal Matters**

### TAX PLANNING SERVICES INCLUDE:

- Business Formations
- Business Transactions
- Tax-Exempt Entities
- Real Estate Transactions
- Individual Tax Planning
- Executive Compensation
- Estate and Gift Tax Planning

*See information below regarding our upcoming seminar on the **Tax Aspects of Divorce**. To register,or for more information on the Taxation Practice Group, visit our website at www.fletchertilton.com.*

## UPCOMING SEMINARS

The **Taxation Practice Group** is offering an informative seminar on the ***Tax Aspects of Divorce***. CPAs can earn 3 CPE Credits. Choose a location near you:

| | |
|---|---|
| ***Thursday, October 30, 2014*** | The Verve, Crowne Plaza, Natick, MA |
| ***Tuesday, November 4, 2014*** | The Beechwood Hotel, Worcester, MA |
| ***Wednesday, November 12, 2014*** | Springfield Marriott, Springfield, MA |

Times for all three locations are the same:

***8:00 a.m.*** Registration and Breakfast | ***8:30 a.m. - 11:30 a.m.*** Seminar

Fletcher Tilton's **Elder Law and Special Needs Practice Group** is offering an informative seminar on ***How to Administer a Special Needs Trust***. An essential seminar for parents, current trustees, future trustees of special needs trusts and OBRA '93 trusts.

***Saturday, November 8, 2014*** The Courtyard Marriott, Marlborough, MA

***8:00 a.m.*** Registsration & Breakfast | ***8:30 a.m. - 1:30 a.m.*** Seminar

***For more information or to register for any of our upcoming seminars, visit our website today at www.fletchertilton.com.***

Fletcher Tilton PC
Attorneys at law

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