

Advising Your
Referral Source:

A Primer on
Real Estate Broker/
Agent Liability

BERNKOPF
GOODMAN | LLP





Robert Stetson is a partner in Bernkopf Goodman's Construction and Surety Law practice group. He is a fellow in the Construction Lawyers Society of America and has been recognized on a national level for his work in construction litigation and commercial litigation.

Robert Stetson
Partner
Bernkopf Goodman LLP

Cell: 413-329-6880
Office Direct: 617-790-3423

rstetson@bg-llp.com

BERNKOPF
GOODMAN | LLP

The purpose of this presentation is for information only. Communication with any member of Bernkopf Goodman LLP in this forum does not establish an attorney-client relationship. Confidential or time-sensitive information should not be discussed on this forum.

Claims Outline

1

Breach of Fiduciary Duties: *NRT New England, Inc. v. Moncure*, 78 Mass. App. Ct. 397 (2010) (self-dealing)

2

Fraud: *McEaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573 (1995) (noise)

3

Fraud Exceptions: *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341 (1952) (sales puffery)

4

Exculpatory Provisions: *Sound Techniques, Inc. v. Hoffman*, 50 Mass. App. Ct. 425 (2000) (barring negligent misrepresentation claims)

5

Negligence: *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795 (2013) (agent's reliance on seller must be "reasonable")

6

Chapter 93A: 940 C.M.R. 3.16(2)

7

E&O Insurance: "Professional Services"

Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions, and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore, there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling—that is, homes and other types of real estate. *Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 264 (Ill. App. Ct. 1979) (Moran, J., dissenting).

The Ghost Realtor



History of Real Estate Agents and Brokers

- Mid-19th Century (New York Real Estate Exchange, 1847)
- Seller's Fiduciary
- Caveat Emptor
- Consumer Confusion

Broker / Agent Regulations

1

254 CMR 3 (Professional Standards of Practice)

2

G.L. c. 112, s. 87AAA (identifying practice standards)

3

G.L. c. 93, s. 114 (shielding agents and brokers from failing to disclose “psychologically impacted” properties)

4

940 CMR 3.16(2) (declaring Ch. 93A violation for failure to disclose “any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction”)

Fiduciary Duties

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

Examples of Breach of Fiduciary Duties

1

Self-Dealing – *NRT New England, Inc. v. Moncure*, 78 Mass. App. Ct. 397 (2010); *Gagnon v. Coombs*, 39 Mass. App. Ct. 144 (1995)

2

Failure to Disclose – *Hurley v. Chobee Hoy Assoc. Real Estate, Inc.*, 1997 Mass.App.Div. 142 (1997)

3

Dual Representation – 254 CMR 3.13

Fraud/ Misrepresentation

1

Elements – *Barrett Assocs., Inc. v. Aronson*, 346 Mass. 150, 152 (1963) (fraud);

2

Silence – *Greenery Rehabilitation Group, Inc. v. Antaramian*, 36 Mass. App. Ct. 73 (1994) (silence on a particular point, in the absence of a duty to disclose, ordinarily does not rise to the level of fraud); *But see Maxwell v. Ratcliffe*, 356 Mass. 560 (1969) (direct question); 940 CMR 3.16(2) (duty to disclose in business context).

3

Half Truths – *Kannavos v. Annino*, 356 Mass. 42 (1969) (half-truths are actionable as fraud).

Fraud/ Misrepresentation Examples

1

Size of Lot – *Anzalone v. Strand*, 14 Mass. App. Ct. 45 (1982)

2

Surrounding Area – *Brandt v. Olympic Constr., Inc.*, 16 Mass. App. Ct. 913 (1983)

3

Water – *Genega v. Autumn Dev. Co., Inc.*, 75 Mass. App. Ct. 1107 (2009)

4

Zoning – *Schwartz v. Rose*, 418 Mass. 41 (1994)

5

Encumbrance – *Mongeau v. Boutelle*, 10 Mass. App. Ct. 246 (1980)

6

Nuisance – *Hinkley v. Vital*, 1992 Mass. App. Div. 91 (1992)

7

Noise – *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573 (1995)

Fraud / Misrepresentation Exemptions (General)

“[F]alse statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable.” *Yerid v. Mason*, 341 Mass. 527, 530 (1960).

“The line between what is a statement of fact and opinion is often shadowy. In construing what is the true meaning of the language used, it is often necessary to consider the subject matter, the relationship of the parties, the opportunity afforded for investigation and reliance, and the attendant circumstances.” *John A. Frye Shoe Co. v. Williams*, 312 Mass. 656, 664–665 (1942).

Fraud / Misrepresentation Exemptions (Specific)

1

Predictions – *Borden v. Betty Gibson Assoc., Inc.*, 31 Mass. App. Ct. 51 (1991);

2

Promissory – *Hogan v. Riemer*, 35 Mass. App. Ct. 360 (1993);

3

Puffing – *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341 (1952).

Negligence

- No liability where agent relies on buyer's representations.
Fernandes v. Rodrigue, 38 Mass. App. Ct. 926 (1995).
- However, the agent's reliance has to be reasonable under the circumstances. *DeWolfe v. Hingham Centre, Ltd.*, 464 Mass. 795 (2013).

Exculpatory Provisions

1

Bates v. Southgate, 308 Mass. 170 (1941)
(exculpatory provisions do not exonerate
fraudulent conduct);

2

Sound Techniques, Inc. v. Hoffman, 50 Mass.
App. Ct. 425 (2000) (exculpatory provisions
apply to negligent misrepresentations);

3

McEvoy Travel Bureau, Inc. v. Norton Co., 408
Mass. 704 (1990) (addressing possible
application of exculpatory claim to fraud claim).

Chapter 93A

940 C.M.R. § 3.16

Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of [M.G.L. c.93A, § 2](#) if:

1

It is oppressive or otherwise unconscionable in any respect; or

2

Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction; or

3

It 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; or

4

It violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection statutes within the purview of [M.G.L. c. 93A, § 2](#).

Professional Liability Insurance

1

“Professional Services”

2

Exclusions

3

Claims Made v. Occurrence-Based

Questions?

Robert W. Stetson, Esquire
Bernkopf Goodman LLP
Two Seaport Lane, 9th Floor, Boston,
MA 02210
Direct Dial: 617-790-3323
Cell: 413-329-6880
rstetson@bg-llp.com