INSIDE THE LAW

Winter 2019

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MY ABUTTER CLAIMS WHAT?

By William D. Jalkut, Esq.

508.459.8045 | wjalkut@fletchertilton.com

Your project seems to be ready to break ground. You obtained all your municipal permits and approvals. You closed on the property. Your financing is in place. Your contractors are locked in. You look forward to the culmination of months, if not years, of hard work. What could go wrong?

There is a knock on the door. A Deputy Sheriff serves you with a Complaint For Adverse Possession and a Notice of Lis Pendens. That piece of land you need for access? A disgruntled abutter now claims that he owns part of it by adverse possession extending back more than 20 years. The Lis Pendens on record now serves as a practical block to the start of your project.

How could this be? You did everything right: you had a tape survey performed; you bought title insurance; you had very competent counsel. Unfortunately, none of that really matters now. You confront Superior Court litigation in which your nemesis abutter avers that for more than 20 years he and his predecessors in title (1) actually (2) have non-permissively possessed that parcel (3) in an open fashion (4) on a continuous basis (5) to the exclusion of others.

The title insurance company, likely with no regret, tells you that its policy does not cover adverse possession claims. The tape surveyor, somewhat defensively, tells you that he did not observe any encroachments. Even worse, your lawyer tells you that the case might not come to trial for two years.

What should you do? What can you do? The blame game isn't going to solve the problem. To a great extent, the response will depend on what the disgruntled abutter wants from the litigation. Typically, some want a slice of land or use of land that you might or might not be able to grant. Others will want cash. If you are able to resolve the claim quickly for a modest concession then you would be well advised to do so in order to avoid the delay, risk and expense of litigation.

If the disgruntled abutter refuses reasonable solutions, then you attack the lawsuit and the claim with vigor. Each of the necessary 5 elements to an adverse possession claim is vulnerable to scrutiny in both factual and legal contexts. There are nuances to each element that counsel can exploit. There are more than 200 years of Massachusetts jurisprudence and case law available to you that offer a fertile source for grounds to defeat any one of the 5 elements. If any one element can be defeated, then the entire adverse possession claim will fail.

The blame game isn't going to solve the problem. To a great extent, the response will depend on what the disgruntled abutter wants from the litigation.

Adverse possession represents something of a proverbial Achilles' heel to any developer. Nonetheless, the possibility should be anticipated. Though there is not much a developer can do on a preventative basis, consider negotiating for a flat warranty in the Purchase & Sale Agreement from the seller on the absence of any basis for such a claim. Instruct your tape surveyor to do more than just eyeball the boundaries. Think about eliciting an admission from the abutters that they have no such claims. Be proactive on the possibility rather than passive.

The entire concept of title by adverse possession is antithetical to the perspective of many businesspersons. For better or worse, the concept remains alive and well in Massachusetts and should not be ignored. **FT**

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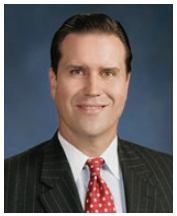
MASSACHUSETTS PASSES NEW NON-COMPETE LAW

By Joseph T. Bartulis, Esq.

508.459.8214 | jbartulis@fletchertilton.com



On October 1, 2018, a new law went into effect in Massachusetts regarding non-competition agreements. The new law significantly restricts an employer's ability to enforce a non-competition agreement against a former employee or independent contractor, and it imposes several procedural hurdles that must be complied with for a non-competition agreement entered into after October 1 even to be enforceable.

RESTRICTIVE COVENANTS GENERALLY

Non-competition restrictions fall within what are broadly defined as restrictive covenant agreements.

There are three common types of restrictions contained in restrictive covenant agreements:

1. Confidentiality/non-disclosure of company information
2. Non-solicitation – of customers and/or employees
3. Non-competition

While many restrictive covenant agreements contain these common types of restrictions, it is important to note that the new law only pertains to non-competition agreements.

While many restrictive covenant agreements contain all three of these common types of restrictions, it is important to note that the new law only pertains to non-competition agreements. It has no direct impact on confidentiality agreements or non-solicitation agreements, which continue to be controlled by common law.

For any type of restrictive covenant agreement to be enforceable, the employer must:

- Give the employee "consideration," i.e., something of value for signing the agreement
- The employee must not be signing the agreement under duress, i.e., the employee has time to read the agreement and decide whether to sign it.

Assuming these first two hurdles have been met, common law next requires that the terms of the restrictive covenant agreement be "reasonable." The courts look for reasonableness in the scope of:

- What conduct is prohibited
- The duration for which the conduct is prohibited
- The geographic area where the conduct is restricted.

KEY ASPECTS OF THE NEW NON-COMPETITION LAW

Several key aspects of the new non-competition law are summarized below (given the amount of detail in the new law, it is beyond the scope of this article to detail all the law's nuances):

- Employers may not enter into non-competition agreements with hourly-paid employees, students who are hired for short-term employment of a finite duration, or any person eighteen years of age or under.
- Employers may enter into non-competition agreements with "independent contractors" and employees alike.
- Employers may not enforce non-competition agreements against any person who was laid off or who was terminated without cause unless the non-competition provisions are agreed to as part of a post-separation severance agreement. The new statute does not define "cause" for purposes of this provision.
- Employers requesting a new-hire employee to sign a non-competition agreement must offer "garden leave" consideration or some "other mutually agreed upon consideration." Regarding non-competition agreements presented to current employees, the statute only requires fair and reasonable consideration but does not define those terms. Similarly, the statute does not provide any further guidance on what constitutes "other mutually agreed upon consideration" for new hires. The phrase "garden leave" in the new statute is defined as 50 percent of the employee's highest paid yearly wages over the past two years. As to the timing of the "garden leave" payment, the law provides that it is to be paid after the employee leaves the employer's employ, and then only if the employer still wishes to enforce the agreement. It can be paid via lump sum or in payroll installments over the one-year period during which competition is restricted. If an employer chooses not to enforce a previously executed non-competition agreement, it need not pay the garden leave consideration.
- Employers must now tailor the non-competition agreement provisions so they are "reasonable" under the new law.
  - Reasonable in duration. With limited exceptions, under the new law, the longest duration allowed for a non-competition agreement is one year. The duration can be extended to two years where the former employee breached a fiduciary duty to the company or has unlawfully taken company property.
  - Reasonable in scope of prohibited conduct. Under the new law, the restricted conduct must be "no broader than necessary to protect the legitimate business interests of the employer." The statute goes on to state that the restriction must be limited to the "specific types of services provided by the employee at any time during the last two years of employment."
  - Reasonable in geographic restrictions. Under the new law, the geographic restrictions regarding where a former employee may not compete are limited to the area where, during the past two years of the employee's

employment, he or she provided services or had a "material presence or influence." The statute does not define the phrase "material presence or influence."

- Employers must also comply with several new procedural hurdles before a non-competition agreement will be enforceable.
  - First, the agreement must be in writing.
  - Second, it must be signed by both parties.
  - Third, the non-competition agreement must be given to the prospective employee before he or she is formally offered employment or ten days before he or she is to start work, whichever is earlier.
  - Fourth, the company must notify the individual that he or she has the right to consult with an attorney before signing the agreement.

A well-tailored non-solicitation agreement can prohibit a former employee from accepting or soliciting any business from a current or recently former customer on behalf of himself or herself or others...

THE TAKEAWAY

Given the significant cost of the "garden leave" payment to enforce most newly entered non-competition agreements, and given the new limitations on what conduct may be prohibited and for how long, it is likely that, going forward that many employers will simply restrict the disclosure of confidential information and prohibit the solicitation of customers/clients and employees, without restricting the former employee's ability to compete, since the new law does not impact those agreements. A well-tailored non-solicitation agreement can prohibit a former employee from accepting or soliciting any business from a current or recently former customer on behalf of himself or herself or others, and it can prohibit him or her from attempting to lure away current employees -- usually the two biggest concerns for most employers. **FT**

Attorney Joesph Bartulis will be speaking on this topic on March 28, 2019 at the Worcester Chamber of Commerce as part of their Chamber Seminar Series. To attend this seminar, visit our website: FletcherTilton.com/seminars-events.

AN EMPLOYER'S PRIMER TO MITIGATING RISKS WHEN CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS

By Scott E. Regan, Esq.
508.459.8220 | sregan@fletchertilton.com

Every employer should be mindful of the Massachusetts independent contractor statute. The independent contractor statute establishes the framework for determining whether a worker is an employee or an independent contractor as a matter of law. Failure to meet the strict requirements of this statute may subject not only employers to significant financial and other risks, but their corporate officers (e.g., presidents and treasurers) as well.

As an initial matter, the independent contractor statute presumes that any individual performing any service on behalf of an alleged employer is an employee as a matter of law. An alleged employer must then prove all the following factors to rebut the presumption of employment:

(i) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(ii) the service is performed outside the usual course of business of the employer; and

(iii) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

It is understandably difficult, if not impossible, for many alleged employers to defeat this presumption. Failure to prove even one factor disqualifies the worker from being classified as an independent contractor.

In addition, employers and workers cannot lawfully agree to contract around the independent contractor statute. Moreover, there is nothing preventing a misclassified employee from willingly working as an independent contractor for years only to then sue the employer for misclassification. Thus, if there is any doubt that the elements are met, it is often the best practice for employers to classify independent contractors as employees. While this will subject businesses to certain payroll, tax and other expenses, such costs are often dwarfed by the liability associated with misclassification claims.

Individuals misclassified as independent contractors are protected by the Massachusetts Wage Act ("Wage Act"). The Wage Act requires employers, among other things, to pay their employees (specifically including misclassified workers)

all earned wages on a weekly or bi-weekly basis. A misclassified worker's contract rate becomes the wage rate, and the worker's damages include the value of the wages and benefits the worker should have received as an employee, but did not. Such damages may include, among other things, monies the worker should have received for overtime compensation, vacation pay, and recompense for self-employment taxes the worker paid as an independent contractor.

Importantly, the Wage Act provides that an employee who prevails in an action under that statute shall be awarded treble damages, reasonable attorneys' fees and litigation costs. Put another way, these penalties apply irrespective of a party's intent or good-faith misunderstanding of the law. In addition, corporate officers – such as a company's president or treasurer – may be held individually liable for the company's violations of the Wage Act. As a practical matter, alleged employers face significant risks and liability if an alleged employee proves even a small amount of damages at trial.

In Massachusetts, misclassification and wage claims have a three-year statute of limitations. In addition, Massachusetts courts have held that misclassified employees may also allege that they are owed certain single damages under a breach of contract theory (which has a six-year statute of limitations), thus exposing employers to additional risks and liability.

As indicated above, the independent contractor statute makes it unlawful to fail to properly classify an individual as an employee, including workers in the highly regulated real estate industry. As licensed real estate brokers and salespersons may be aware, however, this does not harmonize with the real estate licensing statute that expressly authorizes a real estate salesperson to affiliate with a broker as an employee or an independent contractor.

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Unlike licensed real estate brokers – who can be affiliated with many real estate salespersons – a real estate salesperson may affiliate with only one broker under the real estate licensing statute.

Unlike licensed real estate brokers – who can be affiliated with many real estate salespersons – a real estate salesperson may affiliate with only one broker under the real estate licensing statute. Moreover, real estate brokers are responsible for their affiliated salespersons' compliance with a broad range of statutory provisions and regulations, many of which are designed to protect the public in their dealings with real property. Thus, it would be impossible for a licensed real estate salesperson to qualify as an independent contractor under the independent contractor statute (e.g., because a licensed broker must supervise his/her licensed real estate salespersons).

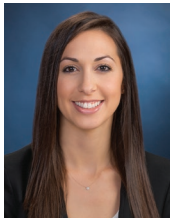
In Monell v. Boston Pads, LLC, 471 Mass. 566 (2015), the Massachusetts Supreme Judicial Court ("SJC") agreed that the real estate licensing statute makes it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status under the independent contractor statute, all of which must be met to rebut the presumption of an employment relationship. Though the SJC determined that the independent contractor statute does not apply to real estate salespersons because of the real estate licensing statute, the SJC did not explain what framework should apply under such circumstances.

Though there exists a rare haven for certain real estate professionals to classify licensed real estate salespersons as independent contractors without running afoul of the Wage Act, employers are well advised to become familiar with the independent contractor statute. Employers should contact an experienced employment lawyer with any questions regarding the proper classification of workers. **FT**

Firm News

JOIN US IN CONGRATULATING OUR NEW OFFICERS

In recognition of their accomplishments, expertise, commitment and community involvement, Fletcher Tilton is proud to announce that the following attorneys have been elected as officers of the firm:



Lauren E. Miller | Elder Law

Within the firm's Trust & Estate and Special Needs/Elder Law departments, Lauren Miller focuses on estate planning, asset protection planning, MassHealth applications for long-term care, and complex MassHealth appeals. She also regularly represents clients in a variety of probate and family court matters, including guardianships, conservatorships and estate administration. Ms. Miller is admitted to practice in Massachusetts. She lives in Milford, MA and works primarily from the firm's Worcester office.

Nelson Luz Santos | Litigation | Real Estate | Corporate

Nelson Santos represents both individuals and businesses, focusing on transactional matters. His practice includes business, real estate, and commerce issues, serving owners, developers and entrepreneurs. His experience extends beyond transactional representation to civil litigation of business and real estate disputes involving housing law, condominium law, leasing, land use, and other corporate and real estate matters. Mr. Santos lives in Hudson, MA. He is admitted to practice in Massachusetts and before the United States District Court of Massachusetts.

JOIN US IN WELCOMING ATTORNEY COURTNEY HARRIS

Mr. Harris is a corporate attorney concentrating in business and transactional matters focusing on mergers and acquisitions, financings, recapitalizations, joint ventures and other commercial transactions. Courtney graduated from Hamilton College, and received his Juris Doctor from Fordham University School of Law. He is admitted to practice in the State of New York and is also a Certified Information Privacy Professional.

FREDERICK M. MISILO, JR. ELECTED AS PRESIDENT OF THE ARC OF THE UNITED STATES, INC.

Attorney Frederick M. Misilo, Jr, Chair of the Trust and Estate Department of Fletcher Tilton PC., has been elected President and Chair of the Board of Directors of The Arc of the United States, Inc. based in Washington, D.C. The Arc is the nation's largest and oldest community-based civil rights organization dedicated to improving the lives of individuals with intellectual and developmental disabilities and their families. It has more than 650 chapters, more than 100,000 employees and serves more than 1,000,000 individuals across the country.

For more details and excerpts from Fred's acceptance speech, visit www.fletchertilton.com/firm-news

UPCOMING SEMINARS

ESTATE PLANNING SEMINARS - *Speaker:* Michael Lahti, Esq.

Tue., Feb. 12: 10 a.m. & 1 p.m.
Location: Colonal Blackinton Inn
Attleboro, MA

Tue., March 26: 10 a.m. & 1 p.m.
Location: Crowne Plaza
Warkwick, RI

Wed., March 6: 10 a.m. & 1 p.m.
Location: The Lobster Pot
Bristol, RI

Tue., April 16: 10 a.m. & 1 p.m.
Location: Connors Center
Dover, MA

SECTION 199A BOOTCAMP (WEBINAR)

Speaker: Michael P. Duffy, Esq.
Thur., Feb 21: 10 a.m.-12 p.m.
For tax preparers & professionals
$40 pp, CPAs earn 2 CE Credits

ESTATE PLANNING FOR MA-FL SNOWBIRDS

Speaker: Frederick Misilo, Jr., Esq.
Fri., June 21: 8:30 a.m.
Location: Doubletree Hyannis
Hyannis, MA

For details and to register for these seminars and others, visit our website, FletcherTilton.com/seminars-events.

Fletcher Tilton PC
Attorneys at law

The Guaranty Building
370 Main Street, 12th Floor
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