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## REAL ESTATE COUNCIL OF ONTARIO

### INSURANCE PROGRAM



## LOSS PREVENTION BULLETIN

July 2011

### *HOW MUCH DUE DILIGENCE IS ENOUGH?*

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#### **THE QUESTION:**

When I list a property for sale, how far do I need to go to ensure that listing information is accurately described?

#### **THE ANSWER:**

There is no right or wrong answer to this question as sometimes no amount of due diligence is going to be enough to escape a finding of liability. What we recommend is to use your common sense, develop a consistent approach in how you communicate with your client and third parties, and take precautionary steps to document important discussions and instructions. Don't rely on your memory or think that your client or a third party will have the same recollection as you do.

#### **THE FACTS:**

The following scenario has been developed from real life cases to reflect this common problem faced by real estate brokers and salespersons every day.

Many years after purchasing a home the buyer discovered that his home was connected to a septic system and not to the municipal sewage system as he believed. This discovery occurred when the septic tank at the property was inadvertently punctured resulting in a flood of his basement. Not only had the buyer been paying sewer charges to the municipality for many years, but he was then compelled to hire contractors to connect to the municipality's sewer system.

When listing the home for sale, Mr. A, who was the listing salesperson at the time, obtained and relied upon a prior MLS listing that indicated the home was on a sewer system. The seller also supplied him with current water bills that included sewer charges from the local municipality – which provided further comfort.

The buyer commenced legal proceedings claiming compensation from Mr. A, the seller and the municipality. The seller could no longer be found. The municipality was found to be responsible for a return of the improperly collected sewage charges.

Mr. A was found to be free from liability.

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## **DISCUSSION:**

Mr. A in this case had no independent means of verifying whether the property was on a septic or sewage system. The prior MLS materials were clearly wrong; however, there was no way Mr. A could have known that.

In this case – fortunately – Mr. A did not simply rely on the prior MLS listing; he undertook a reasonable further independent inquiry. He inquired about, and obtained, a bill from the local municipality that confirmed the sellers were paying sewer charges.

In situations like this the question always becomes – what would a “reasonable and competent” real estate broker or salesperson do to confirm representations? Often, this is a matter of common sense. It is important to be able to demonstrate that you have undertaken your own due diligence and that you have not blindly relied upon the representations of a seller who can no longer be held to account.

The outcome of any lawsuit can be unpredictable. However, if you can demonstrate that you undertook reasonable steps to verify facts or made appropriate inquiries - especially if the representations are unclear or if you have any suspicions about what you have been told by the seller – the likelihood that your actions will be viewed as “reasonable and competent” is greatly increased.

## **IMPORTANT LOSS PREVENTION TIPS:**

- **Never rely on the accuracy of documentation created by others in past transactions. Renovations may have occurred. Past representations may have been inaccurate or incorrect. Do not fall into the trap of perpetuating someone else’s mistake as it might become your own.**
- **Ask the client to verify the information that you will be using to list the property for sale.**
- **Obtain independent verification (in writing if at all possible) in the form of bills, tax assessments etc.**
- **If the verification is from a verbal source, ensure that you fully document it in writing.**
- **Create, and follow, a standard verification check list for issues you cannot confirm through visual inspection.**

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