

HOW TO NOT GET SUED

For Giving Financial Advice

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mortlock mccormack | law

'Angry Investors to Sue Planners.'

Sunday Star Times

8 February 2008

'...horror stories abound...

A public servant with a crippled wife had deposited \$150,000 in the bank, earmarked for a house. A financial adviser persuaded him to shift it to Bridgecorp.'

Sunday Star Times

29 September 2007

'Investors to
sue over
finance firm
losses.'

The Dominion Post
31 January 2008



‘Investors in failed finance companies are turning the heat on financial advisers, as lawyers across the country prepare to sue those they believe are responsible for the loss of their savings.’



How to *not* get sued?

Legal Principles

By requiring disclosure of financial advisers conflicts of interest, fees, and competencies, to ensure that members of the public can make informed decisions about whether to use a financial adviser and whether to follow a financial advisers financial advice.

Financial Advisers Bill

By requiring competency of financial advisers, to ensure that there are available to members of the public, financial advisers who have the experience, expertise, and integrity to match effectively a member of the public to a financial product that best meets that persons need and risk profile.

Financial Advisers Bill

To ensure that financial advisers are held accountable for any financial advice that they give and there are incentives for financial advisers to manage appropriately conflicts of interest.

Financial Advisers Bill

'Advice' means a recommendation, opinion or guidance that is given in the course of business.

Financial Advisers Bill

'Financial advice' means any advice relating to the financial implications of a financial decision and includes information as to the financial advantage or disadvantage of a financial product or a financial decision.

Financial Advisers Bill

A 'financial decision' is defined as any decision made or contemplated by a person in relation to saving money, investing, holding or realising money or property, borrowing money, incurring a debt, giving a security (including a guarantee or indemnity), taking out insurance or making financial provision for the future.

Financial Advisers Bill

Fair Trading Act

The *Fair Trading Act* provides that a person in trade is not entitled to engage in misleading or deceptive conduct. Financial advisers are bound by this.

Contract and Tort

Under the law of contract, where there is a contract between a financial adviser and a client, it is likely to be an implied term of that contract that a financial adviser will exercise care, diligence and skill in carrying out the contractual obligations.

This obligation is duplicated by the law of negligence.

Fiduciary Relationship

A financial adviser has been held to owe a fiduciary obligation to clients where “he or she has created the impression that his or her advice will be provided in an impartial and professional manner and the client has, to the knowledge of the adviser, placed his or her entire faith in the adviser to protect his or her interests.

The Securities Markets Act 1988

A financial adviser is obliged to disclose in writing (irrespective of whether they have been asked to do so) their:

- Experience and qualifications.
- Criminal convictions, and adverse findings in any court on their professional role.
- The nature and level of any fees charged.
- Details of remuneration or rewards the adviser has received/ will receive from any other source.
- Other interests and relationships that could affect the advice.
- Types of securities the adviser advises on.

SUMMARY OF LEGAL PRINCIPLES

The following principles can be distilled from common law, existing and proposed legislation:

- Advisers should exercise care, skill and diligence in giving advice.
- Advisers should not mislead or deceive, or do anything likely to mislead or deceive.
- Advisers should act in the best interests of their clients.
- Advisers should disclose the matters required by *the Securities Markets Act 1988* (as amended).

Gideon Investments

Stanley Brook Holdings Limited v Cowen

TIPS



