



Legal Lines

SUPREME COURT DELIVERS LANDMARK RULING

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On April 1, 1977, the Michigan Consumer Protection Act (MCPA) was adopted as Michigan law. It has taken 30 years to finally establish judicial guidance on the scope of the MCPA. At that time the law was viewed as one of the most comprehensive, clear and meaningful consumer protection laws in the country. The law, since its inception, has been aimed at prohibiting unfair or deceptive practices conducted in trade or commerce of consumer services or products, creating a wide-ranging plaintiff class so that any person, class or corporate entity may sue under the MCPA to obtain declaratory judgments or injunctions. Also, any person subject to actual damage may sue for individual damages. As importantly, a person can also receive attorney fees and costs far in excess of these actual damages. In several instances, plaintiffs received a few hundred dollars in damages and over \$20,000 in attorney fees.

Within the MCPA, however, there exists an exemption for industries regulated by the State. The MCPA provides an exemption for, “a transaction or conduct specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this State or the United States.” We have always understood and advocated that this exemption clearly applies to any licensed real estate agent operating in the capacity that they are licensed for. We have never advocated that the exemption protects an agent engaging in illegal activity or activity outside the scope of their licensure.

This exemption, which seems to be very clear on its face, has been a target for plaintiffs’ lawyers since the MCPA became law. This attention appears to be directly related to the availability of an award of unlimited attorney fees. The proper application of the exemption has been at times a slippery process for Michigan courts, resulting in unclear and conflicting decisions in the trial courts and the Court of Appeals. The lack of a concrete ruling has kept the issue a fairly common staple in courts for the past 30 years. MAR, through its Legal Action Committee, has spent tens of thousands of dollars advocating a clear understanding of the exemption’s scope while crafting the best defense for REALTORS® against MCPA claims.

Over the past few years, as evidenced by the ruling in *Hartman & Eichhorn v Dailey*, where the Court of Appeals made a philosophic concession that the exemption should apply but showed an unwillingness to go against the prior misapplication in *Forton v Laszar* (which did not exempt residential home builders), judicial precedent became increasingly confused as to the analysis of how the MCPA exemption is applied to REALTORS®, builders and other regulated professions. In many ways, it was beginning to appear that the law as written had no bearing on the law as applied.

It took 30 years, but it appears that the Michigan Supreme Court has finally given Michigan REALTORS® a clear and concise ruling that applies the exemption to real

estate licensees and licensed builders. In *Liss v Lewiston-Richards, Inc.* the Michigan Supreme Court ruled in early June to eliminate any question that the specific exemption in the MCPA applies to real estate licensees. The Court specifically overruled any holding to the contrary in *Forton and Hartman*.

This decision by the Michigan Supreme Court provides REALTORS® with an ironclad defense against any MCPA claims asserted against them as a result of licensed activities. REALTORS® attorneys now may present this single decision by the Michigan Supreme Court to defeat MCPA claims. It must, however, be remembered that the MCPA exemption is an affirmative defense, i.e., a REALTOR®’s attorney must raise the exemption as a defense in response to any complaint filed against a REALTOR®. If the REALTOR®’s attorney fails to claim the exemption as an affirmative defense, the defense will be lost. There is simply no reason why any REALTOR® should be found liable under the MCPA for claims arising from licensed activities.

The Court’s holding is a huge victory in clarifying the scope of the exemption. While there have been ongoing attempts in the legislature to open up the MCPA to amendment and limit the exemption, the Court’s recent guidance on the issue will go a long way in directing the application of the exemption in the future. As always, MAR Public Policy and Legal Action continues to keep a close eye this and other important issues that impact the MAR membership. 🏠