

Exemption From Michigan Consumer Protection Act a Victory for Residential Homebuilders

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Sticks & Bricks

The residential construction industry has fallen on hard times due to Michigan's troubled economic environment as residential homebuilders have faced declining profits and increasing foreclosures.

In spite of this, the Michigan Supreme Court recently handed residential homebuilders a silver lining to the cloud hanging over the residential construction industry when it determined that residential homebuilders are not subject to the Michigan Consumer Protection Act (MCPA). The ruling clarified over seven years of confusion about whether a homeowner may sue a residential homebuilder for violation of the MCPA.

The MCPA prohibits unfair, unconscionable or deceptive methods, acts, or practices in the conduct of "trade or commerce." However, the MCPA also creates an exemption for a "transaction or conduct" specifically authorized under laws administered by a regulatory board acting under statutory authority of Michigan or the United States. Most significantly, the MCPA has a fee shifting provision which offers attorneys the promise of reasonable attorneys' fees should a plaintiff succeed on an MCPA claim. The MCPA's fee shifting provision allowed a plaintiff to file a cause of action when damages were minimal, but the case was being pursued for the purpose of recovering attorney's fees.

The confusion first began with the 2000 case of *Forton v Laszar*, where the Michigan Court of Appeals first concluded that licensed residential homebuilders are subject to lawsuits under the MCPA. The Forton ruling was based on the failure of the builder to invoke the MCPA exemption defense and never squarely addressed whether residential builders fell within the MCPA's exemption.

When the appellate court next addressed the relationship between the MCPA and residential builders five years later in *Hartman & Eichhorn Bldg. Co., Inc. v Dailey*, the court mistakenly opined that the Forton court specifically held that the MCPA exemption did not apply to residential builders.

The appellate court's misguided holding in *Hartman* caused wronged homeowners to attach MCPA violations to what was really a breach of contract or warranty dispute. As a result, residential builders were faced with additional expenses in defending themselves because the MCPA provided a statutory basis for a victorious homeowner to recover their attorney fees.

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Fortunately for licensed residential builders, the Supreme Court recently intervened to put an end to this practice by ruling that licensed residential homebuilders are not subject to the MCPA. That is the clear rule of law recently announced in *Liss v Lewiston-Richards, Inc.*, 478 Mich. 203 (2007).

The Liss case stemmed from a disputed residential construction contract. The Lisses contracted with Lewiston-Richards, Inc., a licensed residential builder, for the construction and purchase of a new home. The Lisses complained that the construction was not completed in a timely manner, that the licensed residential builder made representations about its experience that were untrue, and that the construction was defective and not completed in a workmanlike manner. Consequently, the Lisses filed suit against Lewiston-Richards alleging breach of contract/warranties and unfair trade practices in violation of the MCPA.

When Lewiston-Richards sought to dismiss the Lisses' MCPA claim, the trial court refused the builder's request because it believed that it was bound to follow *Forton* and *Hartman* and held that Lewiston-Richards was subject to the MCPA.

At that point, Michigan's high court decided enough is enough and stepped in to end the confusion created by the Forton and Hartman opinions. In concluding that residential builders were not subject to the MCPA, the high court noted that claims brought against licensed residential builders are typically based on a "transaction," for example a contract for the construction or renovation of a residence, which is governed by the Michigan Occupational Code. Also, such claims are ordinarily based on "conduct," (i.e., the construction of a residence that is similarly regulated by the Michigan Occupational Code). Since the defendant's general transaction of building a house was specifically authorized, that transaction was exempted from the Michigan Consumer Protection Act.

This case is important because it puts an end to the common practice of filing MCPA claims, and puts the focus back on what really are straightforward contract or warranty disputes. As a practical matter, this should decrease the amount of exposure a licensed residential builder faces in a lawsuit, since it is no longer subjected to the threat of paying the opponent's attorney fees. Similarly, there will be a significant decrease in the number of lawsuits filed in which the aggrieved homeowner's damages are negligible, but being brought for the purpose of recovering attorney's fees.

By implication, unlicensed residential builders are not exempt from the MCPA because their general transaction of constructing a house is not specifically authorized. Therefore, insurers must be especially cognizant of the insured's licensing status when issuing an insurance policy to residential builders.

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