

blueprints

MAPPING LEGAL SOLUTIONS FOR THE CONSTRUCTION INDUSTRY

6.11.07

Michigan Supreme Court Holds That The Michigan Consumer Protection Act Exemption Applies To Licensed Residential Home Builders

By Janet Callahan Barnes

In *Liss v Lewiston-Richards, Inc.*, _ Mich _ (Docket No. 130064, rel'd June 6, 2007), the Michigan Supreme Court held that the exemption for regulated conduct and transactions under the Michigan Consumer Protection Act (MCPA), MCL 445.904(1)(a), applies to residential home builders who engage in the type of activities that define a residential home builder, which activities are permitted by the Michigan Occupational Code (MOC), MCL 339.101 et seq, to be performed by licensed residential home builders. The Court overruled any holding to the contrary in *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545 (2005) and *Forton v Laszar*, 239 Mich App 711 (2000).

In *Liss*, Plaintiffs entered into a contract with Defendants for the sale and completion of a residential home. After being dissatisfied with the contractors' work, Plaintiffs sued them under the MCPA. In their answer and counterclaim, Defendants asserted that the transaction at issue, residential home building, was exempt from the MCPA. The trial court denied Defendants' motion for summary disposition of the MCPA claim, and the Supreme Court granted Defendants' bypass application for leave to appeal.

In *Hartman*, the Daileys entered a contract with Hartman & Eichhorn Bldg, Inc. to renovate their home. When they became dissatisfied with the quality of the work, they withheld some of the money due under the contract, demanding correction of the deficiencies in the work. Hartman & Eichhorn then refused to complete the project and then sued for breach of contract among other claims. The Daileys filed a cross claim asserting a violation of the MCPA. The builders did not raise the defense that they were exempt from MCPA liability in their first responsive pleading. The trial court summarily dismissed the Daileys' MCPA claim against builder Jeffrey Hartman in his individual capacity only. The Court of Appeals reversed, and the Supreme Court granted leave to appeal.

SECRET WARDLE NOTES:

Licensed residential builders are exempt from MCPA liability for alleged unfair, unconscionable, or deceptive methods, acts, or practices in residential home building activities. Per the Michigan Supreme Court's order in *Hartman & Eichhorn Bldg v Dailey*, the exemption set forth in MCL 445.904(1)(a) is an affirmative defense that must be asserted in the licensed residential builder's first responsive pleading to be properly before the court.

This case is extremely important for licensed residential builders, as well as many other professions licensed under the Michigan Occupational Code. Since claimant's attorneys fees are no longer recoverable in these sorts of cases, it is anticipated that there will be far fewer "nuisance" cases in which the homeowner's damages are minimal, but the case is truly being pursued to gain attorney's fees.

CONTINUED...

In *Liss*, the Supreme Court explained that, “[u]nder the MCPA, ‘[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . .’”, but that MCPA § 4(1)(a) “exempts any ‘transaction or conduct specifically authorized under laws administered by a regulatory board or office acting under statutory authority of this state or the United States.’” That Court held that the party claiming the exemption bears the burden of proving its applicability and “that the relevant inquiry ‘is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.’” “Thus, the exception requires a general transaction that is ‘explicitly sanctioned.’”

The Supreme Court concluded that the general conduct at issue in *Liss* was residential home building. That Court found that residential home builders are licensed under the Michigan Occupational Code (MOC), they are regulated by the Residential Builders’ and Maintenance and Alteration Contractors’ Board, there is a set of administrative rules promulgated to regulate the licensing procedure, and the general transaction at issue, contracting to build a residential home, is specifically authorized by law. Thus, the Supreme Court concluded that the MCPA exemption applies to residential home builders who engage in the type of activities that define a residential home builder and which the MOC permits to be performed only by licensed residential home builders.

In *Hartman*, the Court of Appeals would have found that the exemption for regulated conduct and transactions under the MCPA would apply to residential home builders, but concluded that it was bound by its opposite conclusion in *Forton*. No special panel was convened in *Hartman* to resolve the alleged conflict. However, in *Liss*, the Supreme Court held that *Forton* did not address that exemption; and, therefore, Court of Appeals erred by relying on *Forton* for its decision.

In *Hartman*, _ Mich _ (Docket No. 129733, rel’d June 8, 2007), the Supreme Court vacated the Court of Appeals’ opinion in that case to the extent that it is inconsistent with *Liss*. However, because Hartman & Eichhorn failed to raise the affirmative defense of the MCPA in his first responsive pleading, the Supreme Court found that that defense was not properly before the Court. The Court remanded the case to the trial court for further proceedings consistent with the Court’s order and its opinion in *Liss*.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48083-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2007 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Construction Practice Group Chair

Robert G. Chaklos

Editor

Erene Golematis

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Blueprints, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at marketing@secrestwardle.com, or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowners’ Alert – Defense strategies for property owners and managers
No-Fault Newslite – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Update Illinois – Current trends in Illinois law
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability