



# **Michigan Consumer Protection Act Kit For REALTORS®**

**JUNE 2004**

# Memo

To: MAR Member Firms

From: Bill Martin, CEO

Date: 5/1/04

Re: Risk Management-Michigan Consumer Protection Act Defense Kit

The Michigan Consumer Protection Act (MCPA) continues to be used to initiate lawsuits against REALTORS®. However, any member that has a lawsuit filed under the MCPA has a ready-made defense.

MAR's legal counsel, McClelland & Anderson, and other legal counsel using MAR's MCPA brief have been successful in getting MCPA cases against REALTORS® dismissed at the trial court level. To assist our members with MCPA litigation, MAR has developed the Michigan Consumer Protection Act Defense Kit.

The defense kit explains how to identify an MCPA case, answers frequently asked questions regarding the act and includes a legal brief for use by your attorney. You may download the entire kit from [www.mirealtors.com](http://www.mirealtors.com) or call MAR (800) 454-7842.

# Michigan Association of REALTORS® answers your questions about the Michigan Consumer Protection Act (MCPA)

Q: What is the Michigan Consumer Protection Act (MCPA)?

A: The MCPA is legislation that was enacted in Michigan many years ago to protect consumers when they purchase goods or services for personal use. The MCPA is attractive to attorneys, as it permits a court to grant them all actual, reasonable attorney fees, regardless of the amount of damages awarded under the MCPA.

Q: What kind of claims are made against REALTORS® under the MCPA?

A: Historically, there have been two types of claims asserted against REALTORS® under the MCPA. First, where there was a dispute over an earnest money deposit, buyers or sellers have occasionally sued a REALTOR® under the MCPA claiming that the REALTOR® failed to promptly restore their deposit to them. Second, where a dispute involved any alleged misrepresentations made by a REALTOR®, a buyer or seller sometimes also claimed that the misrepresentations were covered by the MCPA. In addition to these two most common types of claims under the MCPA, there have been various other claims against REALTORS® that lawyers have occasionally claimed are also covered by the MCPA, such as breach of fiduciary duty.

Recently, there has been a change to the rules governing a REALTOR®'s handling of earnest money deposits that should, hopefully, eliminate the first type of MCPA claim. Today, a REALTOR® faced with a claim from a buyer or seller who is unhappy that the REALTOR® will not release an earnest money deposit can simply point to the rule that prohibits the release of these funds in the event of a dispute. R339.22313(6).

Q: How do REALTORS® know when they have had a claim made against them under the MCPA?

A: When a lawsuit is started against a REALTOR®, he/she is served with a summons and a complaint. The complaint is normally broken down into various counts or claims against the REALTOR®. If a claim is being asserted against a REALTOR® under the MCPA, it is highly likely that the title of one of the counts or claims will state "Michigan Consumer Protection Act." If a REALTOR® receives a summons and complaint and it does not appear to contain a count or claim with this title, the REALTOR® should not assume that there is not an MCPA claim in the complaint. Instead, they should specifically ask their lawyer to review the complaint to make certain there is no such claim made against them.

Q: Are REALTORS® liable under the MCPA?

A: REALTORS® are not liable under the MCPA if the claims being made against them are based on a transaction or conduct regulated by the Department of Labor and Economic Growth under Article 25 of the Occupational Code. If a REALTOR® is alleged to have violated the MCPA based on some claimed misrepresentation made during the course of the transaction, the transaction and this conduct are specifically regulated under Article 25 of the Occupational Code, and the REALTOR® is exempt from the MCPA. On the other hand, if, for example, the REALTOR® is also in the business of loaning money, and it is alleged that the REALTOR® violated the MCPA in the course of loaning money, this conduct would not be exempt under the MCPA. The lending of money is not covered under Article 25 of the Occupational Code.

Q: What should REALTORS® do if an MCPA claim is made against them?

A: There are several steps that should be taken to defend a REALTOR® against an MCPA claim. Those steps include the following:

(1) When the REALTOR® is served with the summons and complaint, a written answer and affirmative defenses must be filed by a lawyer on behalf of the REALTOR® with the court. The answer and affirmative defenses filed on behalf of the REALTOR® should include an affirmative defense substantially as follows:

Plaintiffs' claims under the Michigan Consumer Protection Act are barred for the reason that Plaintiffs have failed to meet all the statutory requirements to state a claim under the MCPA and/or the REALTOR® Defendant is statutorily exempt from MCPA liability.

(2) A REALTOR® should visit MAR's website to obtain a copy of the MCPA brief, which has been prepared and successfully used by MAR's counsel and other counsel in the past in defeating MCPA claims. A copy of this brief should be provided to the REALTOR®'s lawyer. A review of the brief and the cases cited in the brief will quickly bring the REALTOR®'s lawyer up-to-speed in this area of the law.

(3) If the case involves a dispute over an earnest money deposit, and the REALTOR® is still holding the earnest money deposit at the time they are served with a summons and complaint, the REALTOR® should consider interpleading (i.e., depositing with the court) the earnest money deposit. If a REALTOR® wishes to have their lawyer interplead the earnest money deposit, MAR provides a form for interpleading earnest money deposits. The form is available at [www.mirealtors.com](http://www.mirealtors.com) or at the MAR office, 800-454-7842.

Q. My lawyer tells me there is a Michigan Court of Appeals decision that says REALTORS® can be liable under the MCPA.

A. Your lawyer is right. The Court of Appeals in *Price v Long Realty, Inc.*, misinterpreted a prior Michigan Supreme Court decision and did hold that REALTORS® could be liable under the MCPA. The Michigan Supreme Court has since corrected this mistake by the Court of Appeals, and the Court of Appeals decision in *Price v Long Realty, Inc.*, is no longer the law of Michigan. All of this is explained in MAR's MCPA brief.

Q. If REALTORS® have an MCPA claim asserted against them, can they use MAR's form of affirmative defenses and MCPA brief to defend themselves in court?

A. No, not ever. If the REALTOR® is a corporation, a corporation cannot be represented by an unlicensed person in court. Most importantly, the MAR's MCPA brief is written by lawyers to be explained to and read by another lawyer and a judge. The financial risk would be too great for a REALTOR® to try to handle this problem by themselves and without the help of legal counsel.

Q. What happens if the trial court does not understand the MCPA exemption and enters a judgment against a REALTOR® on an MCPA claim?

A. Any REALTOR® who has asserted MAR's affirmative defense and unsuccessfully sought dismissal of an MCPA claim from a trial court should contact MAR to let it know of the adverse result. MAR's Legal Action Committee may authorize assistance to the REALTOR® in appealing a wrong decision on an MCPA claim.

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM**

JOHN BUYER and MARY BUYER

Plaintiffs,

v

MAIN STREET REALTY, INC., a Michigan corporation,

Defendant.

Case No. XX-XXXX-XX

Hon. Stephen Wapner

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# DEFENDANT MAIN STREET REALTY INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

## I. STATEMENT OF FACTS

Defendant, Main Street Realty, Inc. (“Main Street”), is a real estate broker duly licensed under the Michigan Occupational Code, MCL 339.101 et seq (the ACode”). On October 15, 2002, Main Street listed for sale a home located at 1215 Burlington, Lansing, Michigan (the “Burlington Home”). On November 4, 2002, Plaintiffs attended an open house and immediately submitted an offer to purchase the Burlington Home. Plaintiffs closed on the Burlington Home several weeks later. Promptly after moving in, Plaintiffs discussed that the roof leaked, the septic system was failing and the pump for the well needed to be replaced.

Plaintiffs immediately filed the present lawsuit against Main Street in which they claim that by failing to disclose the defects in the home, Main Street violated the Michigan Consumer Protection Act, MCL 445.901 et seq (the “MCPA”). Main Street has filed a Motion for Summary Disposition under MCR 2.116(c)(8) and/or 2.116(c)(10) on the basis that Plaintiffs have failed to state a claim and/or there is no genuine issue of material fact. This Brief is filed in support of Main Street’s Motion.

## II. ARGUMENT

Plaintiffs maintain that Main Street violated the MCPA by: Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

[MCL 445.903(1)(s).]

Section 4(1)(a) of the MCPA, MCL 445.904(1)(a), specifically exempts from coverage under the MCPA: A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

It is Main Street’s position that because it is a real estate broker licensed under the Code, and because the listing of homes is specifically regulated under the Code, Main Street’s actions expressly fall within this exemption to the MCPA. As will be discussed fully below, for purposes of Main Street’s Motion, the only issue for purposes of determining whether the MCPA exemption is applicable is whether the conduct in question is regulated under the Code. It so, then the law is clear that the MCPA does not apply.

The scope of the Section 4(1)(a) exemption to the MCPA is controlled by the Michigan Supreme Court’s decisions in *Smith v Globe Life Ins Co*, 460 Mich 446; 59@ NW2d 28 (1999); and *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 32@ NW2d 805 (1982). Under those decisions, the statutory exemption will apply so long as the Ageneral transaction” at issue is authorized by law, even though the legality of a defendant’s conduct in performing the transaction might be in dispute. To this extent, as discussed below, *Smith*, decided in 1999, effectively overrules prior Michigan case law involving the application of the MCPA exemption to real estate licensees. See, *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 33@ (1993).

In *Smith*, the plaintiff alleged that the defendant insurance company violated the MCPA when it made certain misrepresentations in connection with a policy of credit life insurance purchased by the plaintiff’s decedent. *Smith*, supra. Applying a “common sense reading” of Section 4(1)(a), the Court of Appeals held that the legislature did not intend to exempt illegal conduct from coverage under the MCPA, and thus, the exemption contained in Section 4(1)(a) would not apply. *Id* at 453. In reversing the Court of Appeals on this issue, the Supreme Court explained:

We conclude . . . that, when the Legislature said that transactions or conduct “specifically authorized” by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the “common-sense reading” of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is “specifically authorized.” Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that

‘ 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such “transaction or conduct” is “specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.”

Id at 465-466 (emphasis added, footnotes omitted).

The focus on the authorized nature of the “general transaction” rather than the “specific misconduct” for purposes of applying the Section 4(1)(a) exemption is nothing new. As the Supreme Court noted in *Smith*, the issue is controlled by the court’s prior decision in *Diamond Mortgage*, *supra*. In that case, the Supreme Court held that a mortgage company’s real estate broker’s license would not insulate it from liability under the MCPA for fraudulent activities committed in connection with writing mortgages. *Diamond Mortgage*, *supra*, 414 Mich at 615-617. The basis for this holding was that the general activity B i.e., mortgage writing B was not something that was authorized by the defendant’s real estate broker’s license. Summarizing the holding in *Diamond Mortgage*, the Supreme Court in *Smith* explained:

As the Court of Appeals recognized, our decision in *Diamond Mortgage* controls the resolution of this issue.

The defendant in *Diamond Mortgage* argued that it was exempt from the MCPA under ‘ 4(1)(a) because it had a real estate broker’s license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate. Like plaintiff here, the defendants in *Diamond Mortgage* responded that “no statute [or regulatory agency] specifically authorize[d] misrepresentations or false promises” made in conducting that activity.

In concluding that the defendants were not exempt from the MCPA, this Court reasoned: While the license generally authorizes *Diamond* to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of ‘ 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to “[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” For this case, we need only decide that a real estate broker’s license is not specific authority for all the conduct and transactions of the licensee’s business.

In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is “specifically authorized.” Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not “specifically authorized” under the defendant’s real estate broker’s license.

Id at 463-464 (emphasis added, footnotes omitted).

Accordingly, as indicated, the *Smith* decision effectively overrules prior Michigan precedent involving the application of the MCPA’s exemption to real estate licensees. Specifically, in *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993), the Court of Appeals, purporting to follow *Diamond Mortgage*, held that real estate licensees were not exempt from the MCPA for alleged fraudulent activities committed in connection with the sale of real estate because the regulatory scheme does not “authorize” the perpetration of a fraud. Id at 471. However, as the decision in *Smith* makes clear, the Court of Appeals in *Price* misconstrued the holding of *Diamond Mortgage*. The focus is not on whether the alleged misconduct is authorized. The focus is on whether the transaction is authorized. Accordingly, *Price* has been effectively overruled by *Smith*.

This reading of the *Smith* case was recently confirmed by the Court of Appeals in two unpublished decisions. In the first of these cases, *Timmons v Devoll*, unpublished decision of the Court of Appeals decided February 24, 2004 (Docket Nos. 241507 and 249015), after moving into their home, the buyers found numerous defects in the property including evidence of water in the basement. The Court of Appeals affirmed the decision of the circuit court dismissing the MCPA claim against the sellers’ real estate broker on the basis that this “transaction” was regulated under Article 25 of the Occupational Code and, therefore, exempt under the MCPA ‘ 4(1)(a) exemption.

Similarly, in *Love v Ciccarelli*, unpublished opinion of the Court of Appeals decided May 6, 2004 (Docket No. 243970), the purchasers sued both the seller and the sellers’ real estate agent after they discovered several defects in the home that

they had purchased. Plaintiff-purchasers cited the Diamond Mortgage decision in support of their theory that the MCPA '4(1)(a) exemption did not apply because the Occupational Code does not specifically authorize misrepresentation. The Court of Appeals rejected this argument, stating that the plaintiff-purchasers had misconstrued Diamond Mortgage and the Supreme Court's interpretation of it in *Smith v Globe Life*. The Court stated:

In the present case defendants' role as the real estate broker for the [sellers], was simply to sell the real property and engage in real estate services for the [sellers], both activities authorized and within the definition provided in MCL 339.2501(d) and (e) and, thus, the "transaction" and defendants' "conduct," which are Aspecifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States," are exempt from the MCPA under the above noted exemption, MCL 445.904(1)(a). Therefore, the trial court properly dismissed this claim, as summary disposition was proper.

When the holdings of *Diamond Mortgage*, *Smith*, *Timmons* and *Love* are applied to facts of this case, Main Street cannot be held liable under the MCPA. Simply stated, the general transaction at issue in this case -- i.e., the listing and sale of a residence -- is an activity expressly authorized and regulated by Michigan statutory law governing real estate licensees. Specifically, real estate brokers and salespersons in Michigan are licensed and regulated under the provisions of the Code, MCL 339.101 et seq. Pursuant to Section 2508 of the Code, MCL 339.2508, individuals, and principals of various entities to whom a broker's license has been issued, are authorized to perform the acts regulated by Article 25. Because Main Street was generally authorized by the Code to handle the listings of the home Plaintiffs purchased, it makes no difference whatsoever for purposes of the statutory exemption that the propriety of Main Street's actions. See, *Smith*, supra; *Diamond Mortgage*, supra. Rather, that the general activity is authorized and regulated as part of a statutorily created regulatory scheme administered by a board or officer of this State is the basis for applying the MCPA exemption. See, *Smith*, supra, quoting *Kekel v Allstate Ins Co*, 144 Mich App 379, 384; 375 NW2d 455 (1985). Such was clearly the case here.

### **III. CONCLUSION AND RELIEF REQUESTED**

Defendant, Main Street Realty, Inc., respectfully requests that this Honorable Court find that the conduct complained of in this action B i.e., the alleged nondisclosure of defects in a home listed by Defendant B is exempt from the provisions of the Michigan Consumer Protection Act because the conduct in question is regulated under the Michigan Occupational Code. Main Street requests further that accordingly, this Court grant its Motion for Summary Disposition pursuant to MCR 2.116(c)(8) and/or MCR 2.116(c)(10).

Respectfully submitted,

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