

Residential Builder Corporation Owners

Now Liable Under the Michigan Consumer Protection Act

BY KIMBERLY A. BREITMEYER



Introduction

In a May 26, 2005, published decision, *Hartman & Eichhorn Bldg Co, Inc v Dailey*¹ (*Dailey*), the Michigan Court of Appeals held that the owner and qualifying officer of a corporation that engages in residential building can be held personally liable for the tortious actions of the corporation. A panel of the court remanded and reversed the lower court's grant of summary disposition in the corporate owner's favor on the issue of personal liability for fraud and for violations alleged under the Michigan Consumer Protection Act (MCPA).²

Factual and Procedural History

The parties entered into a construction contract on July 19, 2000, to complete a second-level addition and to install a garage on the homeowner's property for \$166,041. When problems arose during the construction process, the homeowners stopped making payments after paying the builder \$105,347. The builder eventually stopped work on the project and sued the homeowners for the remainder of the contract price in the Oakland County Circuit Court.³

On December 11, 2002, Judge Colleen A. O'Brien dismissed the homeowners' counterclaims of fraudulent misrepresentation, violation of the MCPA, and violation of the Building Contract Fund Act against the owner of the corporation individually. Although the circuit court upheld some of the counterclaims against the corporation, the corporation subsequently filed for Chapter 7 bankruptcy on August 25, 2003. The bankruptcy petition automatically stayed the civil court proceeding against the corporation. The court of appeals accepted the homeowners' delayed application for leave to appeal and heard oral arguments on the issue of the corporate owner's personal liability in January 2005.

Meanwhile, the Michigan Bureau of Commercial Services issued a formal complaint, dated August 29, 2002, alleging workmanship and local building code violations, failure to correct the violations within a reasonable time, failure to meet minimal standards of acceptable practice, and failure to comply with the plans and specifications of the project. The administrative hearing, held on January 5, 2005, resulted in a settlement of the matter between the state and the builder. The issue of monetary damages to the homeowners was left to the civil courts.

Legal Holdings

Can Homeowners Pierce the Corporate Veil to Hold an Agent of a Residential Builder Corporation Personally Liable in Tort?

Yes, for torts that the agent personally commits. An agent of a corporation can be held personally liable for torts that he or she personally committed, even if the corporation is also liable for the tort.⁴ Because the lower court's grant of summary disposition in the corporate owner's favor did not appear to be based on a determination that there was not enough factual support for the homeowners' fraud claim against him individually, the court of appeals reversed the circuit court's ruling and remanded the case for determination of the fraud claim.

Can an Agent of a Corporation be held Personally Liable for Violations of the Michigan Consumer Protection Act?

Yes, because the legislature intended to hold individuals accountable on the basis of their actions rather than their affiliations with any business entity. Before the *Dailey* decision, the court of appeals, in an unpublished opinion,⁵ had declined to decide whether personal liability against an agent of a corporation could be imposed under the MCPA because that issue was not adequately briefed by both parties, and it was considered an issue of first impression in Michigan.

The court in *Dailey* stated, "We agree with the [homeowners] that the Legislature intended to hold individuals, and not just their businesses, liable for conduct that violates the MCPA."⁶ The court further reasoned that the MCPA "does not expressly limit a victim's choice of violating defendants to a certain class or type."⁷ Also, nothing in the MCPA states whether a corporate officer can be held personally liable in a civil suit. Torts generally apply to the actual tortfeasor and then to his or her employer by vicarious liability. To hold a company liable before determining the individual liability of employees of the corporation is backward when considering tort liability.

The MCPA regulates "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce...."⁸ The court reasoned that the MCPA prohibits actual conduct, rather than board resolutions, and a corporation cannot violate the MCPA without human action. The court further stated that

[b]ecause the Legislature constructed the MCPA so that actions, rather than affiliations, yield liability, individuals are necessarily the act's primary violators. It stands to reason that, absent express language to the contrary, the Legislature intended that those who actually violate the act would be the ones from whom victims could recover damages, regardless of the violators' affiliation with any business entity.⁹

Thus, the court reversed the lower court's dismissal of the claims of MCPA violations against the corporate owner individually.

Can a Licensed Residential Builder be Held Liable for Violations of the MCPA?

*Yes, because of the precedent set forth in Forton v Laszar.*¹⁰ The MCPA does not apply 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."¹¹ In addition, MCL 445.904(4) states that "[t]he burden of proving an exemption from this act is upon the person claiming the exemption."

The Michigan Supreme Court, in *Attorney General v Diamond Mortgage Co*,¹² held that a mortgage company's real estate broker's license did not exempt it from the MCPA because, "[w]hile 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." The Court applied the exemption "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.'¹³ In *Diamond Mortgage*, the Attorney General alleged that the defendant mortgage

company and real estate broker were offering homeowners mortgages in which they not only charged interest on the loan, but also rolled a brokerage or prepaid financing fee into the total cost of the loan, charging the overall interest on the full amount. The Attorney General argued that the brokerage fee was usurious because the defendant was the lender.

By contrast, in *Caproni v Prudential Securities, Inc.*,¹⁴ the United States Court of Appeals for the Sixth Circuit, applying Michigan law, reasoned that Michigan courts draw the distinction between which transactions are covered by the MCPA and which are not on the basis of “whether the conduct of the defendant is actually regulated.”¹⁵ The court distinguished the *Diamond Mortgage* case (involving securities fraud that is highly regulated by the Michigan Uniform Securities Act and the relevant state agency) from another involving a real estate agent whose alleged improper conduct was not actually regulated. However, *Caproni* relied on the ruling in *Kekel v Allstate Ins Co*,¹⁶ which the Michigan Supreme Court overruled in *Smith v Global Life Ins Co*.¹⁷

In *Smith*, the Michigan Supreme Court, concluding that its decision in *Diamond Mortgage* controlled, noted that mortgage writing (the activity that gave rise to the complaint in *Diamond Mortgage*) was not “specifically authorized” under the defendant’s real estate broker’s license.¹⁸ The *Smith* Court also stated 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. . . . [T]he relevant inquiry is not whether the specific misconduct alleged by the plaintiff is “specifically authorized.” Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.*¹⁹

Also contrasting *Kekel* and *Diamond Mortgage*, the Michigan Court of Appeals in 1993 held in *Price v Long Realty, Inc.*²⁰ that a real estate agency’s fraudulent conduct associated with the listing and sale of property was not exempt from the MCPA even though the listing and sale of property (which was involved in the fraud) is directly regulated by the occupational code governing real estate brokers. The *Price* court reasoned that

*[t]he purpose of the MCPA is to prohibit certain practices in trade or commerce, and to provide for certain remedies. Trade or commerce includes the sale of real property under the act. . . . Because the MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce, it must be liberally construed to achieve its intended goals.*²¹

The court further reasoned that, although real estate brokers, like those engaged in other occupations regulated by the state, are subject to penalties under the Occupational Code, their respective licenses do not “specifically authorize” the conduct complained of in the case.

More recently, the Michigan Court of Appeals refused to apply the MCPA to a class action brought by a class of consumers against the three Detroit casinos for allegedly fraudulently inducing consumers to play slot machines by failing to disclose that bonus wheels on slot machines were programmed to stop more often on lower payoffs.²² The court, applying the test set forth in *Smith*, held that the exemption in MCL 445.904(1)(a) applied because the general transaction, the operation of slot machines, is



Fast Facts:

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To hold a company liable before determining the individual liability of employees of the corporation is backward when considering tort liability.

specifically authorized by the Michigan Gaming Control Board and its rules and regulations, regardless of whether the specific misconduct alleged is prohibited.²³

The corporate owner in *Dailey* argued, referring to *Kekel* and *Smith*, that the MCPA does not apply “where there is a specific administrative procedure which addresses any alleged misconduct and where the general transaction is specifically authorized by law.” The corporate owner argued that, since all the allegations related to “construction work on the existing residence,” the general transaction was specifically authorized by the Occupational Code, rendering the transaction exempt from the MCPA. The corporate owner relied on the unpublished opinion in *Winans v Paul & Marlene, Inc.*²⁴ The court in *Winans* had held that, because “the activity involved comes within the scope of the residential builder licensing scheme,” it was exempt from the MCPA. The activity alleged in *Winans* was “deceptive representations about the quality and standard of the construction work performed on the residence and its premises. . . .” The distinction is between a narrow or broad view of the transaction or conduct being complained of.

In *Dailey*, however, the court held that it was precedentially bound by the broad definition of MCPA-regulated “trade or commerce” set forth in *Forton*, which includes residential builders. In *Forton*, the Michigan Court of Appeals more liberally construed the purposes of the MCPA in holding that residential homebuilders are subject to claims under its provisions prohibiting unfair, unconscionable, or deceptive methods, acts, or practices.²⁵ The *Forton* court reiterated the remedial nature of the MCPA and pointed out that it prohibits “[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce.”²⁶ Further, the MCPA broadly defines “trade or commerce” as

the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service

or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.²⁷

The court also reasoned that “the clear legislative intent of the MCPA is to protect consumers in the purchase of goods and services” and that “the definition of ‘trade or commerce’ includes residential builders who construct and sell homes for personal family use.”²⁸ Whether a residential builder’s conduct rises to the level of “unfair, unconscionable, or deceptive practice” must be determined on a case-by-case basis.²⁹ In *Forton*, the defendant residential builder deviated from the blueprints, resulting in defects in the floor of the home. The trial court found that this deviation constituted the MCPA violation because the defendant had represented that he would construct the house according to the blueprints, and he did not.

Thus, despite a corporate bankruptcy discharge or corporate dissolution, individual qualifying officers and owners of residential builder corporations may be personally liable to wronged homeowners on the basis of tort or a violation of the MCPA, which also allows for the recovery of attorney fees. Given homeowners’ concerns that they are often unable to recover attorney fees through restitution in administrative enforcement proceedings, and given that they are also often unable to recover any restitution or damages from a since dissolved or bankrupt corporation, if *Dailey* is either affirmed or declined by the Michigan Supreme Court, it could be a significant victory for homeowner complainants throughout the state.

On July 13, 2005, Jeffrey Hartman, the owner of Hartman & Eichhorn Building Company, filed a motion for reconsideration of the opinion of the Michigan Court of Appeals. The Michigan Association of Realtors, Michigan Association of Home Builders, and Michigan Defense Trial Council all filed amicus curiae briefs soon after. On September 13, 2005, the Michigan Court of Appeals denied the motion, and Mr. Hartman filed an application for leave to appeal with the Michigan Supreme Court on October 24, 2005 (Docket No 129733). This time, the Michigan Association of Realtors and Michigan Association of Home Builders filed amicus curiae briefs in support of the application, but the Court has not yet rendered a decision or scheduled oral arguments. ♦

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Footnotes

1. *Hartman & Eichhorn Bldg Co v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005). The court subsequently declined to convene a special panel to resolve a conflict between this case and *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), because the conflict was not “outcome-determinative.” 266 Mich App 801 (2005).
2. MCL 445.901 et seq.
3. *Hartman & Eichhorn Bldg Co, Inc v Dailey*, Oakland County Circuit Court Case No 01-032202-CK, before the Honorable Colleen A. O’Brien.
4. *Dailey*, supra at page 3, citing *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968).

5. *Spencer v ISAW, Inc*, unpublished opinion per curiam of the court of appeals, issued May 22, 2001 (Docket No 218138).
6. *Dailey*, supra at 550.
7. Id.; see also MCL 445.911(2).
8. MCL 445.903(1).
9. *Dailey*, supra at 551; see also MCL 445.911(7), which provides that “when a person commences an action against another person, the defendant may assert . . . any claim under this act . . .” (Emphasis added.)
10. *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000).
11. MCL 445.904(1)(a).
12. *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982).
13. Id. at 617.
14. *Caproni v Prudential Securities, Inc*, 15 F3d 614 (CA 6, 1994), overruled on other grounds by *Rotella v Wood*, 528 US 549, 563; 120 S Ct 1075; 145 L Ed 2d 1047 (2000). The United States District Court for the Eastern District of Michigan declined to follow *Caproni* in *Robertson v State Farm Fire & Cas Co*, 890 F Supp 671, 677–679 (ED Mich, 1995).
15. *Caproni*, supra at 621.
16. *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985).
17. *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).
18. Id. at 464.
19. Id. at 465.
20. *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993).
21. Id. at 470–71.
22. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 542; 683 NW2d 200 (2004).
23. Id. at 541.
24. Unpublished opinion per curiam of the court of appeals, issued July 8, 2003 (Docket No 230944).
25. *Forton*, supra at 717.
26. Id. at 715, quoting MCL 445.903(1).
27. MCL 445.902(d).
28. *Forton*, supra at 715.
29. Id. at 715–16.