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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES
FROM: LORI E. TALSKY, ESQ.
RE: CONSUMER PROTECTION ACT VIOLATION CLAIMS AGAINST
STATE LICENSED REALTORS AND HOME BUILDERS
DATE: May 4, 2004

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Disgruntled consumers who sue realtors and builders in connection with alleged defects in the home they have purchased often try to characterize their claims as violations of the Michigan Consumer Protection Act, MCL 445.901 *et seq.* (the "MPCA") because the MPCA mandates an award of reasonable attorney fees to a claimant in connection with an MPCA violation. However, in a recent unpublished decision, the Michigan Court of Appeals has decided that state licensed builders and brokers are exempt from the MPCA if the general transaction or conduct of the licensee involved is regulated by the state. *Winans v Paul & Marlene, Inc.* unpublished opinion per curium of the Court of Appeals decided July 8, 2003 (Docket No. 230944). In other words, a licensed broker who is sued in connection with his/her involvement in the purchase and/or sale of residential real estate would be exempt from the MPCA but a broker who is sued in connection with the sale of a motor vehicle would not be exempt. Similarly, a licensed builder who is sued in connection with the construction of a home would be exempt from the MPCA. Pursuant to section 4 of the MPCA, the burden of proving the right to an exemption from the MPCA falls on the person or entity claiming the exemption. Therefore, exemption from the MPCA must be pled as an affirmative defense to any MPCA violation claim and the failure to do so may result in the loss of the exemption. This affirmative may be pled as follows:

Plaintiffs' claims under the Michigan Consumers Protection Act are barred because the Defendant is statutorily exempt from any liability under such Act pursuant to MCL 445.904(1)(a) and/or because Plaintiffs failed to meet all statutory requirements to state a claim under such Act.

Unpublished opinions are not binding precedent in the courts. There is no guarantee that another Court will follow the lead of the *Winans* court. However, the reasoning might persuade other courts.

Our firm has experience representing real estate licensees and residential builders in licensing matters. If you would like to discuss the *Winans* holding or other license regulations, please contact me at (248) 827-1864 or e-mail me at let@maddinhauser.com.