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## MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

RE: LICENSURE FOR BROKERS IN NON-REAL ESTATE TRANSACTIONS

DATE: May 4, 2004

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In a June 2003 decision, the Michigan Supreme Court deviated from its usual strict construction of relatively unambiguous statutes to reinterpret MCL 339.2501, better known as the Real Estate Brokers Act, or REBA. The case, *G. C. Timmis & Company v. Guardian Alarm Company*<sup>1</sup>, involved an investment banking firm (Timmis) that claimed to have found a business opportunity, namely the purchase of alarm servicing contracts, on behalf of the Defendant, Guardian Alarm.

For its efforts, Timmis demanded a "success fee", that it alleged the two parties had agreed upon orally. Guardian Alarm in turn claimed that Timmis had gone outside of its usual role as an investment banker, and had actually engaged in negotiations relative to Guardian's purchase of the assets. Accordingly, Guardian argued, in addition to the non-existence of the oral agreement regarding a "success fee", that Timmis' conduct fell within the definition of a "real estate broker" under REBA, which reads in relevant part:

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<sup>1</sup> Michigan Supreme Court, No. 120035 (June 18, 2003).

“Real estate broker” means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable consideration . . . sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others . . .<sup>2</sup>

Guardian reasoned that Timmis was not entitled to a fee, because it had acted as a “real estate broker”, was not licensed as such, and because REBA further provides that:

A person engaged in the business of, or acting in the capacity of a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.<sup>3</sup>

The Court of Appeals agreed with Guardian Alarm, however, the Michigan Supreme Court did not. In a decision which alters accepted case law on the subject<sup>4</sup>, the Michigan Supreme Court held that in essence, REBA only applies to real estate.

Michigan started regulating brokers in 1919, when the Legislature enacted the Brokers License Act<sup>5</sup>, which defined and licensed not only real estate brokers and salesmen (sic), but also “business chance brokers”. Section 2 of that act defined business chance broker as a person or entity that for compensation, “sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of a business, business opportunity, or the good will of an existing business for others”. In 1937, the act was amended to prohibit even a single act of unlicensed brokerage, as opposed to an ongoing business practice.<sup>6</sup>

In 1943, the separate reference to business chance brokers was dropped in favor of an expansive definition of “real estate broker”:

A real estate broker within the meaning of this act is any person, firm, partnership, association, co-partnership or corporation, who with intent to collect or receive a fee, compensation or valuable consideration . . . sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the good will of an existing business for others<sup>7</sup>

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<sup>2</sup> MCL 339.2501(d)

<sup>3</sup> MCL 339.2512a

<sup>4</sup> Contrast for example, the Court’s opinion in *Timmis*, with that in *Cardillo v. Canusa Extrusion Engineering, Inc.*, 145 Mich App 361; 377 NW 2d 412 (1985).

<sup>5</sup> 1919 P.A. 306

<sup>6</sup> 1937 P.A. 188

<sup>7</sup> 1943 P.A. 57

Based on this history of legislating brokers, and a strict reading and application of the wording of the statute, Michigan courts have generally found that the current incarnation of REBA encompasses more than just real estate, and where a company's assets were being brokered for a fee, the person or entity collecting that fee must be licensed under REBA to lawfully claim that fee. With its decision in *Timmis*, the Michigan Supreme Court has changed this.

According to the Supreme Court, REBA does not require one to be a licensed real estate broker when one performs the usual function of a broker, such as finding a purchaser, unless that function involves the buying and selling of real estate or the negotiating of a real estate transaction for another. To justify its reading of REBA, the Supreme Court opined that because: (1) REBA defines a specific type of broker, namely a real estate broker, and (2) the act almost exclusively references real estate throughout, and (3) the courses that a person is required to complete to become licensed under the statute only concern real estate, and (4) because the other sections of REBA only concern real estate, this particular provision of the act must only come into play when real estate is at issue, not a business opportunity unrelated to real estate. Simply put, according to the Michigan Supreme Court in *Timmis*, REBA only applies to transactions involving real estate, and one need only have a real estate broker's license when, for a fee, one arranges to sell or buy real estate or negotiates a real estate transaction for another.

The application of the *Timmis* decision to instances where a real estate transaction happens to be part of or incidental to a larger sale of a business or other personal property and assets, remains to be seen. One would assume that in an effort to reconcile previous case law with *Timmis*, the courts will require the sale or negotiation of any real estate to be broken out or separated from the non-real estate transaction if a non-licensed broker is to receive the payment. Obviously, there is no bar to a licensed real estate broker negotiating both the sale of the business and the sale of any real estate involved for a fee.

The Ruling in *Timmis* leaves the legal door wide open for parties to negotiate "broker's fees" in non-real estate transactions. Those arrangements should be carefully documented and thought out. It is worth noting that the plaintiff's case in *Timmis* was based on an oral agreement. Our firm regularly assists clients in documenting transactions of all kinds. If you have a situation, similar to that in *Timmis* or otherwise, that you wish to document, we would be pleased to advise you. If you have questions about the *Timmis* case, please feel free to contact me at (248) 354-4030 or by e-mail at [tcn@maddinhauser.com](mailto:tcn@maddinhauser.com).