

Tacket

1995 Session

LRB or Bill No./Adm. Rule No.

AB 386 *LRB-2925*

Amendment No. if Applicable

- ORIGINAL
- UPDATE
- CORRECTED
- SUPPLEMENTAL

FISCAL ESTIMATE

DOA-2048 (R10/94)

6-27-95

Subject

Fraudulent representations in the purchase, sale, hire, use or lease of real estate, merchandise, securities, services, or employment

Fiscal Effect

State No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation
- Increase Existing Revenues
- Decrease Existing Appropriation
- Decrease Existing Revenues
- Create New Appropriation

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 - Permissive Mandatory
- 2. Decrease Costs
 - Permissive Mandatory

- 3. Increase Revenues
 - Permissive Mandatory
- 4. Decrease Revenues
 - Permissive Mandatory

5. Types of Local Governmental Units Affected:

- Towns
- Villages
- Cities
- Counties
- Others _____
- School Districts
- WTCS Districts

Fund Sources Affected

- GPR
- FED
- PRO
- PRS
- SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

This bill neither increases nor decreases the department's revenues or financial liability.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)
Department of Regulation & Licensing
Patricia C. McCormack (267-2435)

Authorized Signature/Telephone No.
Patricia C. McCormack / 7-2435

Date
5/31/95

FISCAL ESTIMATE WORKSHEET

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R10/94)

1995 Session

ORIGINAL UPDATE
 CORRECTED SUPPLEMENTAL

LRB or Bill No./Adm. Rule No. Amendment No.
AB 386 LRB-2925

Subject

Fraudulent representations in the purchase, sale, hire, use or lease of real estate, merchandise, securities, services or employment

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

II. Annualized Costs:	Annualized Fiscal impact on State funds from:	
	Increased Costs	Decreased Costs
A. State Costs by Category		
State Operations - Salaries and Fringes	\$	\$ -
(FTE Position Changes)	(FTE)	(- FTE)
State Operations - Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	\$	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
III. State Revenues- Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Rev.	Decreased Rev.
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	\$	\$ -

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	\$ 0	\$
NET CHANGE IN REVENUES	\$ 0	\$

Agency/Prepared by: (Name & Phone No.)
Department of Regulation & Licensing
Patricia C. McCormack (267-2435)

Authorized Signature/Telephone No.

Patricia C. McCormack / 2435

Date

5/31/95

SCHMIDT & RUPKE, S.C.

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1995 AUG 1 1995

Walter F. Schmidt,
Of Counsel

August 1, 1995

Mr. Rick Staff
Wisconsin Realtors Association
4801 Forest Run Road, Suite 201
Madison, WI 53704-7337

Re: Assembly Bill 386
Our File No: 2268

Dear Mr. Staff:

Thank you for sending me a copy of the letter from the Attorney General's office to Representative Owens expressing opposition to Assembly Bill 386. This bill would exempt real estate licensees from the operation of sec. 100.18, stats. We agree with the Attorney General's opinion that sec. 100.18 is valuable to level the playing field for businesses engaged in retail sales. Real estate brokerage is not a retail sales business, and sec. 100.18 can be unfairly applied to real estate licensees who are marketing a home they never lived in, do not own, and which the owners know much better than the real estate licensee.

As you know, we represent Wauwatosa Realty Company, which is Wisconsin's largest home seller. Wauwatosa Realty carefully trains its sales associates, and incidents of Wauwatosa Realty Company's sales associates making affirmative misrepresentations about homes are exceptionally rare and dealt with harshly by the company. Nonetheless, Wauwatosa Realty Company has run afoul of sec. 100.18 in ways the legislature never contemplated.

In one circumstance, a homeowner listed a house for sale with Wauwatosa Realty Company. This house was located in an older neighborhood in Wauwatosa where virtually every home has hardwood floors. The seller represented to Wauwatosa Realty Company that this home had hardwood floors beneath the installed wall-to-wall carpeting. It was impossible to take up the carpeting without destroying it or its installation. The seller assured Wauwatosa Realty Company that he knew there were hardwood floors beneath the carpeting from when he installed the carpeting. As a result, Wauwatosa Realty Company

Mr. Rick Staff
August 1, 1995
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included in its property specification sheet, which is distributed to potential buyers, and in the Multiple Listing Service description that the home had hardwood floors. It turns out that the home did not, which was discovered by the buyer after closing when the buyer wanted to take up the wall-to-wall carpeting and have the floors refinished. Even though the seller is the one who made the misrepresentations in this case, and it was not possible for Wauwatosa Realty Company to verify the representations, both the seller and Wauwatosa Realty Company were sued in Civil Court pursuant to sec. 100.18. The seller had no assets subject to execution, and Wauwatosa Realty Company was left not only paying the buyers to settle the case, but also paying buyers' attorney fees.

In another circumstance, a seller with a large house had two central air conditioning compressors standing outside the house, hooked up to the house. He represented in his seller's condition report that there were no defects with the central conditioning system. The property was listed in winter, when it was not possible to check the functioning of the air conditioning system. Wauwatosa Realty Company put in its specification sheet and Multiple Listing Service information that this house had central air conditioning. It turns out that one of the compressors never worked, and the sellers only used air conditioning in the bedrooms, which was serviced by the other compressor. After closing, the buyers discovered that they only had central air conditioning in the bedrooms, and that the other compressor did not work and had not worked for years. It needed to be replaced, and the buyer has sued both the seller and Wauwatosa Realty Company. Once again, the seller has minimal assets, and buyers' attorney fees continue to mount.

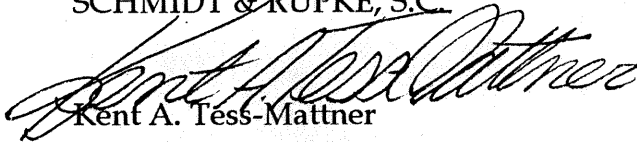
Unfortunately, these innocent misrepresentations fall within the purvey of sec. 100.18. These are not the type of fraudulent misrepresentations which the legislature had in mind when it enacted sec. 100.18. Chapter 452 of the Wisconsin Statutes and RL24 of the Wisconsin Administrative Code place an affirmative duty on licensees to exercise reasonable care in performing an investigation or inspection of a property and in making disclosures in connection with a real estate transaction. Unfortunately, sec. 100.18 contains no such limiting language, exposing a real estate licensee to not only civil liability for an innocent misrepresentation, but also the added penalty of the buyer's actual

Mr. Rick Staff
August 1, 1995
Page 3

reasonable attorney fees. This is unnecessary, and the sec. 100.18 remedy would still remain available against the culpable party, the seller. Thank you.

Yours very truly,

SCHMIDT & RUPKE, S.C.



Kent A. Tess-Mattner

KAT/bsw

cc: Mr. Donald F. Horning
WAUWATOSA REALTY COMPANY



Preferred Properties

P.O. Box 13494
Milwaukee, WI 53213

September 5, 1995

To the Legislature of the State of Wisconsin

Re: Assembly Bill 386

I am General Counsel for Wisconsin Preferred Homes, Inc., a Wisconsin corporation owned by Wisconsin residents which does business under the tradename "The Prudential Preferred Properties." In this position, I am responsible for all legal matters which affect the corporation, including litigation. I am authorized to express this corporation's support for Assembly Bill 386 which would exempt licensed real estate brokers from Section 100.18 of the Wisconsin Statutes.

We are affiliated with approximately 400 real estate licensees who conduct business in the greater Milwaukee area. These licensees are currently regulated under Chapter 452 of the Statutes and under the RL chapters of the administrative code, and are, of course, subject to the common law. I must say that if attorneys were subject to the same huge maze of often-conflicting laws and regulations, they would use every means at their disposal to impose change.

Some relief has been provided to real estate licensees by recent changes in Chapter 452 but the fact is that in the very same transaction the licensee must be a loyal advocate for one side while being "fair" to the other, while all the time "safeguarding the interests of the public." A breach of any of these responsibilities subjects the licensee to a lawsuit and action against his or her license. To assume that this juggling act can be accomplished by the application of good morals and/or keen legal insight would be naive. Neither is sufficient since what seems fair to one side of the transaction will surely seem unfair or disloyal to the other. And even with the best legal research and advice, the licensee is usually adrift in a sea of generalities which may be interpreted differently by different persons, including trial judges. In any particular transaction a licensee will have to interpret "fairly", "in good faith", "diligent", "reasonable", "material", "objective", "unbiased" and "substantial".

Since 1985 I have defended this company in lawsuits commenced by buyers or sellers of real estate. There is no shortage of causes of action under the common law, the statutes and the administrative code. Plaintiffs are allowed to express their allegations in the alternative, essentially "if it is adjudged the broker didn't violate this law, then I say they violated that other law." It is not uncommon for a plaintiff to express five (5) or more "cause of action" against us, all based on the same set of facts. Violation of Section 100.18 is only one of many tools plied by plaintiffs' counsel. The common law breaks misrepresentation into three (3) different categories - intentional, negligent and strict responsibility and plaintiffs' counsel apply different strategies to each. Since most cases settle prior to trial, the practical effect of pleading these varying causes of action is their use in threatening that an adverse result for the broker at trial will result in a judgment which far exceeds the pecuniary damages (if any) actually suffered by the plaintiff. For example, intentional misrepresentation is pleaded to threaten the possibility of a large punitive damage award. (The common line among trial attorneys and judges when settlement is discussed is "Juries are unpredictable. You never know what they'll do. Why, I remember the time...".) In the same way, a violation of Section 100.18 is pleaded in order to threaten a large award of attorney's fees. I was present in a bar-sponsored mediation where this aspect of Section 100.18 was utilized to increase the sum which we and the seller agreed to pay to a disgruntled buyer. The bar-appointed mediator stated "It's clear that the buyer's actual damages, even if they can prove them, are no more than \$10,000 but you could be on the hook for their attorneys' fees which could easily exceed \$50,000 if this goes to trial." While this may or may not have been an accurate prediction, the fact is that, as used in practice, Section 100.18 detracts from the resolution of disputes on the basis of the facts and places the focus on the economics of litigation.

As a practical and legal matter, every parcel of real estate is distinct from every other parcel. There is no uniformity and a licensee has the huge task of educating himself or herself about every property listed or shown. It may seem a daunting task for an appliance salesperson to become familiar with the major features of the appliances he or she sells but this task is minute compared to what a real estate licensee may be expected to know. For this reason, a licensee often becomes a conduit of information provided by the owner of the property. Even if the licensee is cautious in every instance to attribute information to the seller, when a buyer sues for a violation of Section 100.18, it is a case of "his word against yours" as to whether the licensee did so.

Again as a practical matter, this merely increases the sum that would be paid in settlement to someone who may not have been the victim of a violation of Section 100.18. Since the law has been interpreted to apply to private conversations, there is no effective way of disproving an allegation of a violation unless a buyer of real estate were to sign a statement reciting everything the licensee told him or her about the property. Of course, a licensee is prohibited from preparing such an exculpatory statement (unless it is requested by a party to the transaction).

In conclusion, the practical effect of Section 100.18 as it is used against real estate licensees is to shift the focus away from the facts of a dispute and toward the economics of defending against allegations which the licensee believes are absolutely without merit.

Sincerely yours,

Jeffrey P. Patterson
General Counsel

JPP/id



State of Wisconsin \ DEPARTMENT OF REGULATION & LICENSING

Tommy G. Thompson
Governor

Marlene A. Cummings
Secretary

1400 E. WASHINGTON AVENUE
P.O. BOX 8935-8935
MADISON, WISCONSIN 53708
808 266-2112

TESTIMONY OF THE DEPARTMENT OF REGULATION AND LICENSING
ON ASSEMBLY BILL 386

Before the Committee on Housing

September 7, 1995

Good afternoon, Chairperson Owens and members of the Committee.

I am Cletus Hansen, Director of the Bureau of Direct Licensing and Real Estate in the Department of Regulation and Licensing. I am testifying on behalf of the Department and the Real Estate Board to express their support of AB 386.

The Wisconsin Realtors Association had presented its position on this bill to the Board and the Department and we concur with the arguments which they have presented. Therefore, our testimony will simply focus on the fact that both the statutes and administrative rules have been rewritten in recent years and expanded to meaningfully require real estate agents to inspect for adverse facts and to disclose them to various parties involved in a real estate transaction. This is an area of regulation which is taken most seriously by the Board, as is evidenced by the fact that out of 26 disciplinary actions listed in the last issue of the Regulatory Digest, a publication which is sent to real estate licensees twice a year, 7 persons were disciplined for failure to inspect, investigate or disclose. These cases resulted in one voluntary surrender of license, one 60-day suspension and 5 limitation of licenses. The Board may also revoke licenses and impose forfeitures for violation of the disclosure requirements.

Regulatory Boards

Accounting; Architects, Landscape Architects, Professional Geologists, Professional Engineers, Designers and Land Surveyors; Auctioneer; Barbering and Cosmetology; Chiropractic; Dentistry; Dietitians; Funeral Directors; Hearing and Speech; Medical; Nursing; Nursing Home Administrator; Optometry; Pharmacy; Physical Therapists; Psychology; Real Estate; Real Estate Appraisers; Social Workers, Marriage and Family Therapists and Professional Counselors; and Veterinary.

The point that we are trying to make is that the current enforcement provisions in s. 100.18 of the Wisconsin Statutes unnecessarily duplicate the efforts of the Department of Regulation and Licensing and the Board. We do not need two state agencies regulating the same activities. Therefore, exempting real estate agents from the provisions of s. 100.18 is appropriate. We acknowledge, too, that those provisions apply primarily to retail sales and that real estate is not a very good fit into that category.

If you have any questions, I will try to answer them or obtain answers for you.

Thank you for this opportunity to address you.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
V/TTY 608/267-8902

The Honorable Carol Owens
State Representative
100 North Hamilton Street, Room 411
Pot Office Box 8953
Madison, Wisconsin 53708

Re: Assembly Bill 386

Dear Representative Owens:

We are writing to express our opposition to Assembly Bill 386, which would exempt licensed real estate brokers from the requirements of the fraudulent representations statute, section 100.18, Stats.

For the past 80 years, section 100.18 has been the general catch-all prohibition against fraudulent advertising in Wisconsin. It was designed to evenhandedly apply to everyone who engaged in dishonest sales solicitation activities in the state. Twelve years ago the insurance industry obtained the first and only exemption under this statute. Section 100.18(12), Stats. In our opinion, this exemption should be repealed. But certainly we should not compound that mistake by adding other exemptions.

The rationale for exempting real estate sales no doubt is that the industry is already licensed and regulated under Chapter 452. However, there are numerous trades that are subject to special regulations dealing with the unique nature of the business. If this proposal is enacted, who will be next in line to seek an exemption based on the argument that they are subject to special regulations? The optometrists; securities brokers; used car salesmen; telemarketers? The list could be endless with the net result that section 100.18 would become riddled with exceptions and ultimately of little value.

Section 100.18 provides a common, and needed, minimal standard for all sellers: do not engage in fraudulent representations in selling to the Wisconsin public. It provides a set of common sanctions and remedies that apply to everyone and are not available under the special regulations that govern specific industries, including real estate brokers. Why favor certain trades with special exemptions from such a basic statute requiring honest dealing with the Wisconsin consuming public?

The Honorable Carol Owens
Page 2

Assembly Bill 386 upsets the level playing field that currently exists for businesses engaged in retail sales. If enacted, it would represent unsound public policy and would be unfair to consumers and to the general business community. We strongly urge your opposition to this ill-advised proposal.

Sincerely,



Andrew Cohn
Executive Assistant

JED:AC:cl

cc: Members of the Assembly Housing Committee

NANCY SCHMELZER, CRB, CRS, GRI, President

WILLIAM MALKASIAN, CAE, Executive Vice President

TO: Assembly Housing Committee
FROM: Michael Theo and Rick Staff
DATE: September 7, 1995
RE: AB 386 - Regarding Fraudulent Advertising

**YOUR
FUTURE
IS OUR
BUSINESS.**

"The purpose
of the
Wisconsin
REALTORS®
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is to enhance
the success
of the
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professional."

The Wisconsin REALTORS Association (WRA) strongly supports AB 386, a bill exempting real estate brokers and salespersons from the fraudulent representations law which is intended to cover retail sales, not real estate brokerage. This legislation in no way dilutes the substantial disclosure and representation duties real estate licensees currently owe to their customers and clients and thus will not jeopardize consumers of real estate services in Wisconsin.

Background

Chapter 100, Wisc.Stats., provides the statutory framework for the Department of Agriculture, Trade, And Consumer Protection (DATCAP) to enforce a broad spectrum of fraudulent advertising practices from drug ads to rustproofing warranties. The clear intent of s.100.18 is to protect consumers and create a level playing field for businesses engaged in *retail* sales.

However, a recent Wisconsin Court of Appeals decision unreasonably expanded the scope of s.100.18 to "alleged" oral communications of a real estate broker. (*Grube v. Daun*, 173 Wis.2nd 30). Such communications are strictly regulated by Chapter 452 of the statutes and RL 24.07 administrative rules under the Department of Regulation and Licensing. Extending the laws governing retail sales to real estate sales goes beyond the legislative intent of the law and is duplicitous of existing statutes governing real estate sales.

Reasons To Support AB 386

1. Current Real Estate Regulations

Real estate professionals are already appropriately and aggressively regulated by the Department of Regulation and Licensing (DRL). These regulations have been continually updated over the years to insure their relevance to market realities and effectiveness in protecting consumers. Wisconsin real estate regulations are among the nation's most substantial and effective.

REALTOR® -- is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®



DRL actively participated in the development of 1993 Wisconsin Act 127, which has become model legislation nationally for real estate agency law. Act 127 clearly specifies a broker's duties to all parties in a modern real estate transaction. Because of this law, these duties now include the disclosure of all material adverse facts to all parties in the transaction. Also included are the duties of honest and fair treatment to all parties, (Wis.Stats. s.452.133.). Wisconsin's new real estate agency law is comprehensive and provides significant protections for consumers. If a misrepresentation has been made by a real estate licensee in Wisconsin, existing statutory and administrative laws provide consumers with comprehensive procedures for recourse. Given these provisions, application of s.100.18 to real estate brokerage practice is redundant, unnecessary and confusing. We believe the regulation of real estate brokerage should be exclusively under the umbrella of DRL.

2. Real Estate Sales Differ From Retail Sales

S.100.18 was designed to create a level playing field for businesses engaged in retail sales. Real estate brokerage practice is not, by definition, retail sales. The relevant distinction being the detailed knowledge of the condition of the property being sold. Unlike retail sales, real estate brokers are marketing experts. They are not expected to be responsible for determining the exact physical condition of the property they are marketing. This is why real estate transactions typically involve specialized home, electrical, or septic inspectors, etc. However, as marketers, real estate licensees must communicate what third party inspectors or sellers tell them about the property. Thus, if the standards of s. 100.18 are applied to real estate, brokers become liable without any need to prove they were negligent. In other words, brokers will be made the guarantor of representations made by the seller or other third parties.

This is not to say real estate licensees have no responsibilities or duties. Wisconsin administrative code, RL 24.03(2)(b)(c) for example, provides that brokers are required to be knowledgeable regarding laws, public policies and market conditions affecting a transaction and must advise the parties based on these factors. Moreover, a broker is required to provide a reasonably competent and diligent inspection of the property under RL 24.07.

Given these key distinctions, the standard and penalties established in s.100.18 seem appropriate for retail activities, but are clearly inappropriate for real estate brokerage practice. S.100.18 is entitled "fraudulent representations" and when applied to retail transactions, the penalties of actual damages, costs, and reasonable attorney fees seems appropriate. However, because the language does not require

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a misrepresentation to be "fraudulent" the courts have applied this section without evidence that a broker has acted fraudulently.

The Bottomline

The bottomline: Without this bill, a new and potentially substantial liability for brokers has been created unnecessarily by the courts. Brokers who may have acted in accordance with real estate law under Chapter 452 and RL 24.07, can now be found in violation of retail advertising laws under Chapter 100. AB 386 seeks to eliminate this potential liability and forestall a rash of unwarranted lawsuits. And, because the bill does not affect current consumer protection in real estate law, the public remains protected.

It is for these reasons that the Real Estate Board of the Department of Regulation and Licensing - the state's real estate disciplinary arm - voted unanimously on May 26, 1995, to support AB 386. Likewise, we respectfully encourage your support.



RICHARD KOLLMANSBERGER, CRB, CRS, GRI, President

WILLIAM MALKASIAN, CAE, Executive Vice President

TO: Members, State Assembly
FROM: Michael Theo
Vice President for Public Affairs
DATE: November 2, 1995
RE: AB 386 - Regarding Fraudulent Advertising

YOUR
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The purpose
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Background

Chapter 100, Wisc.Stats., provides the statutory framework for the Department of Agriculture, Trade, And Consumer Protection (DATCAP) to enforce a broad spectrum of fraudulent advertising practices from drug ads to rustproofing warranties. The clear intent of s.100.18 is to protect consumers and create a level playing field for businesses engaged in *retail* sales.

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