

Consumer Law

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State Bar of Michigan Consumer Law Section

Michigan Consumer Protection Act AMENDED—

Insurance Companies Completely Out; Who's Still In?

By Carolyn Bernstein

The legislature recently amended the exemption provision contained in the Michigan Consumer Protection Act.¹ The amendment was passed with very little warning and despite this section's intention to try to block the change. The change, effective March 28, 2001, is summarized here in the context of related history.

I. HISTORY OF EXEMPTION RULES OF MCLA 445.904

The MCPA specifies three ways a business can seek an exemption from the Act. First, "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer" under Michigan law is exempt from the MCPA.² For example, a 25% used car loan interest rate arguably violates the MCPA as grossly in excess of the market rate. However, the transaction is exempt from the MCPA because usury statutes specifically authorize charging up to 25% interest on used car loans.

Second, newspapers and the like are exempt from liability for misleading ads unless they knew the ads were misleading.³

Prior to this amendment, the third exemption stated that "except for the purposes of an action filed by a person under section 11", the act doesn't apply to deceptive actions already made unlawful under other specified code sections, including the Insurance Code, the Banking Code, the Motor Carrier Act, the Public Service Commission Act or the Non-Profit Dental Care Corp. Act.⁴ The goal was to prevent the Attorney General from suing these industries under the MCPA, requiring instead that the AG use the regulatory statutes and their procedures. Consumers as individuals or in class actions were still allowed to sue these industries for damages, declaratory relief or injunctions under the MCPA.

The Supreme Court muddied the waters dramatically in *Smith v Globe*⁵ which addressed whether an insurance company transaction was exempt from the MCPA under paragraph (1) the first exemption discussed above. The contorted decision held 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 is prohibited." Thus, credit insurance transactions were held to be entirely exempt under the MCPA since the Credit Insurance Act authorizes the sale of credit insurance, regardless of whether the Act specifically authorized the alleged misconduct.

Following *Globe*, consumers were left with only a narrow loophole through which they could claim the MCPA still applied to an insurance transaction. Consumers had to show that the alleged misconduct violated **both** the MCPA and an Insurance Code provision in order to sue under the MCPA.

(See also the discussion of *Forton v Laszar* later in this issue.)

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From the Chair

By Carolyn Bernstein

Greetings to the members of the Consumer Law Section. I look forward to serving as chair for the next year and will work to continue our progress and increase our efficiency. My thanks go to Ian Lyngklip, the past-chair, and Clarence Constantakis, treasurer from 1996 until this year, for their dedicated service to the Section. I welcome this year's officers, Mary Grace McCarter as treasurer, Laurin' Roberts Thomas as secretary, John Roy Castillo, as chair-elect, and our new council members, Kathy Fitzgerald from the Attorney General's office and Lynn Shecter, a private practitioner with a long history of fighting for consumers.

This is only the fifth year the Consumer Law Section has been in existence but we have come a long way since 1996, when we were forced into debt just to hold our 1st Annual Meeting. Each year this organization has become bigger, stronger and more organized. Now, with 475 members we have built up our funds so we can begin to tackle larger projects and issues with the help of the Section at large.

One of my goals as chair is to find ways of encouraging non-council section members to volunteer their time, skills and energy to serve on our many committees. In the past council members have largely done the work of the Section. We have established some traditions, like getting great speakers at our annual meetings; maintaining a brief bank, website and listserv so we can share our work, ideas, and solutions; and producing an informative, interesting newsletter. Now we need the help of the rest of the Section to strengthen these traditions and develop new ones.

We have projects pending now to create a pro bono list of consumer attorneys to further the Access to Justice campaign originated by the Bar, and to create an essay contest on consumer-related topics for law students to encourage new lawyers and law students to enter this type of practice. We are also beginning work on a short publication summarizing consumer-related causes of action and recent caselaw. And I would like to see us become more proactive in the legislative process and with media relations.

The Section is at a crucial point. We need the help of Section members to complete our projects and plan new ones. If you want to volunteer please call me or any of the council members and we will provide you with more information or direct you to the committee of your choice.

I'm looking forward to a good year with a great group of officers, council members and section members and I thank you all for the opportunity to serve.

Consumer *Pro Bono*: Do Good and Build Your Practice



By Mary Grace McCarter

Consumer laws and consumer protection are especially important to low-income consumers.

These often unsophisticated consumers are commonly the target of fraud and abuse. They may call their local legal aid office in search of representation but hesitate to contact a private attorney for fear they will incur yet another financial obligation.

Unfortunately, the legal aid office is confronted with two obstacles. First is the mistaken belief by some that legal service is restricted by the Legal Services Corporation (LSC) from accepting consumer cases where there is a potential statutory attorney fee award. This misconception is based on the 1996 Legal Services Corporation-funded programs restriction in which Congress forced severe restrictions and funding cuts upon legal services programs. Among the worst were two rules directly impacting consumer work: no class actions and no attorney fees. As we all know, the claim of statutory attorney fees in consumer cases is a vital part of effective consumer practice. In addition, the funding cuts forced legal aid offices to re-prioritize their already limited funds and consumer law was all but squeezed out in many offices. The result was an immediate decrease in the number of low-income consumers receiving legal assistance by their local legal aid office.

In reality, the 1996 restrictions prohibit LSC funded programs from "claiming, collecting, or retaining" attorney fees (45 CFR 1692) but do not prevent programs from accepting cases nor do

the regulations prevent programs from co-counseling cases in

which a private co-counsel seeks fees. Programs are also free to refer these cases through their pro bono program.

The second obstacle is the lack of true consumer experts on legal aid pro bono panels. Many attorneys volunteer to represent consumers as a part of their general practice but may not be aware of the detailed statutory consumer protections available. They may negotiate a dispute and consider a settlement successful without utilizing the laws available to their consumer client.

Contact your local legal aid organization and make a commitment to evaluate consumer cases. Utilize the resources available to you, including the Consumer Law Listserv at consumerlaw@lists.michbar.org.

Legal services offices screen thousands of calls each year and, referrals after initial assessment and screening will be made if the private consumer law practitioner is seen as available and willing to pursue consumer claims.

Responding to the needs of the poor people is a tradition of the legal profession. Here is an opportunity to reach out to poor people, be a part of supporting the consumer law, and pursue the attorney fees earned in the process.

Welcome to Our Home!

www.michbar.org

Be sure to visit our Internet site for the latest Section news and project updates!



The Michigan Supreme Court Rejects Educational Malpractice—

Can the Michigan Consumer Protection Act be used to redress claims by students injured as a result of improper instruction?

By Gary M. Victor and Barry Fish

INTRODUCTION

The question of whether courts should allow educational malpractice to proceed as a cause of action for alleged educational defects has led to much debate and substantial litigation.¹ Most state courts have either treated the theory as strongly disfavored or have rejected it outright.² It is not surprising, then, that when the Michigan Supreme Court recently considered this question it decided to reject educational malpractice as a cause of action in Michigan. In doing so, however, it appears to have painted with too broad of a brush.

In *Page v Klein Tools, Inc*³, the Court held that educational malpractice will not be recognized as a cause of action in Michigan. In doing so, the Court left a man who alleged his injuries were a result of negligent instruction without a remedy. As a result of the Court's decision, students whose safety, or perhaps even their very lives, depend on the receipt of complete information will no longer be able to use a negligence theory to redress the educational deficiencies that led to their injuries.

This article will examine the impact of *Page* on the avenues of redress for complaints by students injured as a result of improper instruction. The holding and reasoning of the case will be examined and critiqued. The article will then examine whether the Michigan Consumer Protection Act⁴ (MCPA) can be used as a cause of action by students injured as a result of improper or incomplete instruction.

THE FACTS

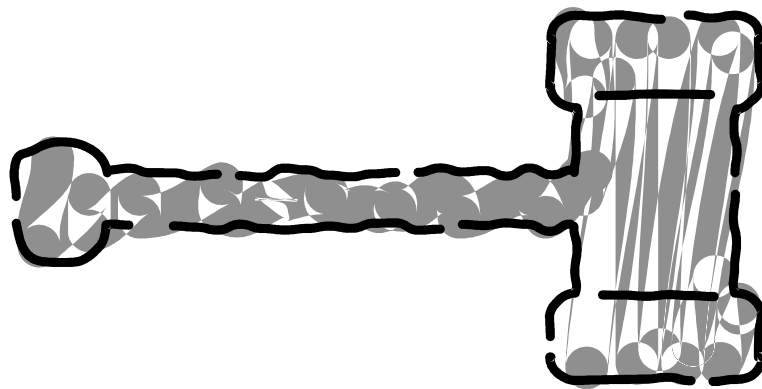
It should be noted from the outset that the facts of *Page* do not represent the typical educational malpractice case. Such cases can be thought of as “why-can't-Johnny read” cases. For example, the typical educational malpractice case seeks redress for students who graduate from high school or college as functional illiterates. These cases claim that the “educational institution failed to provide a quality education or used improper materials or techniques.”⁵ As argued by the dissent,⁶ the facts of *Page* more closely resemble a standard negligence case.

The plaintiff, Kenneth Page, was employed as an apprentice linesman. On April 3, 1993, he was injured as a result of a sixty-foot fall from a utility pole. Shortly before his employment, plaintiff had

completed a three-week course provided by defendant American Line Builders Apprenticeship Training Program (ALBAT). The course was supposed to instruct plaintiff in climbing wooden utility poles and the use of equipment for that purpose. The undisputed facts were that plaintiff had fallen while trying to maneuver around a “cross bar” using equipment purchased from, and a method taught by, ALBAT. This method involved the climber unhooking himself from the pole strap that goes around the pole, moving past the obstacle and then reattaching himself to the pole strap.⁷

Plaintiff sued ALBAT and several other defendants in a multi-count complaint. Plaintiff's claims included a count in “Negligence” alleging that ALBAT was negligent in supplying inappropriate climbing

equipment and in “failing to provide adequate instructions, education, and warning regarding pole climbing.”⁸ ALBAT moved for summary disposition⁹



arguing that plaintiff's claim regarding inadequate pole climbing instructions was a claim of educational malpractice and should be dismissed.¹⁰ The trial court granted the motion and dismissed plaintiff's complaint against ALBAT.¹¹

In an unpublished opinion,¹² the Court of Appeals affirmed in part and reversed in part. While the Court affirmed the dismissal of plaintiff's other claims against ALBAT,¹³ it reversed the trial court's dismissal of his negligence claim. Although the Court of Appeals recognized that while “claims of so-called ‘educational malpractice’ are widely disfavored, it believed Plaintiff's claim to be one of ‘simple negligence’.”¹⁴ The Supreme Court granted leave to appeal.

THE HOLDING AND REASONING OF THE COURT

The Supreme Court's holding was quite broad. In reversing the decision of the Court of Appeals and reinstating the trial court's dismissal of Plaintiff's negligence claim against ALBAT, the Court stated:

We agree with and adopt as our own the reasoning employed by those courts that have declined to recognize a cause of action for educational malpractice, whether those claims

are brought against public schools, institutions of higher learning, or private proprietary and trade schools. We therefore hold that claims sounding in educational malpractice, that is, claims alleging negligent instruction, are not cognizable in Michigan.¹⁵

In one fell swoop, the Court appears to have eliminated virtually all content based negligence claims against educational institutions and trade schools.

From the above quote, it can be seen that the Court, rather than engaging in its own reasoning, simply adopted the reasoning of other courts that had declined to recognize educational malpractice as a cause of action. Other courts have cited a variety of policy reasons for rejecting educational malpractice. These include:

(1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."¹⁶

These, and the substantial number of other reasons cited by the Court,¹⁷ would support the rejection of a cause of action for educational malpractice in any standard educational malpractice case. Certainly, cases alleging negligence based on educational methodology or the failure of students to learn materials taught could present insurmountable policy problems. However, the argument of the Court of Appeals majority and the dissent, written by Justice Kelly, was that *Page v Klein Tools* was not a case of educational malpractice but one of simple negligence.¹⁸

Justice Kelly's dissent discusses the majority's reasons for rejecting educational malpractice and shows how they do not apply to the case at hand.¹⁹ She views the case as one of simple negligence where the plaintiff is claiming that ALBAT "failed to properly instruct him in the use of equipment it sold to him."²⁰ She concludes:

Plaintiff's complaint establishes a prima facie negligence claim, and it should be heard by a jury. His negligence claim is distinct from a claim for educational malpractice and, thus, should not be foreclosed by the application of a doctrine prohibiting claims of educational malpractice.²¹

CRITIQUE

One of the principal reasons cited for rejecting educational malpractice is the collaborative nature of the educational process. In other words, some or all of a student's failure to learn lies with the student rather than the instructor. When the majority's discussion of this issue is examined in relation to the facts of *Page*, it shows the folly of the Court's conclusion.

In the last sentence before writing its conclusion, the Court states:

. . .Allowing individuals such as plaintiff to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge.²²

Mr. Page went to ALBAT as experts in the skill of utility pole climbing to be taught that skill. He purchased equipment from them for that purpose. His claim was that ALBAT was negligent in failing

to inform him that by the use of a second pole strap he could negotiate his way around obstacles without releasing himself from the pole and thereby avoid the risk of falling.²³ The Supreme Court seems to be saying that Mr. Page's fall was his own fault. He should somehow have second-guessed his chosen experts, somehow assumed or known that they had failed to provide him certain safety information and found that out for himself. Surely, this approach places an unreasonable burden on Mr. Page and, by extension, students in general.

Courts have been able to recognize the policy problems associated with educational malpractice claims and still afford protection for students put in harms way by inadequate instruction. An example is *Doe v Yale University*.²⁴ The plaintiff in *Doe*, a medical resident at Yale-New Haven Hospital, contracted AIDS as a result of changing an arterial line in a terminally ill AIDS patient. He sued the university claiming that he had not been properly trained in the procedure. The university moved for summary judgment on the basis that plaintiff's claim amounted to a claim for educational malpractice.²⁵

The trial court acknowledged that Connecticut was one of those states whose supreme court had rejected educational malpractice claims,²⁶ but went on to distinguish this case from the usual educational malpractice suit:

These cases, however, uniformly involve fairly broad challenges to the overall quality of a particular educational program. They have tended to focus generally, although not exclusively, on primary and secondary education received in public schools and to involve claims either of 1) failure of a particular educational program to equip the would-be recipient with the skills and knowledge reasonably to be expected of such a program, or 2) improper diagnosis of learning disabilities. . . .

Against the backdrop of all of these cases, it is apparent that the plaintiff's claim in this case is not a claim for educational malpractice. Dr. Doe does not claim a failure in the defendant's overall educational program or that education did not equip him to be a good doctor. Instead, his is a very precise claim based on Yale's alleged failure to train him adequately in needle safety and in the performance of the arterial line insertion which is the subject of this case.²⁷

While it was reasonable for the *Page* majority to reject educational malpractice, sacrificing the claims of students whose lives or limbs are put in jeopardy due to inadequate instruction was neither necessary nor wise. The Michigan Supreme Court's position that students injured as a result of insufficient safety education are responsible for their own injuries is particularly unreasonable. Are these injured students, like Mr. Page, to be left with no remedy at all? The remainder of this article will focus on several non-negligence theories that might be used to press their claims.

THE MICHIGAN CONSUMERS PROTECTION ACT AS A POSSIBLE AVENUE FOR REDRESSING INJURIES RESULTING FROM DEFECTIVE INSTRUCTION

It must be recognized that whatever theories are advanced to redress injuries resulting from defective instruction, if a court is

predisposed to do so, it will treat them as “sounding” in educational malpractice and dismiss them. The burden, then, is to present whatever theory is used in such a manner that the court will find it distinguishable from educational malpractice. One possible approach that might be successful is the use of the MCPA.²⁸

The MCPA it designed to protect consumers in the marketplace.²⁹ It prohibits over forty types of conduct as unfair and deceptive in the conduct of trade or commerce.³⁰ It provides for awards of actual damages together with reasonable attorney’s fees.³¹ Recently, judges and commentators have come to recognize that educational institutions are in the “business” of marketing their services to student consumers.³² It is reasonable for students, then, to be able to use the MCPA to redress injuries that have resulted from defects in the educational services they have purchased.

There are many sections of the MCPA that could be violated where a student consumer is injured as a result of improper or incomplete instruction. Some of them, for example, are:

Using deceptive representations. . . ;³³

Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. . . ;³⁴

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;³⁵

. . . failure of the other party to the transaction to provide the promised benefits;³⁶

Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is; ³⁷ and,

Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.³⁸

A MCPA claim could be based, for example, on specific representations made by an educational institution’s admissions personnel or contained in the school’s advertisements or catalog. For example, in *American Commercial Colleges, Inc.*,³⁹ the Texas Court of Appeals affirmed a judgment under the Texas Deceptive Trade Practices Act on behalf of a student who had relied on misrepresentations contained in the school’s catalog. The judgment included damages for mental anguish.⁴⁰ In another case, *Becket v Computer Career Institute, Inc.*,⁴¹ the Oregon Court of Appeals upheld a judgment on behalf of students in a suit brought under Oregon’s Unlawful Trade Practices Act. The suit claimed that admissions representatives misrepresented the placement rate for graduates. It would seem that where an educational institution misrepresents or fails to reveal material facts and a student is injured as a result, a cause of action under the MCPA should be viable.

There are certain difficulties associated with using the MCPA in an educational setting that should be noted. Schools could claim as a defense that they are not engaged in “trade or commerce” within the meaning of the MCPA or that they are exempt from coverage under the act. Our Court of Appeals in *Nelson v Ho*⁴² created a “learned professions” exception to the MCPA’s very broad definition of “trade or commerce.”⁴³ The *Nelson* Court held that physicians, as members of one of the learned professions, are not subject

to suit under the MCPA for misconduct in the actual performance of medical services.⁴⁴ Physicians can only be sued under the MCPA for conduct in their entrepreneurial activities.⁴⁵ Although traditionally the “learned professions” applied only to physicians, lawyers and ministers, educational institutions may well assert membership in that category to avoid MCPA liability.

Perhaps more troublesome is the question of exemption. The principal exemption section of the MCPA provides that the act 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.⁴⁶

The Supreme Court, in *Smith v Globe Life Insurance Co.*,⁴⁷ recently came up with what can only be described as an extraordinary interpretation of this section. Rejecting the Court of Appeals “common sense reading”⁴⁸ of the section, the Court held that where the general transaction of a business is specifically authorized by statute, the business is exempt under this subsection “regardless of whether the specific misconduct alleged is prohibited.”⁴⁹ This holding has led virtually all businesses that are the least bit regulated to claim an exemption to MCPA liability. It appears certain that educational institutions will similarly seek to claim exemptions under the language of *Smith*.

SUMMARY AND CONCLUSION

The plaintiff in *Page v Klein Tools* was severely injured in a sixty-foot fall from a utility pole. His injury took place three weeks after completing a course in utility pole climbing at ALBAT. He fell while attempting to negotiate his way around an obstacle while using the method taught by, and equipment sold to him by, ALBAT. If Mr. Page had been using a different method incorporating additional equipment, he probably would not have fallen. The Supreme Court used this case to reject educational malpractice as a cause of action in Michigan. In doing so, it left the plaintiff without a remedy.

The Court’s holding rejecting educational malpractice is consistent with the position of many other states. However, by holding that plaintiff’s negligence claim was actually one of educational malpractice, the Court’s position is much more unique. The Court has applied educational malpractice to a case that is simply not the usual educational malpractice case. This application leaves students who are injured as a result of improper or incomplete instruction without negligence as a cause of action. The MCPA should be considered as a possible basis to redress the claims of such injured students.

Because students are the consumers of educational services, they should be able to sue under the MCPA—a statute enacted to protect consumers. An educational provider that fails to reveal material facts or makes misrepresentations would violate many sections of the MCPA. When a student is injured as a result of such conduct, the MCPA would seemingly provide a remedy. Difficulties in using the MCPA may arise, however, if a defendant claims that it is not engaged in trade or commerce or that it is exempt from the MCPA as a regulated industry. Finding out how well the MCPA will work for redressing the claims of students injured as a result of improper or incomplete instruction must await future cases.

Endnotes

1. See generally, Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 Md L Rev 183, 211-25; Jody M. Alholinna, *Why Johnny Still Can't Read - What Should Minnesota Do to Address the Issue of Abysmal Test Scores Among Inner City Kids*, 18 Hamline J Pub L & Pol'y 169, 177, 181 (1996); Sharan E. Brown & Kim Cannon, *Educational Malpractice Actions: A Remedy for What Ails Our Schools?*, 78 West's Ed L Rep 643, 656-57 (1993); Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 Clev St L Rev 301, 302 (1991); Laurie S. Jamieson, Note, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B C L Rev 899, 964-65 (1991); Frank D. Aquila, *Educational Malpractice: A Tort en Ventre*, 39 Clev L Rev 323, 324 (1991).
2. See, *Ross v. Creighton University*, 957 F2d 410 (1992); *Houston v Mile High Adventist Academy*, 846 FSupp 1449 (1994); *Clarke v Trustees of Columbia University*, 1996 U.S. Dist. LEXIS 15620 (SDNY, 1996); *Moore v Vanderloo*, 386 NW2d 108 (Iowa 1986); *Donohue v Copiague Union Free School District*, 391 NE2d 1352 (N.Y.1979); *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979) and *Doe v. Board of Education of Montgomery County*, 453 A2d 814 (1982). *Turner v. Rush Medical College*, 537 NE2d 890 (Ill App), appeal denied, *Turner v. Rush Medical College*, 545 N.E.2d 133 (Ill 1989); *Peter W v San Francisco Unified School District*, 131 Cal Rptr 854 (1976); *Cavaliere v Duff's Business Institute*, 605 A.2d 397 (Pa Super 1992); *Swidryk v St Michael's Medical Center*, 493 A.2d 641 (NJ Super 1985).
3. 461 Mich 703 (2000).
4. MCL 445.901, et seq.
5. 461 Mich at 722-723 citing *Nalepa v. Plymouth-Canton Comm. School Dist.*, 207 Mich.App. 580, 594, 525 N.W.2d 897 (1994). See also, *Cavaliere v. Duff's Business Inst.*, 413 Pa.Super. 357, 370, 605 A.2d 397 (1992); *Johnson v. Clark*, 165 Mich.App. 366, 367, 418 N.W.2d 466 (1987); and *Peter W v. San Francisco Unified School Dist.*, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976).
6. Id at 718-731.
7. Id at 706.
8. Id at 707. The allegations of Plaintiff's Negligence claim against ALBAT are contained in the Court's dissenting opinion. See Id at 719..
9. ALBAT's motion was brought under MCR 2.116 (C)(8) and (C)(10).
10. 461 Mich at 707.
11. Id.
12. Docket No. 200788, June 5, 1998.
13. Plaintiff's complaint also contained claims against ALBAT in products liability and breach of implied warranty. The Court of appeals upheld the dismissal of the products liability claim following *Prentis v Yale Mfg Co*, 421 Mich 670 (1985) and *Antcliff v State Employees Credit Union*, 414 Mich 624 (1982). *Antcliff* held that a manufacturer could not be held liable for failure to instruct or warn that its product would be safer if used in conjunction with some other product. *Prentis* held that a seller's duty is no greater than the manufacturer's duty. Unpublished Opinion issued June 5, 1998 at p 2 (Docket No. 200788). The Court of Appeals did not discuss plaintiff's breach of warranty claim, apparently considering that claim to be subject to the same analysis as the products liability claim.
14. 461 Mich at 708.
15. Id at 715-716.
16. Id at 712 citing *Alsides v Brown Institute, Ltd*, 592 N.W.2d 468, 472 (Minn App, 1999).
17. See, e.g., the reasons cited by the Court from *Wilson v Continental Ins Cos*, 87 Wis. 2d 310, 323-324; 274 N.W.2d 679 (1979):
Even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden [on the defendant]; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point. Id at 715.
18. The Court of Appeals majority analysis was:
In this case, plaintiff's claim is one of negligence against a commercial job training entity that assumed a duty to train plaintiff in the proper methods and techniques of working on utility poles with equipment that it sold to plaintiff to perform such work. To summarily dispose of such a claim on the ground that it sounds in educational malpractice would represent a misapplication of the policy reasons supporting the nonrecognition of the tort. This is not a case in which a plaintiff has alleged a failure in the overall educational program of an educational entity. Plaintiff is not asking the court to interfere with the purely academic decisions of an educational entity, to make judgments about the quality of broad educational policies, or to evaluate the overall quality of his education. Instead, plaintiff has made a very precise claim against a commercial vocational training entity based upon that entity's alleged failure to instruct him on the proper methods and techniques of maneuvering around an obstacle on a utility pole, namely, a pick or a cross arm, with equipment sold to him by defendant. Plaintiff testified that the manner in which he attempted to negotiate the obstacle was the only method taught to him by defendant, and plaintiff's expert testified that plaintiff should have been instructed in the use of a second pole strap, which would have prevented the accident. In short, plaintiff has made a claim sounding in simple negligence, not educational malpractice, in which plaintiff must prove duty, breach of duty, proximate cause, and damages. The public policy considerations that have caused courts to conclude that educational malpractice claims are not cognizable are absent in this case. Unpublished opinion per curiam, issued June 5, 1998 at p 3 (Docket No. 200788).
19. 641 Mich at 718-731.
20. Id at 721.
21. Id at 731.
22. Id at 717.
23. See the Court of Appeals analysis, supra f n XX
24. No. CV900305365S, 1997 WL 766845 (Conn. Super. Ct. Nov. 28, 1997).
25. Id at 1.
26. Id.
27. Id at 2.
28. Several other theories may be available. Breach of contract theory, for example, might be used; however, the economic loss doctrine applicable to contract claims could eliminate the possibility of recovery for personal injury and pain and suffering. See *Nieberger v Universal Cooperatives, Inc*, 439 Mich 512 (1992). Also, although unsuccessful in *Page*, products liability might be an available theory where a student's

Fighting Identity Theft— New State Statutes Target Information Crimes

By Terrence Berg¹

The credit card company was calling to verify the customer's change of address. The customer, "Joe Smith," was surprised because he had not applied for any new credit cards, and had not changed his address. The credit card company told Mr. Smith the address and phone number where the new card was to be sent. Pretending to be an employee of the credit card company, Mr. Smith called the number of the would-be credit card applicant and asked to speak to "Joe Smith." After a brief pause, and Mr. Smith had the eerie experience of hearing an imposter assume his identity, as an unfamiliar voice came on the line and answered: "Yes, this is Joe Smith." The real Joe Smith hung up the phone and called the police.

The experience of "Mr. Smith" is based on a real identity theft complaint reported to the Michigan Attorney General's High Tech Crime Unit. This relatively new specimen of crime is usually accomplished in two steps. First, the criminal acquires personal identification information about his victim, such as the victim's name, address, and phone number, social security number or financial or employment information. This can be accomplished through "dumpster diving," employee theft, mail theft, computer intrusion into stored data bases, or any number of methods for stealing personal information. Next, the thief assumes the identity of victim for purposes of obtaining a credit card, seeking a loan, or making purchases of goods or services. Once the credit card is obtained in the victim's name, the perpetrator makes extravagant purchases on credit with no intention of paying. In addition to credit accounts, the ID information might also be used to sign up for Internet accounts, including porn sites. Thus the criminal effectively steals both the products from the merchants as well as the good name, reputation, and credit-worthiness of the victim whose identity was used.

What makes the crime worse is that the victim may not even be aware of it until she receives an unfriendly call from a collections agency, or applies for a car loan or house mortgage and is denied, due to her "dead-beat" credit history. Even worse, the victim must now wrangle her way through the hassle of clearing up incorrect "bad credit" history with the various credit reporting agencies. This inconvenience may be compounded by the fact that the victim's information may be sold to "spammers" who will then continually deluge the victim with torrents of un-

wanted e-mail advertisements for pornographic or fraud scam websites. This is indeed the crime that "keeps on offending" by harming the victim long after the fraudulent transactions are over.

The advent and mainstreaming of the Internet for commercial use has unfortunately increased opportunities for identity thieves in several ways. First, e-commerce transactions are necessarily *not* face-to-face, thereby making it easier to assume someone else's identity by using a credit card number or password. Second, verifying the authenticity of one's identity is harder over the Internet than in the real world, because of the inability to "check a photo ID," compare a signature, or seek some other kind of authentication. Third, the growth of online

"...Mr. Smith had the eerie experience of hearing an imposter assume his identity..."

purchasing has resulted in many "dot.com" merchants storing vast data bases of credit card numbers, passwords, e-mail addresses, and other personal information in systems that are not always secure, and have been tempting targets for hackers interested in trafficking in credit card numbers. Fourth, the Internet has created a whole new array of "account-based" services that are used by consumers: e-mail accounts, list-serve accounts, purchasing accounts, online checking accounts, etc., that rely on passwords for identification. Access to such passwords may mean access to a person's entire financial, medical, employment, academic, and personal history.

Recently the Michigan Legislature has passed statutes creating serious criminal penalties for identity theft. On December 7, 2000, the Michigan Legislature passed a new Identity Theft law that creates a five-year felony for Identity Theft.² Specifically, the law makes it illegal for a person to obtain or attempt to obtain, without authorization, personal identity information of another person with the intent to "unlawfully" use that information to: (1) obtain financial credit; (2) purchase or lease real property; (3) obtain employment; (4) obtain access to medical records; or (5) commit an illegal act. The new bill defines "per-

sonal identity information” as including: a social security number, a driver’s license or State ID card number, “employment information,” financial account information, including: an account number, a financial transaction device number, a stock or other security certificate number. If approved by the Governor, this new statute would significantly enhance the prosecutor’s arsenal against Identity Theft, by expanding the law’s reach beyond merely using stolen ID information in credit transactions. The law is slated to be codified as M.C.L. § 750.285 if signed by the Governor.

Earlier this year, effective as of February 2, 2000, Michigan lawmakers adopted two other Identity Theft statutes aimed at addressing the narrow problem of using false identity information to obtain credit. Section 750.219e of the M.C.L. creates a four-year felony for conduct where a person, without authorization, (1) prepares or submits a credit or loan application in another person’s name, (2) receives or possesses such a false loan or credit application knowing it was unauthorized, or (3) receives or possesses an instrument or device for accessing loan or credit extension proceeds knowing it was obtained without authorization.³

M.C.L. § 750.219e zeroes in on the “preparation and submission” of loan applications using another’s identity without permission, as well as the “receipt and possession” of loan or credit applications, and credit cards or access devices, where the possessor knows “or has reason to know” that the application or device was prepared or obtained in another’s name without permission. The law clearly targets not only individuals who *submit* phony credit applications or cards using other peoples’ names, but also sweeps in those who merely possess or receive such items knowing, or even having reason to know they are phony.

M.C.L. § 750.219f is divided into two subsections dealing with trafficking in loan applications or in credit cards/access devices which have been obtained using another person’s name without authorization.⁴ This section also creates four-year felonies. The language of the statute appears to have been crafted with the Internet or e-mail in mind, because it prohibits receiving or possessing “with the intent to forward,” as well as “forwarding,” any credit application or credit card where the person knows or has reason to know that the application or access device was prepared in another person’s name without authorization. This Act clearly targets “middle-men” or “clearinghouses” which collect phony applications or cards and pass them on to be processed.

Both of these statutes contain exemptions for financial institutions that have no “prior actual knowledge” of the unauthorized nature of the application.

According to the Federal Trade Commission, 55% of the complaints they have received regarding Identity Theft relate to credit card fraud (credit card account opened without authorization, or “takeover” of existing account), 28% to communications services (telephone, cellular or other utility service opened without permission), 18% to banking services (unauthorized checking or savings account opened / checks written), 11% to lending (loan obtained in victim’s name).⁵ At the national level, the FTC has taken the lead in responding to the problem of ID theft by setting up a toll-free hotline for complaints, 1-877-ID-THEFT (438-4338), and by creating an Identity Theft Data Clearinghouse, a data base of complaint information accessible to law enforcement entities through the FTC’s secure website, “Consumer Sentinel.” This database allows law enforcement to spot trends, detect patterns, and identify repeat offenders. The FTC is an excellent resource for information regarding Identity Theft in general. The FTC’s general website is www.ftc.gov, their ID theft clearing house website is www.consumer.gov/idtheft. The Michigan Department of Attorney General also has an online complaint system to deal with ID theft complaints, which is accessible at www.ag.state.mi.us.

Until biometric authentication (fingerprint, voice, or retinal recognition technology) or other reliable means of authentication are perfected and made easy-to-use, it is a safe bet that identity thieves will continue to prowl both the physical world and the Internet looking for victims. Fortunately lawmakers have begun to address this problem by adopting measures such as Michigan’s new statutes on ID theft. Although changes in technology promise to continue to challenge law enforcement’s ability to respond, tools such as these new statutes strengthen the prosecutor’s ability to combat this new kind of crime.

Endnotes

1. Assistant Attorney General, Michigan Department of Attorney General, Chief, High Tech Crime Unit. The views expressed in this article are his own and do not necessarily represent the views of the Michigan Department of Attorney General.
2. See Senate Bill 120, accessible on www.michiganlegislature.org.
3. MCL § 750.219e.
4. MCL § 750.219f(1)&(2).
5. See Testimony of Betsy Broder, Assistant Director for the Division of Planning and Information of the Bureau of Consumer Protection, Federal Trade Commission, before the House Committee on Banking and Financial Services, September 13, 2000.

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A serious question remains: Is *Globe* limited on its facts to insurance companies only or must it be applied to all other businesses whose transactions are generally regulated elsewhere.⁶ Obviously consumer attorneys are inclined to interpret the case narrowly as dealing with insurance companies only but the answer is not settled.

II. MCLA 445.904 AS AMENDED

The amended exemption provision is as follows:

Sec. 4. (1) This act does not apply to either of the following:

- (a) 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.
- (b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.
- (2) Except for the purposes of an action filed by a person under section 11, this act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by any of the following:
 - (a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.
 - (b) 1939 PA 3, MCL 460.1 to 460.10cc.
 - (c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.
 - (d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.
 - (e) 1925 PA 285, MCL 490.1 to 490.31.
- (3) **This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093.**

- (4) The burden of proving an exemption from this act is upon the person claiming the exemption.

The loophole *Globe* left open enabling consumers to sue insurance companies has been closed by the addition of paragraph (3) above. **Any business now regulated by the insurance code is exempt from the MCPA under the combined authority of paragraph (3) and *Globe*.**

Is there any good news here? The amendment deals with the insurance industry only; the legislature did not enact similar provisions to exempt the banking, savings, credit union and public utilities industries from consumer causes of action. Under paragraph (2) consumers—but not the Attorney General's office—retain their right to sue banks, savings and loans, credit unions and public utilities under the MCPA, at least as to MCPA violations that also violate cited regulatory laws.

More creatively, consumers now have a stronger argument that *Globe* is limited to insurance companies and should not be interpreted to apply section 4(1)(a) exemptions to other industries. That is, the mere fact that a general transaction is otherwise regulated should not exempt it from the MCPA under Section 4(1). Consumers should once again argue that the misconduct otherwise violative of the MCPA is only exempt if the *specific* conduct is authorized under other law. After all, if the legislature had wanted broad exemptions to apply to other industries, it could have easily done for them what it did for insurers. But luckily for consumer, it did not.

Endnotes

1. MCLA 445.904
2. MCLA 445.904(1)(a)
3. MCLA 445.904(1)(b)
4. MCOA 445.904(2)
5. 460 Mich 446 (1999)
6. See *MCPA after Smith v Globe*, *Consumer Law Newsletter*, Vol. 4, No.1, by Frederick L. Miller.

Are Residential Contractors Exempt from the MCPA? Update on *Forton v Laszer*

By Carolyn Bernstein

In *Forton v Laszar*¹ a trial court found that a licensed residential contractor violated the Michigan Consumer Protection Act (MCPA)² by causing structural damage to the plaintiffs' home. On appeal to the Court of Appeals, the contractor argued that the sale of a residential building could not be the subject of a suit under the MCPA. The Court of Appeals rejected that argument and held that defendant's deviation from blueprints supported the conclusion that the contractor violated the MCPA.

On appeal to the Supreme Court, the court denied the motions for leave to appeal on the grounds that they were not persuaded that the questions presented should be reviewed.³ However, a concurring statement by Justice Corrigan is particularly troublesome for consumer attorneys because it makes clear that she at least believes that the reasoning in *Smith v Globe*⁴ should be extended to other regulated industries. Corrigan joined in the order denying leave because the contractor failed to raise the specific defense that the sale was exempt from the MCPA until the motion for rehearing in the Court of Appeals when it was too late. She writes:

Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) por-

tions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board.

Although defendant's legal argument appears to have substantive merit, it can be of no avail to defendant, who failed to raise the issue in a timely fashion. (emphasis added).

Justice Cavanagh concurred in a separate concurring statement by Justice Kelly reminding us that the order denying leave to appeal should be given no precedential significance. So at least for now, the right to sue a residential contractor under the MCPA has not been foreclosed.

Endnotes

1. 238 Mich App 711 (2000).
2. MCL 445.901 et seq.; MSA 19.418(1) et seq.
3. SC: 116871; 2001 Mich LEXIS 195, February 16, 2001 decided.
4. 460 Mich 446 (1999).

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injury is not based on equipment being safer when used in conjunction with another product. See *supra*, fn 12. Fraud or misrepresentation are other possible approaches. Fraud presents the difficulty of showing intent and both theories require a greater showing of reliance than does the MCPA. Also, if these latter theories are offered in contract rather than tort, the economic loss doctrine would limit recovery.

29. See *Dix v. American Bankers Life Assurance Co.*, 429 Mich 410, 417 (1989).

30. See MCL 445.903.

31. MCL 445.911(2).

32. See *Andre v. Pace Univ.*, 618 N.Y.S.2d 975, 979 (City Ct. 1994), *rev'd*, 655 N.Y.S.2d 777 (App. Div. 1996) (stating that "Colleges and Universities are in the business of marketing and delivering educational services and Degrees to the general public"); *The New Guide to Student Recruitment Marketing* (Virginia Carter Smith & Susan Hunt, eds, 1986); David Brodigan & George Dehne, *Data for Effective Marketing in an Uncertain Future*, J C Admission, Spring 1997, at 16, 18-20; Jody Johnson & David Sallee, *Marketing Your College as an Intangible Product*, J C Admission, Summer 1994, at 16, 20; Robert E. Johnson, *Where Consumer Has Become King*, *Trusteeship*, Mar.-Apr. 1998, at 26; John Martin & Thomas Moore, *Problem Analysis: Application in Developing Marketing Strategies for Colleges*, 66 C. & Univ. 233, 234 (1991); Ri-

chard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 Fla L Rev. 781, 792-93 (1996); Mark S. Neustadt, *Is Marketing Good for Education?*, J C Admission, Winter 1994, at 17, 22; Robert Zemsky et al., *In Search of Strategic Perspective: A Tool for Mapping the Market in Postsecondary Education*, 29 Change 23, 35 (1997).

33. MCL 445.903(1)(b).

34. MCL 445.903(1)(c).

35. MCL 445.903(1)(s).

36. MCL 445.903(1)(y).

37. MCL 445.903(1)(bb).

38. MCL 445.903(1)(cc).

39. 821 SW2d 450 (1992).

40. *Id.* at 451.

41. 852 P2d 840 (1991).

42. 222 Mich App 74 (1997).

43. MCL 445.902(c).

44. 222 Mich App at 83.

45. *Id.*

46. MCL 445.904(1)(a).

47. 460 Mich 446 (1999).

48. For a discussion of the Court of Appeals decision in *Smith* as well as the impact of *Nelson*, see *Victor*, *The Liability of Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act*, 77 Mich B J 69 (1998).

49. *Id.* at 465.

REQUST FOR FRANK J. KELLEY CONSUMER ADVOCACY AWARD NOMINATIONS

April 20, 2001 is the deadline to send in nominations for the fourth annual Frank J. Kelley Consumer Advocacy Award. The award, created in honor of former Attorney General Frank J. Kelley, recognizes persons who have shown long-standing dedication and service to consumer affairs. We invite members to submit nominations for the award in writing by letter, fax or e-mail to either of the following:

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