

# MICHIGAN CONSUMER PROTECTION LAW AND OTHER MICHIGAN CONSUMER STATUTES

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## I. THE MICHIGAN CONSUMER PROTECTION ACT

### A. INTRODUCTION AND OVERVIEW

When the Michigan Consumer Protection Act (MCPA) was passed in 1977, it appeared to be one of the broadest and most powerful consumer protection acts in the country. It prohibits over thirty types of conduct as unfair and deceptive practices when committed in trade or commerce. See MCL 445.903(1)(a) through (cc) and MCL 445.903(b). It defined “trade or commerce” very broadly including virtually all types of economic activity providing goods or services for “personal, family or household” purposes. See MCL 445.902(c). It provided remedies in the form of declaratory judgments, injunctions, individual damages and class actions. See MCL 445.911. Perhaps most importantly, in individual actions it provided for a minimum amount of damages of \$250.00 together with reasonable attorneys’ fees. See MCL 445.911(2).

During the early years of litigation under the MCPA, several important cases illustrated the great possibilities the MCPA could provide for redressing consumer complaints. *Smolen v Dahlmann Apartments, Ltd*, 127 Mich App 108 (1983), for example, held that a violation of the Landlord-Tenant Relationships Act (MCL 554.601, *et seq.*), which does not provide for attorneys’ fees, could also constitute a violation the MCPA which does. *Mikos v Chrysler Corp*, 158 Mich App 781 (1987) established the principle that a breach of an implied warranty of merchantability constituted a violation of the MCPA entitling the plaintiff to attorneys’ fees. Also, the use of the MCPA in class actions to protect large groups of consumers damaged by unfair or deceptive trade practices was supported by the Supreme Court in *Dix v American Bankers Life Assurance Co*, 429 Mich 410 (1987).

Unfortunately, during the first dozen years after the enactment of the MCPA, the Act’s potential boon to consumers was limited by the refusal of courts to grant what amounted to really reasonable attorneys’ fees. This problem was corrected to a great extent by *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292 (1990), which discussed the calculation of attorneys’ fees under the MCPA and established the right to attorneys’ fees on appeal; and *Jordan v Transnational Motors, Inc*, 212 Mich App 94 (1995), which instructed trial courts to consider the remedial purpose of the MCPA rather than focusing on the amount of damages involved when determining attorneys’ fees.

With the greater availability of reasonable attorney fee awards, litigation under the Act increased and business began to view the MCPA as a real danger. When the Supreme Court took on a conservative majority, and what can reasonably be described as a pro-business agenda, the days of the MCPA as a white knight for protecting consumer's rights were numbered. In its first major case interpreting the MCPA, the Supreme Court rendered a decision which was totally inconsistent with both the plain wording of the Act and its legislative purpose. See *Smith v Globe Life Insurance Co*, 460 Mich 446 (1999). Under *Smith* some, perhaps many or even all regulated businesses may be exempt from liability under the MCPA. Currently, the main question for consumer lawyers, or anyone else considering representing consumers under the MCPA, is to what extent *Smith* may have gutted the Act.

## **B. WHO CAN SUE UNDER THE MCPA?**

Any "person" may sue under the MCPA to obtain declaratory judgments or injunctions. MCL See 445.911(1)(a) and (b). On the other hand, only a "person who suffers a loss" may sue for individual or class damages. See MCL 445.911(2) and (3). However, the loss suffered to have standing to sue under the MCPA need not necessarily be monetary. See *Mayhall v A H Pond Co, Inc*, 129 Mich App 178 (1983). The Act very broad defines "person" to include "natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity."

Given the definition of "person", a question developed whether businesses could sue under the Act, and if so, for what. Initially, the Court of Appeals held that businesses could sue for damages regarding goods or services purchased for use by the business. See *Catallo Associates, Inc v MacDonald & Goren, PC*, 186 Mich App 571 (1990). As *Catallo* was decided prior to the 1990 Administrative Order [See MCR 7.215(H)], it was in essence overruled by the subsequent Court of Appeals case of *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72 (1999). Although it now apparent that businesses can not sue regarding goods or services purchased for their own business use, they still may be able to sue competitors who engage in unfair and deceptive trade practices. Many federal cases brought under the MCPA allow such suits to go forward. See, e g, *John Labatt Ltd. v. Molson Breweries*, 853 F. Supp. 965 (ED Mich 1994) and *Action Glass v Auto Glass Specialists*, 134 F Supp2d 892 (WD Mich 2001).

## **C. "TRADE OR COMMERCE"**

The MCPA defines "trade or commerce", in part, to mean the "conduct of a business providing goods or services primarily for personal, family or household purposes." It goes on to include just about every type of business imaginable. Even so, in 1997, the Court of Appeal went outside the wording of the Act in order to create an exception to the broad definition of "trade or commerce". In *Nelson v Ho*, 222 Mich App 74 (1997), the Court created a "learned professions" exception to trade or commerce. The issue in *Nelson* concerned the liability of physicians under the MCPA. The Court held that the professional practice activities of physicians are not included in meaning of trade or commerce, and that

physicians can only be sued under the MCPA for their entrepreneurial activities. Although *Nelson* involved physicians, other professions are certain to claim entitlement to this exception. See Victor, *Nelson v Ho—The Court of Appeals Creates a “Learned Professions” Exception to the Michigan Consumer Protection Act*, 32 MTLA Quarterly 19 (Winter, 1998).

**NOTE:** *Nelson* and the entire issue of the liability of professionals may have become moot as a result of *Smith v Globe Life Insurance Co*, 460 Mich 446 (1999) which will be discussed in greater depth below.

**Personal, Family or Household Purposes.** If the goods or services in question are sold primarily for the personal, family or household use of consumers, they fit within the meaning of trade or commerce. See, e g, *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363 (1986), and *McRaild v. Shepard Lincoln Mercury, Inc*, 141 Mich App 406 (1985). An individual consumer that buys goods or services and uses them for primarily business purposes may not sue under the Act. See *Zine v Chrysler Corp*, 236 Mich App 261 (1999).

#### **D. WHAT TYPES OF CONDUCT ARE PROHIBITED?**

As mentioned above, over thirty types of conduct are prohibited by the MCPA as unfair, unconscionable or deceptive practices. See MCL 445.903(1)(a) through (cc) and MCL 445.903(b). The types of conduct the Act prohibits are extremely wide and varied. Some of these are:

- Using deceptive representations or deceptive designations of geographic origin in connection with goods or services. MCL 445.903(1)(b).
- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has sponsorship, approval, status, affiliation, or connection which he does not have. MCL 445.903(1)(c).
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. MCL 445.903(1)(e).
- Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction. MCL 445.903(1)(n).
- Representing that a consumer will receive goods or services "free", "without charge", or words of similar import without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions, terms, or prerequisites to the use or retention of the goods or services advertised. MCL 445.903(1)(r).
- 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. MCL 445.903(1)(s).
- Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits. MCL 445.903(1)(y).

- 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. MCL 445.903(1)(bb).
- Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner. MCL 445.903(1)(cc).

The above sections represent less than a third of the types of conduct prohibited. The breadth of the MCPA prohibitions is so great that it is arguable that almost any breach of contract will be a violation of the Act. For example, in *Mikos v Chrysler Corp*, 158 Mich App 781 (1987), the Court held that a breach of an implied warranty of merchantability constituted a failure to “provide the promised benefits” within the meaning of MCL 445.903(1)(y) entitling the plaintiff to attorneys’ fees.

**Intent.** Generally, there is no requirement to show to intent or knowledge in order to establish a violation of the MCLA. Few MCPA subsections include the word “intent”. MCL 445.903(1)(g), for example, prohibits: “[a]dvertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.” Other subsections requiring a showing of intent or knowledge are: MCL 445.903(1)(h), (q), (v) and (x).

#### **E. REMEDIES AVAILABLE UNDER THE MCPA**

As mentioned above, the MCPA provides for declaratory judgments, injunctions, individual damages and class damages.

**Declaratory Judgments and Injunctions.** As the MCPA provides that a “person” rather than a “person who suffers a loss” may seek declaratory or injunctive relief, no contractual or other relationship with the defendant is necessary for standing to seek these types of relief. See MCL 445.911(1)(a) and (b). The MCPA is designed to encourage consumers to become public attorneys general and assist in the enforcement of the Act. See Victor, *The Michigan Consumer as a Private Attorney General*, 4 COLLEAGUE 13 (December, 1991). The problem with these sections is that there is no provision for attorneys’ fees. Therefore, generally cases seeking declaratory or injunctive relief also contain individual and/or class claims for damages.

**Individual Damage Claims.** MCL 445.911(2) provides that a person who suffers a loss may bring an individual action “to recover actual damages or \$250, whichever is greater, together with reasonable attorneys’ fees.” The availability of attorneys’ fees allows consumers to obtain access to the courts by offering attorneys the promise of attorneys’ fees if they take MCPA cases and win. The issue of attorney fees under the MCPA will be discussed more extensively below. However, the nature of damages available under the Act can be addressed here.

Until very recently there was a question of whether a consumer who has been subjected to unfair and deceptive trade practices would be entitled to non-economic damages. Although

there are no Michigan cases on the issue, in *Avery v Industry Mortgage Co*, 135 F Supp 2d 840 (WD Mich 2001), the Court held that non-economic damages were available because MCPA cases were more analogous to tort claims than pure contract suits. *Avery* will provide guidance on this issue until a Michigan appellate court holds otherwise.

**Class Actions.** The MCPA specifically provides for class actions. See MCL 445.911(3). In *Dix v American Bankers Life Assurance Co*, 429 Mich 410 (1987), the Supreme Court emphasized the importance of MCPA class actions in providing a remedy for unfair and deceptive trade practices. The Court stated:

The Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons. 429 Mich at 417-418.

One of the major problems with class actions in general is the cost of notice to class members. This can be particularly devastating in consumer class actions which often involve small amounts of money over a large group of individuals. To remedy this problem, the MCPA allows the cost of notice to be shifted to the defendant. The plaintiffs may petition the court to shift the cost of notice and the court may do so on considering the probability that plaintiffs will succeed on the merits. MCL 445.911(5).

#### **F. ATTORNEYS' FEES UNDER THE MCPA**

Given the economics of the legal profession, perhaps the most important question an attorney must consider before taking a case is whether he will be able to be compensated for his efforts. The MCPA has a fee shifting provision which offers attorneys the promise of reasonable attorneys' fees should they succeed. See MCL 445.911(2). However, that promise must be evaluated in relation to other economic opportunities. Generally, attorneys are compensated on either an hourly or contingency basis. Hourly work offers the guarantee of payment without regard to success. Contingency work requires one to gamble on success, but usually provides what amounts to a higher hourly rate if success is achieved. Work under the MCPA fee shifting provision usually provides the worst aspects of both of the other alternatives. Attorneys who take MCPA cases will not be entitled to an attorney fee award unless they succeed, and usually courts base the awards on the hours worked without giving a multiplier to compensate for the contingency of success. Moreover, until the 1990s, MCPA cases met with a good deal of judicial resistance resulting in attorney fee awards considerably lower than what would be a reasonable hourly rate.

The first case to provide an extensive analysis of how attorneys' fees were to be calculated under the MCPA was *Smolen v Dalhmann Apartments, Ltd*, 186 Mich App 292 (1990). The *Smolen* Court held that trial courts should consider the guidelines established in *Crawley v Schick*, 48 Mich App 728 (1973)—(1) the professional standing and experience of the

attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. The Court indicated, however, that trial courts are not limited to those factors. On a positive note, the *Smolen* Court made it clear that MCPA attorneys' fees were available for work performed on appeal. However, the Court refused to hold that a "lodestar"—reasonable hours times a reasonable rate—was presumptively a reasonable fee. On this issue of reasonable rates, the Court referred the trial court to the Economics of Law Practice Survey. While the Court noted that fee enhancements might be available in some circumstances, it generally left trial courts with wide discretion to consider all aspects of the case. See Victor, *Attorneys' Fees Under the Michigan Consumer Protection Act, and Other Recent Developments on Attorneys' Fees*, 4COLLEAGUE 8 (May, 1991).

Both before and after *Smolen*, many trial courts based low MCPA attorney fee awards on the "amount in question and results achieved" *Crawley* criteria. That approach is no longer permitted. The Court of Appeals in *Jordan v Transnational Motors, Inc*, 212 Mich App 94 (1995) held that trial courts can not focus only on the amount involved; they must make awards based on the remedial nature of the statute. The *Jordan* Court stated:

In consumer protection (sic) as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is but precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended. 212 Mich at 98-99.

See Victor, *Court of Appeals Gives New Economic Life To Consumer Protection Cases*, 30 MTLA Quarterly 11 (October, 1996).

There have not been any recent MCPA attorney fee cases, however, cases dealing with other statutes have had an impact on the calculation of attorneys' fees under the Act. For example, awards of double attorneys' fees—under both a fee shifting statute and under the court rules on mediation or offers of judgment—are generally no longer available. The good news is that fee enhancements may be available, especially if necessary to attract competent counsel to such cases. However, the possibility of a fee reduction for partial success must also be considered. See Victor, *Recent Attorney Fee Cases and Their Potential Effect on the Calculation of Attorney Fees in Consumer Protection Cases*, 78 Michigan Bar Journal 278 (1999).

**Class Actions.** Although there is no specific provision of the MCPA providing for

attorneys' fees in class actions, fees should generally be available as a percentage of the amount collected for the class—the fund theory. Under this theory, class action plaintiffs are usually awarded attorneys' fees as a percentage of the fund recovered by the class. There a dilemma for class action attorneys where the statute is silent as to class action attorneys' fees, the fund to be protected is not large and/or the amount of work to recover the fund is extensive. Currently, there are no MCPA class action cases holding that attorneys' fees can be awarded on the basis of the amount of work involved rather than as a percentage of the amount collected for the class.

## **G. WHO IS EXEMPTED FROM MCPA LIABILITY—THE BIG ISSUE OF THE DAY**

As originally passed the MCPA exemption section, MCL 445.904, read, in pertinent part, as follows:

- (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. . . .
  - (2) . . . Except for the purposes of an action filed by a person under section 11, this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:
    - (a) Chapter 20 of the insurance code. . .
    - (b) The banking code. . . .

The exemption section appeared to be narrow and have two purposes. The first was to protect businesses from liability under the MCPA when they engaged in conduct that was “specifically authorized by law. For example, the Motor Vehicle Service and Repair Act (MCL 257.1301, *et seq.* (MVSRA) permits a repair facility to charge 10% or \$10.00 over a written estimable without getting the permission of the customer. That conduct could constitute a violation of several sections of the MCPA. Under MCL 445.904(1)(a), a repair facility that does what is specifically authorized under the MVSRA is exempt from MCPA liability for that conduct. MCL 445.904(2) applied only to the attorney general and exempted certain regulated industries from suit by the attorney general. Individuals were still permitted to sue those industries.

The exemption section, especially MCL 445.904(1)(a) was the subject of substantial and confusing litigation. The Supreme Court in *Attorney General v. Diamond Mortgage Co*, 414 Mich. 603 (1982), gave this language a narrow interpretation consistent with the Act's remedial purpose. Under *Diamond*, a transaction or conduct was only exempt from the MCPA if it was “specifically authorized” by law. A later Court of Appeals case—*Kekel v. Allstate Ins Co*, 144 Mich App 379 (1985)—appeared to hold that any regulated business could be exempt from MCPA liability. It seemed that this confusion was cleared up when the Court of Appeals rendered its decision in *Smith v Globe Life Insurance Co*, 223 Mich App 264 (1997) siding with the *Diamond* interpretation. See Victor, *The Liability of*

*Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act*, 77 Michigan Bar Journal 69 (1998). Unfortunately, the Court of Appeals' decision in *Globe* was reversed by the Supreme Court in *Smith v Globe Life Insurance Co*, 460 Mich 446 (1999). As a result of this reversal, the MCPA has entered a new era. Indeed, there may be little left of the power to protect consumers that the legislature had in mind when it passed the Act.

Under the Supreme Court's interpretation in *Smith* of the "specifically authorized" language in MCL 445.904(1)(a), the inquiry on the issue of exemption is not whether the defendant's conduct was "specifically authorized" by law, but whether the general transaction was specifically authorized. The Court stated:

Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude 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 alleged is prohibited. 460 Mich at 465.

Under *Smith*, if the general transaction is specifically authorized by statute, e.g., selling credit life insurance; then even if the defendant has engaged in unfair or deceptive trade practices in selling the credit life insurance, the transaction is exempt from MCPA liability. The question left by *Smith* is what types of businesses will be entitled to this blanket exemption from MCPA liability. It is not unreasonable to predict that as long as the Supreme Court maintains its present conservative majority, any MCPA cases that reach the Court will result in exemptions for regulated industries. A review of Justice Corrigan's concurrence in *Forton v Laszar*, 463 Mich 969 (2001) supports this prediction.

Another indication of the political atmosphere surrounding the MCPA is how the Act was amended after the Court's decision in *Smith*. Although the *Smith* Court found insurance companies exempt under MCL 445.904(1)(a), it found the defendant insurance company subject to liability under MCL 445.904(2)(a) (See above). The insurance industry lobby immediately went to the legislature and obtained an exemption. Effective March 28, 2001, the MCPA was amended to read:

MCL 445.904(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 the chapter 20 of the insurance code.

Any attorney considering taking a MCPA case involving a regulated industry must consider not only whether the trial court will find an exemption under *Smith*, but whether the defendant may be willing to pursue the case in an effort to get to the Supreme Court and obtain an exemption.

## **H. THE MCPA AND OTHER CAUSES OF ACTION**

Leaving aside the Smith problem for the moment, the use of the MCPA with other causes of action should be considered. The MCPA can be used as an additional count in conjunction with many other causes of action. As mentioned above, almost any breach of contract will also constitute a violation of the MCPA. See *Mikos v Chrysler Corp*, 158 Mich App 781 (1987). Certainly, cases involving fraud or misrepresentation lend themselves to MCPA counts. In many, if not most, cases combining the MCPA with other theories of liability, proving the MCPA count will be easier than the other counts, especially frauds. See *Dix v American Bankers Life Assurance Co*, 429 Mich 410 (1987).

Violations of many statutes will also violate the MCPA. In *Smolen v Dahlmann Apartments, Ltd*, 128 Mich App 108 (1983), for example, the Court held that a failure to return security deposit monies within the LTRA timeframe was a “failure to promptly return a deposit” within the meaning of MCL 445.903(1)(u) of the MCPA. In motor vehicle repair cases, the MCPA can be used in conjunction with violations of the MVSRA. Violation of the Pricing and Advertising Act (MCL 445.351, *et seq.*) also lend themselves to use of the MCPA. In cases involving breaches of warranty, the MCPA can be used as a complement to the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.* See *Jordan v Transnational Motors, Inc*, 212 Mich App 94 (1995). In all such statutory violation cases, however, the *Smith* issue must be investigated.

## **I. WHAT TO CONSIDER WHEN EVALUATING A MCPA CASE**

The general considerations in deciding whether to work on an MCPA case are similar to those of other cases. Attorneys must consider whether they want to establish a relationship with this client. Whether the plaintiff will be an asset in the case and provide the necessary cooperation are questions which must be answered. Since MCPA cases have an element of contingency, like any other contingent fee cases, the financial status of the defendant and/or any insurance carrier for the defendant must be considered. Several items that are more unique to the MCPA, especially for those not experienced in litigating MCPA cases, are as follows:

- Does the defendant’s conduct fall within the meaning of the acts prohibited under the MCPA?
- Does it appear that the other similarly situated consumers have been subjected to the same type of conduct? This is the primary consideration for class treatment?
- To what extent is the defendant’s business activity regulated?
- How far will the defendant go to avoid liability? Many cases that appear to be quite simple will generate considerable litigation? This is especially true because defense firms generally do not know how to litigate MCPA cases.
- If there are several theories of liability, will the inclusion of a MCPA count contribute to the ability to settle or ease of trying the case?
- Are other attorneys who are familiar with MCPA cases available for participation or advice? Generally, there are a number of experienced consumer attorneys who are willing to provide advice and support other attorneys working on MCPA cases.

## II. OTHER MICHIGAN CONSUMER STATUTES

### A. Pricing And Advertising of Consumer Items, MCL 445.351, And Unlawful Ads, MCL 445.101

1. Except in the specific instances noted in the statute, the price of a "consumer item" offered for "sale at retail" shall be clearly and conspicuously indicated upon or affixed to the consumer item. Knowingly charging or attempting to charge more than the price marked is a violation of the act. If an "automatic checkout system" charges more, then it is a prima facie evidence of a violation.

2. If the price is stated in an ad and there is no indication that it is a special, sale or reduced price, the advertiser must indicate the dates the item is available at the advertised price, indicate the quantity available, or make the item available for 5 days after the ad.

3. An advertiser must state the quantity of the consumer item available, offer the item throughout the advertised sale dates or offer a rain check.

4. Individual or class actions are allowed by someone who suffers a loss for actual damages or \$250, whichever is greater, for each day on which violations of the act have been found. The attorney's fees on an individual action, however, may not exceed \$300. No one can be part of an individual or class action regarding item pricing violation unless the seller intentionally charges more for an item than the price stamped, or the seller is notified in person or in writing of the loss suffered. Once a consumer gives notice, the seller then has two days to tender the difference between the price stamped and the price charged, plus a penalty (ten times the price difference) of no less than \$1 and no greater than \$5.

5. A consumer suffers a "loss" and can bring an action if a buyer's expectations as a result of seller's advertising are not met, even without allegations of actual monetary loss. Plaintiff may recover the difference between advertised value and actual value. *Mayhall v A.H. Pond Co, Inc*, 129 Mich App 178 (1983), but see *Pantelas v Montgomery Ward & Co*, 169 Mich App 273 (1988)(no recovery available for a nine month delay in waiting for out-of-stock advertised products).

6. Unclaimed damages from a class action may be used for a "fluid recovery," lowering the price of the good or giving the state the money for use on a project of interest to the class. *Cicelski v Sears, Roebuck & Co*, 132 Mich App 298 (1984).

7. Misleading advertising is also deemed unlawful by MCL 445. 101, et seq. Techniques deemed illegal include claiming "sale at wholesale" by retail sellers, charging excessive prices and falsely advertising as a "sale" regularly priced goods. Remedies include an 8 month right of rescission from the date of sale. If an unlawful practice has caused damage or "threatens to cause damage" to petitioner, a circuit court may issue an injunction

and award reasonable attorneys fees and costs. This is one of the few acts to potentially give attorney fees for obtaining an injunction. No attorneys fees or costs will be awarded if the trial judge rules that a meritorious, even though unsuccessful, defense was presented.

**B. Home Solicitation Sales Act, MCL 445. 111 & Promotional Sales, MCL 445.931**

1. Under the Home Solicitation Sales Act, there is a three day right to cancel a contract if there is a personal or telephone sale at the buyer's residence for a good or service over \$25. Exceptions include sale of insurance by a licensed agent, sale by a licensed realtor, sale made pursuant to prior negotiations occurring at a fixed location, sales initiated by the buyer who hasn't been previously solicited by the seller, and sales pursuant to printed advertisements. Notice of the right of cancellation must be given in the manner and form stated by the statute before the three days to cancel begins. If cancellation occurs, the seller is not entitled to compensation for services performed before the cancellation.

2. Under the Promotional Sales Act, there is a three day right to cancel contracts for the sale of goods, services, or memberships whose value exceeds \$500 and where the buyer has been offered anything more than \$25 in value in exchange for attending a sales promotion. Notice of the right of cancellation must be given. In certain cases, when the buyer requests the goods, services or membership without delay because of an emergency, and it would be unfair to the seller, there is no right to cancel.

**C. Unsolicited Merchandise by Mail, MCL 445.131 and Negative Option Selling**

1. Under Michigan law (and the Federal statute, 39 USC 3009), the recipient of unsolicited goods by mail may keep the goods and is not bound to return them, without any obligation to the seller.

2. This is a powerful tool, especially in combination with 16 CFR 425.1 of Federal Trade Commission Act. Federal law prohibits sales of goods or merchandise by negative option selling without clear and conspicuous disclosure. Negative option selling is a very effective and widely used technique of requiring a consumer to opt out of a sale or a charge will be incurred on a credit card that the seller has acquired through some other means (a sale of an unrelated product or a "marketing" arrangement with a credit card issuer).

**D. Retail Installment Sales Act, MCL 445.851**

1. Applies to retail sales by persons regularly in the business of selling goods or services to retail buyers (but not services of a licensed professional performing legal, medical or dental services) with a time price differential in which buyer pays the balance in one or more installments.

2. Requires a written contract with certain disclosures and a maximum time price differential of 12% on amounts up to \$500 and 10% on amounts over \$500.

3. Certain rights are granted to the buyer including: prepayment in full of unpaid balance is permitted, regardless of what the seller's contract says; right to receive a receipt for payments made, statement of dates and amounts of payments, and many more.

4. Late fees or collection charges for installments in default more than 10 days may not exceed 5% or \$5, whichever is less.

5. Violation of the act, except as a result of accidental or bona fide error, bars the seller from recovering the time price differential, all other delinquency charges and any contractual attorney fees. The buyer, on the other hand, is given a statutory right to reasonable attorney fees.

**E. Home Improvement Finance Act, MCL 445.1101**

1. Covers the sale of goods and services valued over \$300 to retail buyers if the buyer promises to pay the indebtedness in installments.

2. Gives rules for content and form of the contract, and rules on prepayment.

3. Gives substantive rights to buyer including a right of recession till 5pm on the business day following the sale, maximum time price differential and finance charge, prohibition against securing the credit extended with a lien on buyer's principal residence, and a list of provisions which will be deemed void if inserted such as a liquidated damages clause, buyer's waiving any right of action against contractor for any illegal act, etc.

4. Delinquency and collection charge for each installment in default shall not exceed 5% or \$5, whichever is less.

5. Willfully violating the act is a misdemeanor and the attorney general or the prosecutor may seek an injunction, but nothing in the act creates a private right of action or grants attorneys fees.

**F. Unsolicited Advertising by Fax machine, MCL 445.1771**

1. Unless consent is received, sending an advertisement by fax is prohibited.

2. A person who receives an ad in violation of the act may file a suit to recover actual damages or \$500, whichever is greater, plus reasonable attorneys fees if the recipient has notified the sender in writing that the sender did not have the person's consent to send the ad (or the attorney general has issued a cease and desist order, or there has been a voluntary assurance of discontinuance signed).

**G. Notice To Cosigners of Adverse Credit Reporting, MCL 445.271**

1. Before reporting adverse information about a co-signer to a credit reporting agency, the cosigner must be notified and given 30 days to respond

2. Violations allow a right of action for actual damages or \$250, whichever is greater, together with attorney's fees. However, defendant must be given 30 days notice before a lawsuit is filed and be given the right to tender an amount equal to the loss or otherwise resolve the matter. If Defendant does pay the actual loss, Plaintiff is barred from further action and cannot get attorney's fees.

#### **H. Credit Service Protection Act, MCL 445. 1821**

1. Entities serving as intermediaries between a debtor and a creditor, who attempt to improve a person's credit, or obtain credit for another person are prohibited from doing certain things.

2. The act does not cover banks, licensed lenders, attorneys, a person licensed under the occupational code engaged in regular course of business, a credit reporting agency, or a licensed debt management company.

3. Prohibited acts include taking money or other consideration before the closing of the loan and completing performance of all services agreed to be performed by the credit services organization for the buyer, charging the buyer a fee for referring a retail seller who will give credit to the buyer if that same credit is generally available to the public, deceptive acts or practices such as guaranteeing to delete an adverse credit report even if the report is accurate and not obsolete, or guaranteeing to extend credit without equally conspicuous disclosure of the requirements.

#### **I. Mortgage Brokers, Lenders And Servicers Licensing Act, MCL 445.1651a**

1. There is a broad prohibition against "fraud, deceit, or material misrepresentation" in connection with a mortgage transaction by a mortgage broker, mortgage lender, or mortgage servicer.

2. "[A]ny person...may bring an action, including a class action" to obtain declaratory relief, injunctive relief, and recover actual damages or \$250, whichever is greater, together with reasonable attorney fees and the costs of bringing the action. However, only actual damages can be recovered if the licensee establishes by a preponderance of the evidence that the failure to comply with the act was not willful, intentional, or the result of gross or wanton negligence. Notably, a person need not be someone who has suffered damage in order to sue.

#### **J. Credit Reform Act, MCL 445.1851**

1. This strange act passed in 1996 reads more like a lender entitlement act. It's provisions allow certain regulated lenders to make various charges. However, the corollary is never discussed. If charges other than those referenced in the act are made, it is not at all certain that the act has been violated. The act has some of the strongest remedies available in Michigan's consumer statutes, but they require violation of the act. What does the act prohibit? Very little it seems. The act does prohibit a depository institution from requiring a borrower or buyer to pay "an excessive fee or charge." However, there is no attempt to define what is excessive.

2. The act allows a bank and other depository institutions to charge any rate of interest for a credit card and all regulated lenders may charge up to 25% interest for an extension of credit on a loan or credit sale.

3. The remedies for a borrower include declaratory, injunctive, class action and individual actions. In an individual action, a borrower may recover "\$1,000 and actual damages if the alleged violation of this act was committed by a regulated lender for a noncredit card arrangement or \$1500 and actual damages if the alleged violation involved any other credit arrangements." Reasonable attorneys fees and costs are also available, apparently for injunctive and declaratory relief as well as for an individual action. Presumably, because statutory attorney fees are not listed for class actions, a common fund attorneys fee (a percentage of the amount recovered) is contemplated for class actions.

4. A regulated lender is excused from a violation of this act if it has fully complied with the truth in lending act, 15 USC 1601, et seq. and shows that any violation was a bona fide error such as a clerical mistake.