

## **HOW AND WHY THE CONSUMER PROTECTION ACT CAME TO BE<sup>1</sup>**

by Edwin M. Bladen<sup>2</sup>

### **The Need for the Act**

We had a serious problem in 1966. Consumers found themselves far better off than ever before because the American System was the most fabulous producer of goods and serves the world had ever known. Nevertheless, the consumer had cause for concern about the marketing system, because of deceptive and fraudulent selling together with credit abuses.

Dissatisfaction with the system in those days could be summarized under three headings: First, some consumers felt unrepresented in the way policy was determined in the market place. They were disenchanted with the belief that their purchasing dollar actually voted. They were unhappy with continuing changing packaging, names and models, and with being sold things they did not plan to buy, may not need and generally could not afford.

Second, some consumers felt unhappy about the marketplace because it provided no one to whom a complaint could be made. The marketplace was impersonal. No person was ever really identified as the person with whom responsibility existed, with whom the complaint could be made, and with whom the authority to resolve the dispute rested.

Finally, the consumer could not make value comparisons. The sheer number of competing items complicated deciding what to choose. Packaging often made it impossible for the consumer to see, feel or even smell the merchandise. Loose fill practices, stuffing, false bottoms and identifying packages with relatively meaningless terms such as, family, economy, or giant, tended to mislead consumers. The multitude of sizes of packages and differing measuring weight or contents expressed on the labels

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<sup>1</sup>Much of the material for this article is drawn from the author's copywrited work A Handbook on Consumer Protection Law in Michigan originally published by the Attorney General Consumer Protection Division in 1976 and revised in 1978. That handbook was originally written as a guide for attorneys in the Consumer Protection Division and for County Prosecutors to set up consumer units in their offices under grants from the Law Enforcement Assistance Administration of the U.S. Justice Department.

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were difficult to interpret, let alone make a value choice of the consumer buying dollar. prizes, discounts and stamps further complicated the problem of value comparison. Consumer items were not marked with prices so that comparisons among varieties of the same product could be made.

On top of all of these myriad confusing marketing practices, there was the old standby of fraudulent selling. The boundary between undesirable and illegal selling practices was difficult to define and common conventional fraud law was unable to adequately cope with many practices recognized as unlawful.<sup>3</sup> The major difficulty was the requirement that the victim prove intent to defraud on the part of the merchant or seller. Often times it was difficult to pin point on what the consumer relied to make the purchase. Reliance under the law was difficult to prove. Besides, deceptive and fraudulent selling practices most commonly encountered involved a wide range of old and newly invented practices.

Meaningless terms were common in advertising. While Michigan had both a civil and criminal false advertising law<sup>4</sup> media, billboards, store counters and packages were often covered with jargon designed to evoke a favorable response without saying anything<sup>5</sup>. Michigan's then Fair Trade Laws and planned production levels demanded advertising to sell expected quantities of products substantially dictated that approach. The messages of the media were "some cars have it", "don't knock it until you've tried it", and "your breath feels fresher for hours." The packages screamed (including today) "low calories", "extra strength", "new", "more vitamins", and "guaranteed". The store's prices were reduced (even today) "10 cents", and "up to "50%". With the salesman having been largely replaced and this kind of advertising being a routine and generally accepted merchandising practice, the rule of *caveat emptor* was and still is very real: that is, the consumer was led to base maximum expectations on a minimum of information.

Give away enticements were many and varied.<sup>6</sup> For example, trading stamps, a prize for doing a puzzle, offering free breakfast coffee with the purchase of two boxes of cereal, shishkabob skewers for only \$2.50 with a coupon for a 35 cent roll of paper towels, "all accessories free", a color television with a mobile home, a stereo by signing a contract to buy eight records, a free trip later to be subjected to high pressure salesmanship to buy real estate, a cheap vacuum cleaner free by suggesting ten or twenty names for ten or twenty dollars a name, a free lawn chair as an enticement to make a down payment on a contract to improve a house with that marvelous new siding. All enticements of value made it difficult to know what the principal merchandise or service being purchased was costing. The consumer paid more for the total purchase than if everything offered were purchased separately, and in some instances, enticements were come-on bait for outright fraud.

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<sup>3</sup>See, Comment, 68 Mich. L. Rev. 926 (April, 1970)

<sup>4</sup> Civil: 1966 PA 241, MCLA 445.801. Criminal: 1931 PA MCLA 750.33.

<sup>5</sup>See also, Notes, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965)

<sup>6</sup>See at that time Federal Trade Commission Advisory Opinion Digests: RE: Us of the word "free" and similar representations. November 16, 1971, effective December 15, 1971.

Michigan was confronted with creditors who purchased the consumers' contracts asserting their claim of "holder in due course" in defense to the consumer claims of faulty merchandise or outright shoddy workmanship. The consumer was without an effective remedy. Claims of fraud were almost impossible to establish in such circumstances.<sup>7</sup>

Bait and switch was a common practice<sup>8</sup> It was considered unethical between businesses when the items advertised were loss leaders, that is, when an item is advertised and sold below cost to attract customers to buy other items. When the advertised item was distinctly shoddy, it is unfair to the consumer, and certainly deceptive if never available in the first place. Again a plain and speedy remedy was unavailable.

Fictitious discounts or discounts on prices marked up for the purposes of being discounted were a major source of concern.<sup>9</sup> There was little recourse because frequently the consumer had little knowledge they had been taken in. Michigan Law gave and continues to give a consumer whose victimized by such a practice an 8 month rescission right.<sup>10</sup>

Simple high pressure and unconscionable selling practices under purportedly generous credit options were responsible for numerous pathetic cases of consumer abuse. Take the case of the widowed ADC mother with five children who purchased a refrigerator bearing a manufacturer's suggested list price in 1966 of \$399.95, but was sold to her for \$895. Finance charges of \$356 were added to bring the total contract with sales tax to \$1287.<sup>11</sup>

The case of the lady who was sold dancing lessons costing thousands of dollars has been told in many versions, as has that of the husband who was led by his wife to believe that the new drapes were being paid for out of household budget savings until he was garnished by the holder-in-due course of the contract his wife had signed.

The Attorney General's Consumer Protection Division files were replete with complaints from people who had bought from a door to door peddler yesterday something which they did not really want, and which could not be returned, or might not even be delivered.<sup>12</sup>

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<sup>7</sup>Michigan later abolished the holder in due course doctrine in the Retail Installment sales Act, and the Home Improvement Finance Act See, MCLA 445.865; MCLA 445.1207.

<sup>8</sup>Bait and Switch is to advertise what appears to be a bargain and then endeavor to sell the responding prospective customer another item, usually higher priced. See, FTC Advisory Opinion Digest RE: Bait Advertising, November 24, 1959.

<sup>9</sup>See FTC Advisory Opinion Digest in effect on Deceptive Pricing January 8, 1964 and Michigan's version of a similar prohibition found at MCLA 445.106(a).

<sup>10</sup>MCLA 445.108

<sup>11</sup>See *Jones v. Star Credit Corp.*, 298 NYS2d 264 where the court held excessive price may constitute unconscionability on substantially similar facts.

<sup>12</sup>Michigan addressed this problem with the Home Solicitation Sales Act, 1971 PA 227, MCLA 445.111 et.seq.

Misrepresentation of products in the market by chain and department stores, franchise sellers and by reputable local merchants, was and still is minimal. There is little room for it. Less than complete representation from the perspective of the consumer is, however, more prevalent. The line of communication between the producer and the consumer is unfortunately long. Well intended labeling can become a garble to the consumer. Often the customer has to be possessed of considerable scientific or technical knowledge to understand labels. Knowing how to interpret the label may involve knowing the quality and origin of the merchandise as is certainly the case in a number of fine wines.<sup>13</sup>

In the common market of the urban peddler and the secondhand dealer who mainly serve the inner-city poor, faulty and used merchandise was more frequently passed off as new, first class, or operable when it may very well be none of these. Such vendors seldom allowed merchandise to be returned. They had final sales. Furthermore, favorable credit arrangements, law designed for another era, and the customer's lack of understanding usually made it impossible for a buyer of misrepresented merchandise to receive redress. Fraudulent misrepresentation had become conspicuous in the service fields. For example Michigan experienced in those days home repairmen who skipped the county before they were apprehended because they had delivered nothing or did a patently inferior job, such as using paint which washed off with the first rain, sold lightning rods which were nothing more than wooden sticks painted with aluminum paint, or recovered roofs or driveways with inferior material.

With all of these consumer grievances we in the Consumer Protection Division went about our work to correct the marketplace. We approached the problems with a two fold attack. First was to use innovative legal theories to deal with the more egregious wrongdoers. Second, we sought legislation which had a likelihood of adoption by the legislature.

### The Litigation Approach

During this time period pyramid schemes were prevalent. One particularly onerous scheme involved a company calling itself Koscot Interplanetary Inc. It sold cosmetic distributorships to many gullible and unsuspecting consumers who were led to believe they could become highly successful and rich over night. Thousands of consumers attended weekly "golden opportunity" meetings in which the host would engage in what was called the "money hum" and dumped from a canvass bag onto a stage what appeared to be a million dollars. The attendees stood on chairs chanting "money", "Money" to a fever pitch. Eventually, the host got around to doing a "chalk talk" on a blackboard describing how each participant for a small investment of \$4000 could recruit about twelve similar persons who each in turn would invest \$4000 and recruit another twelve and on and on in an endless chain. Soon they were told of earning thousands of dollars literally overnight with the efforts of all in "their" organization.

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<sup>13</sup> Michigan's wine labeling law was of some benefit. See, 1895 PA 193, MCLA 289.81 et. seq.

As you can immediately recognize down the line the population of the earth is exceeded. In short, someone has to lose. But, how were we to attack this scam? Common law fraud was not the answer because we had the absence of an ability to prove intent to defraud, and reliance on some false statement which the maker knew or should have known was false. Could we get an injunction? On what theory? We hit upon the idea that the representations made at these meetings constituted a form of advertising and since we had a false advertising statute which prohibited misleading and deceptive advertising we could allege that leaving out a material fact was deceit under that law. Additionally, we thought the whole notion of a pyramid scheme or old fashioned "Ponzi" scheme without the classic investor was simply unfair or unconscionable. But Michigan had no common law of unfair business practices. So we came up with the idea of conduct contrary to public policy.

We commenced the action and the end of the story is that the Court of Appeals in *Attorney General v. Koscot Interplanetary, Inc.*, 37 Mich. App. 447; 195 N.W.2d 43; 1972 Mich. App. LEXIS 1716; 54 A.L.R.3d 195 (1972) held that the scheme violated the Deceptive Advertising Act and was contrary to public policy. The Court described public policy as follows:

In *Sipes v. McGhee*, 316 Mich 614, 623\_624 (1947), the Court gave a definitive meaning to the term public policy: "What is the meaning of 'public policy?' A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare.' In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation. Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people, in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed

under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be

obviously contrary to public policy, though such policy has never been so written in the bond, [\*\*\*50] whether it be Constitution, statute or decree of court. It has frequently been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone, the foundation, of all constitutions, statutes, and judicial decisions, and its latitude and longitude, its height and its depth, greater than any or all of them."

Later we used this definition to frame the concept of unconscionability and fairness in what later became the Consumer Protection Act.

Other cases we commenced utilized various existing Michigan Court precedent where the private right of action was absent and the remedy was only administrative or criminal. For example, where there was a violation of some statute which although did not provide for a regulatory process but nonetheless imposed certain obligations on a seller, we turned to the case of *Turner v. Schmidt Brewing Company*, 278 Mich 464, 270 NW 750 (1936) where the Supreme Court held that the Michigan courts are unavailable to a person who violates any provision of law. Thus, where a consumer was the victim of easy credit and rigorous collection practices a defense was available to the consumer to have the collection action dismissed because of the usury violation.

Still others were commenced by our office using the *Quo Warranto*<sup>14</sup> powers of the Attorney General against a corporation who engaged in conduct which we considered to be unfair or deceptive theorizing that the state granted a corporate charter which did not authorize such conduct in the firm's business affairs. We were quite successful against land developers with such actions.

### The Legislative Approach

As a problem proved to be troublesome we advocated various regulatory statutes to deal with them. Among the statutes we advocated and assisted or wholly wrote is the Motor Vehicle Service and Repair Act, MCLA 257.1301 which licensed repair facilities,

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<sup>14</sup>See MCLA 600.4501 et. seq. .The sanctions are quite severe. see MCLA 600.4521 and 4531.

and mechanics but also prohibited unfair and deceptive trade practices. A private right of action was provided for in that act and a set of rules principally drafted by our office defined what is encompassed within the concepts of unfair and deceptive.

We dealt with the land developer problem with the Michigan Land Sales Act, MCLA 565.801 et. seq. This law regulated the disposition of lots, units, parcels or interests in land within real estate subdivisions which had yet to have any improvements. Essentially vacant vacation properties.

In 1965-1966 we assisted in writing and advocating the Retail Installment Sales Act, MCLA 445.1851 set. seq. This set out certain requirements in the consummation of retail installment sales agreements involving the sale of goods and services intended for persona, family or household use.

The home improvement problems were addressed in the writing and adoption of the Home Improvement Finance Act, MCLA 445.1101 et. seq. in 1965. This law applied only to home improvements and not to construction of new homes, and only if paid for over time. The principal problem of the itinerant repairman could not be solved except by criminal prosecution. But this act dealt primarily with the siding salesmen who went door to door selling long term siding contracts.

The door to door peddler was dealt a heavy blow when they had to wait three business days before they could peddle the encyclopedia contract or other long term paper which was signed at the consumer's residence. This right came from the Home Solicitation Sales Act, MCLA 445.111 et. seq..

All during this time period we had introduced every two year legislative session a law we called the "Little Federal Trade Commission Act" or the "Deceptive Trade Practices Act." And, as we succeeded in addressing piecemeal these various consumer problems with a particularized statute we desperately sought an all encompassing law which directly prohibited in all trade and commerce in or affecting Michigan, deceptive, unfair or unconscionable business practices.

#### The Legislative Effort to Adopt an Unfair and Deceptive Trade Practices Act

What later became the Michigan Consumer Protection Act had its genesis in the recognition that existing tort and fraud law proved to be inadequate as a legal basis for correcting marketplace injury to consumers.

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At common law, false advertising was actionable if the advertisement contained a representation of fact which was known by the advertiser to be false and was intended to induce the consumer to purchase the product advertised. The consumer, of course, actually had to purchase the product. This was known as an action for fraud and deceit. As well, under the law of sales, an affirmative statement of fact or a promise the natural tendency of which was to induce the purchase amounted to an express warranty.

Many states, as I have stated above, adopted what were known as "Printer's Ink" laws which made untrue, deceptive and misleading advertising a misdemeanor so long as the advertiser intended to dispose of the goods or services advertised.<sup>15</sup>

Prior experience in the suppression of criminal false advertising demonstrated that our law encountered definitional difficulties. We found the following essential elements necessary to the proof of an actionable case: [1] scienter, [2] reliance, [3] nature of the representation, [4] materiality, [5] injury.

Consequently, legislation confined to these elements soon proved to be virtually worthless. To the average consumer, the state of mind of the advertiser at the time of the making of the representation was irrelevant. The consumer's concern was not that the state of mind of the advertiser was deceitful, but the fact that the merchandise received was not as represented.

The element of reliance was embarrassing to a consumer who sought to obtain relief. Thus, if false advertising was to be eliminated by these statutes, the fact that a consumer relied upon the misrepresentation should have been of no consequence.

I suppose we could go on and on describing the frustrations of consumers seeking redress in the legal system. If this historical interlude entices the reader to delve deeper in to swamp of frustration, I suggest you try Kintner, [A Primer on the Law of Deceptive Practices](#), MacMillan Company, New York, for a more thorough historical review.

In any event, it was then suggested that the prevailing doctrine of *caveat emptor* of yesteryear has passed and we had stepped into the world of *caveat Venditor*. A proposed deceptive trade practices act was intended to take the first giant step toward requiring merchants to treat their customers with respect and fairness.

The first bill to see any legislative vote was HB 4646 entitled the "Deceptive Trade Practices Act." This bill was finally taken up after about 7 years of effort with previous similar versions all of whom ultimately failed when the previous two year legislative sessions ended *sine die*.

This bill had a simple approach. Its prohibitory language simply read: "Unfair and Deceptive methods acts and practices in trade and commerce in or affecting Michigan is declared unlawful." The bill authorized the Attorney General to promulgate rules to further define what were these practices in the context of any particular industry or trade.

HB 4646 also followed the then familiar pattern for similar legislation throughout the country of providing for private rights of action, recovery of attorney fees, class actions, and certain limited exemptions.

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<sup>15</sup> See MCLA 750.33

Unfortunately, even though HB 4646 passed the House of Representatives and found its way onto what was called "third reading" on the Senate calendar, it was never taken up for a vote. Instead, then Governor Milliken informed the Senate Majority leader that the bill should not be taken up but instead saved for the next two year legislative session so that the Governor could include it in his State of the State message.

Indeed, the following year in Governor Milliken's State of the State he requested the legislature enact a consumer protection law but did not specify its name or content.

The following year, and after the previous November elections, the Senate changed so the Democrats took control. In response to the Governor's message, then Senator Thomas Guastello [Sterling Heights] introduced Senate Bill 1. It was HB 4646 all over again. The Senate Judiciary committee to whom the bill was assigned promptly took up the bill and insisted on major revisions. Of particular interest was the elimination of the broad prohibition language and a perceived limitation on the Attorney General's rule making authority.

In place the committee asked me to prepare a laundry list of prohibited and unlawful trade practices as it affected consumers, which I did. The bill ultimately passed the Senate and was passed by the House with changes back to the original HB 4646 version. Now there were to different bills and a conference committee was necessary.

Rather than bore the reader with all that I can recall of the negotiations in the conference committee suffice to say what was adopted was the Consumer Protection Act, 1976 PA 331.<sup>16</sup> But, I will digress with one significant point settled in the conference. The laundry list used the term time and again "likelihood" but the chairman of the committee Senator Daniel Cooper insisted it be changed to "probability" since he could not define and understand "likelihood". I agreed believing then and still do that there is little if any difference between the two. In that connection I discuss below how to find whether a deception has a "tendency" to deceive which encompasses the concept of probability and likelihood.

### An Overview of What was Adopted and our Intentions in doing so

#### Fraud Elements eliminated

The Consumer Protection Act was intended to eliminate as an element of proof of

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<sup>16</sup> Obviously there have been several amendments to the act most notably in Section 3.

a violation, intent or state of mind of the merchant. We drew our thinking from the Federal Trade Commission Act and decisions such as *FTC v. Algoma Lumber Company*, 291 US 67 (1934). There the Supreme Court found the absence of statutory language requiring intent in the FTC act mandated a conclusion that the respondents were not relieved by the innocence of motive from a duty to conform to the act. The conduct, the court said, could be unfair even though it did not amount to fraud as traditionally understood by the courts. In short, the Consumer Protection Act should not be construed with a reference to the common law of fraud. We intended just the opposite.<sup>17</sup>

This was important. When compiling the laundry list of prohibited practices, I deliberately eliminated any element of intent except only for subsection (g) of Section 3 [Advertising or representing goods or services *with intent* not to dispose of those goods or services as advertised or represented]. This subsection was intended to prohibit bait and switch practices which required as an historical element that of intent.

Aside from an Attorney General class action, a suit by the Attorney General or a county prosecutor does not require as an element of proof the establishment of injury to any consumer. This had been the reasoning of the courts when construing similar language in the FTC act.<sup>18</sup> The private right of action requires some injury to the consumer but the damages are actual or \$250 which ever is greater.

Furthermore, a method, act or practice is deceptive under the CPA if it has the *tendency to deceive*. For example, look at Section 3(1)(s) regarding the failure to reveal a material fact which *tends* to mislead or deceive. A "tendency" has been variously defined. We relied upon the definitions in *Hertzfeld v. FTC*, 140 F.2d 207 (2nd Cir. 1944) because it provided the best when it held a tendency includes a fair probability that the consumer will be deceived. We also relied upon *FTC v. Hires Turner Glass company*, 81 F2d 362 (3rd Cir. 1935) to adopt the view that a tendency to deceive is the natural and probable result of the method, act or practice.

So, we intended that when determining whether a representation is deceptive, the entire representation must be taken into account, the entire transaction. We knew of and expected the language in *Mercke & Company v. FTC*, 392 F2d 921, 927-928 (6th Cir. 1968) to be a guideline in doing just that. The court said:

A false impression can be made by words and sentences which are literally and technically true but framed in such a setting as to mislead or deceive. *Bockenstette v. FTC*, 134 F2d 369 (10th Cir. 1943), and as one writer has pointed out, the skillful advertiser can mislead the consumer without mis-stating a single fact. The shrewd use of exaggeration,

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<sup>17</sup> An analogous law is the Consumer Item Pricing and Deceptive Advertising Act. The Court of Appeals illogically and incorrectly said in *Mayhall v. A. H. Pond Co.*, 129 Mich App 178 (1983), that the law is construed with reference to the common law of fraud. As the principal author of that act I can say with complete certainty that we wrote the language of the act to eliminate words of intent which is an essential element of fraud at common law.

<sup>18</sup> See *FTC v. Royal Milling Company*, 288 US 212 (1933).

innuendo, ambiguity and half truth is more efficacious from the advertiser's standpoint than factual assertions.

One must also look to whom the representation affected. Thus, the ordinary, or average person was to be considered as well as the public as a whole. We intended the standards used in the FTC act would be a further guidepost when making that determination.<sup>19</sup> Essentially then, the test to be employed under the CPA was to be the same as that under the FTC act in place at that time, that is, the representation was intended to be interpreted on the basis of how it may be construed by the audience group to which it was directed.<sup>20</sup>

The CPA was not created for the experts, but to protect the consuming public - - that vast multitude which includes the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but, too often, are governed by appearances and general impressions.<sup>21</sup>

Some distinction was intended to be drawn between misrepresentation of material fact and an opinion or "puffing". Assistance was to be taken from the cases on this subject interpreting the FTC act. Such decision have as a theme that, although the statement of an opinions not alone actionable, but an opinion stated in such a manner that is designed to mislead can be actionable.<sup>22</sup> Puffing is not actionable when it includes only those expressions that the consumer clearly understands to be pure sales rhetoric -- expressions on which he or she should not rely when purchasing the merchant's goods or services.

We expected that several sources would be used in making determinations of when words or phrases are deceptive and when they are lawful, just like courts normally do. Definitions found in standard dictionaries have been used to find meaning to words,<sup>23</sup> The United State's Bureau of Standards definitions of products has been approved for reasons of consistency<sup>24</sup>. Testimony of members of the general public of the impressions made upon them after reading an advertisement are admissible.<sup>25</sup>

#### Who is Covered under the MCPA

The act applies to any person who engages in an unfair, unconscionable, or deceptive method act or practice in trade or commerce as defined in the act. Thus, any person who engages in these activities is subject to the standards imposed by the act governing the marketplace, except under certain circumstances which are set forth in the exemptions in Section 4.

Care must be taken in determining, not whether the person is subject, but whether

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<sup>19</sup>See *Stanley Laboratories, Inc. v. FTC*, 138 F2d 388 (9th Cir. 1943).

<sup>20</sup>*Wards Labs v. FTC*, 276 F2d 952 (2nd Cir) *cert den.* 364 US 261 (1960).

<sup>21</sup>*Aronberg, t.a. Positive Products Company v. FTC*, 132 F2d 165 (7th Cir 1942).

<sup>22</sup>*e.g., Proctor & Gamble Company v. FTC*, 11 F2d 47 (6th Cir. 1926).

<sup>23</sup>*FTC v. Sterling Drug Co.*, 317 F2d 669 (2nd Cir. 1963)

<sup>24</sup>*James S Kirk & Company v. FTC.*, 59 F2d 179 (7th Cir. 1032)

<sup>25</sup>*Gulf Oil Corporation v. FTC*, 150 F2d 106 (5th Cir. 1945).

the method, act or practice is covered. This is a major understanding of the scope of this law.

For example, the use of the words "a transaction" in subsection 4(1)(a) is singular in nature. Our intent was to exempt those specific statutorily authorized transactions which the legislature had already permitted.

I personally wrote those words and chose the word "a" to emphasize the singular nature of the transaction to keep with the overall thrust of the act's view that we look to see, not whether the entity is subject to the act, but whether the method, act or practice alleged to violate the act is indeed one addressed and prohibited by the act.

To the extent *Smith v. Globe Life Insurance* 460 Mich 446, 597 NW2d 28(1999) arrived at a different view, it is clearly erroneous and totally illogical given the other exemption sections and investigative coverages in the act.

You will find that the listing of statutorily regulated businesses is prefaced by the phrase "an unfair, unconscionable, or deceptive method, act or practice made unlawful by, " is extremely crucial. Since the legislature has defined those terms by listing, at that time 29 different circumstances, those listed statutes must, therefore, expressly prohibit the act's defined methods, acts and practices. If the listed statutes fail to so prohibit any or all of the 29 defined unfair, unconscionable or deceptive methods, acts or practices, then the persons regulated by those laws who engage in any of the prohibited conduct are subject to the MCPA.

Stated another way, we intended that an examination of the regulatory statute was required in order to learn whether that regulatory law expressly outlawed the method, act or practice at issue.

At the time of the adoption of the act we used the example of the Banking Code of 1969<sup>26</sup> Nowhere in the Banking Code is there found a prohibition from failing to reveal a material fact. So, too, the code does not prohibit making misleading or confusing statements about credit. Such acts or practices are prohibited by the MCPA and thus the banking entity is subject to the act because the conduct is so subject.

We intended that the exemptions be very limited and the act to be broadly construed to remedy consumer wrongs simply because it was in derogation of common law fraud and deceit.

Coupled with all of these exemptions is the necessity to recognize that the burden of claim and proving an exemption is on the person claiming it. Section 4(3).

There is a media exemption. We recognized that the media are actually mere conduits for the communication of the advertising or the deceptive representations. We knew of and relied upon *Bigelow v. Virginia*, 421 US 809, 95 S.Ct. 222, 44 L.Ed2d 600

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<sup>26</sup>MCLA 487.301 *et. seq.*

(1975) which held essentially that the media enjoys a first amendment freedom from regulation when the merely act as a conduit or publisher.

So, to make it clear beyond chance, the Michigan Consumer Protection Act was intended to have a strong relationship to the Federal Trade Commission Act,<sup>27</sup> because it proscribes like the FTC act unfair and deceptive methods, acts and practices in or affecting Michigan's trade or commerce. However, unlike the FTC act which leaves to the Commission the power to factually define, either on a case by case basis or by rule, what constitutes a violation, the Michigan act proceeds to statutorily define these.

### Kinds of Practices Deemed Unlawful And What Precedent was Intended to be Employed

The original section 3 contained twenty nine separate paragraphs defining what constituted unfair, unconscionable or deceptive methods, acts and practices. These were derived in part from the Ohio Consumer Sales Practices Act, some created by this author from an examination of the complaint files in the Attorney General's Consumer Protection Division, some from old Michigan cases dealing with fraud and deceit, and some from the federal law known as the Lanham Act.

Subsections 3(1)(a), (b), (c), (d), (e) and (f) were derived from the Federal Lanham Act<sup>28</sup> and case law so interpreting it. This was done for two purposes: First, so that individual consumers could utilize the Lanham Act unfair competition and deceptive advertising principles and precedent to pursue a claim against a dishonest merchant, Second, we sought to include businesses as persons who could bring a private action for a violation.<sup>29</sup> However, under the Lanham Act to obtain monetary damages - as opposed to simply injunctive relief - a Lanham Act plaintiff must also demonstrate actual consumer

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<sup>27</sup> 15 USCA 45(a) *et. seq.*.

<sup>28</sup> Congress originally enacted the Lanham Act, including § 43(a) (which is codified at 15 U.S.C. § 1125(a)), in 1946 [and amended it in 1988 long after the MCPA was adopted]. But in both instances it appeared Congress provided scant guidance on how courts should construe § 43(a). Consequently a practitioner would have to consult with the precedent for a more complete construction of § 43(a). This provision prohibits any use of a false or misleading description or representation in commercial advertising or promotion that "misrepresents the nature, characteristics, qualities, or geographic origin of. . . goods, services, or commercial activities." Courts have formulated the following elements for a claim under § 43(a): The defendant must have made a false or misleading statement of fact in advertising.

- That statement must have actually deceived or had the capacity to deceive a substantial segment of the audience.
- The deception must have been material, in that it was likely to influence the purchasing decision.
- The defendant must have caused its goods to enter interstate commerce.
- The plaintiff must have been or is likely to be injured as a result.

*See United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8<sup>th</sup> Cir. 1998) for these elements and the latest interpretations.

<sup>29</sup> Thus you will see where the term "person" is broadly defined to include, for example, corporations. In this latter context, while lobbying various business entities for support of a deceptive trade practices law, we made clear that we would include them as potential plaintiffs under the act and they could bring unfair competition claims in state court.

reliance on the false advertisement and a resulting economic impact on its own business. Finally, although § 43(a) appears to be aimed at protecting consumers, the Lanham Act provides no cause of action to consumers, only to business competitors. *Barrus v. Sylvania*, 55 F.3d 468, 470 (9<sup>th</sup> Cir. 1995); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1169-70 (3<sup>d</sup> Cir. 1993). The Michigan Consumer Protection Act cured this defect in the Lanham Act and gave consumers a way to collect damages and recover attorney fees as well.

Most of the other provisions in Section 3(1) were derived from the *Ohio Consumer Sales Practices Act*<sup>30</sup> In compiling the laundry list as demanded by the Senate Judiciary Committee on SB 1, I looked to that act since it laundry listed most if not all of the types of methods, acts and practices which we could live with and could enforce. I recommend a practitioner consult with the Ohio case law on how that law has been interpreted and enforced as a guide in understanding and advocating a claim under any particular subsection of section 3 of the Michigan Consumer Protection Act.

Some of those that are left were derived in part from *Sullivan v. Ulrich*, 326 Mich 218, 40 NW2d 126 (1949). The court's concept of deceit was important and useful for our purposes. The following taken from the case demonstrates how we used its concepts in subsections 3(1)(s), (b)(b) and (c)(c).

“No one can evade the force of the impression which he knows another received from his words and conduct, and which he meant him to receive, by resorting to the literal meaning of his language alone. Everyone is responsible for the belief he intentionally creates, whether by words or otherwise, and will be precluded from profiting by any unconscionable use of an obligation which has been thus wrongfully obtained.” *Mizner v. Kussell* (syllabus), 29 Mich 229.

“Designed partial statements which deceive, and concealment of facts such as to make those declared partial and misleading, are fraudulent in law.” *Kenyon v. Woodruff* (syllabus), 33 Mich 310.

“The doctrine is settled in this State that if there was in *fact* a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby; citing *Holcomb v. Noble*, 69 Mich 396 (headnote 3).” *Busch v. Wilcox* (syllabus), 82 Mich 315.

“Fraud may be consummated by suppression of a material

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<sup>30</sup> See Ohio Revised Code §§ 1345.01 to 1345.13.

fact by either party to a contract of sale which he is in good faith bound to disclose, as well as by open false assertions since by such suppression there is fraudulently produced a false impression upon the mind of the other party.” *Wolfe v. A. E. Kusterer & Co.* (syllabus), 269 Mich 424.

“A representation, within the meaning of the law of fraud, is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action.” *Groening v. Opsata* 323 Mich 73(syllabus).

The remaining concepts of unconscionability were derived in part from *Attorney General v. Koscot Interplanetary, supra*, definition of public policy, also in part from the Ohio law and in part from *Williams v. Walker-Thomas Furniture Company*, 350 F2d 445 (DC Cir. 1965). This is particularly true regarding section 3(1)(aa).

### Why Smith v. Glove Life Insurance is Wrongly Decided

The Supreme Court's decision is inconsistent with the written words of the exemption section which it construed. It is also inconsistent with the overall theme of the act regarding regulated industries and businesses.

As I understand *Smith v. Glove Life Insurance* 460 Mich 446, 597 NW2d 28 (1999) it finds that the exemption in Section 4(1)(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" refers to all or the multitude of transactions which may be engaged in by a regulated entity. In sum then, if the defendant in a MCPA action can point to the legal fact it is regulated by law, then it may obtain an exemption from the MCPA. This is utter absurdity.

This is also wrong because the court ignored a key word in the exemption sentence. They ignored the word "a". Only the singular transaction then at issue was to

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be examined to determine whether it was or was not authorized under the applicable law. Moreover, the burden of making a showing of authorization was on the person claiming the exemption. See section 4(4). Your author wrote these words and used as a guidepost a similar provision in the Ohio Consumer Sales Practices Act<sup>31</sup> As the Ohio provision emphasizes the transaction in the singular so does the Michigan provision. However, when I looked at the Ohio version I was concerned about the use of the words "An act or practice." I chose instead to use "a transaction or conduct" thinking that would suffice.

Moreover, at this time in the writing of the compromise conference committee version of SB !, Governor Milliken's Commerce Department was concerned that their regulatory agencies were left out in the cold from using the act when appropriate. The

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<sup>31</sup> Ohio Revised Code, § 1345.12(A).

then Director of the Corporations and Securities Bureau and I conferred on these issues and we agreed to include authority for the agencies within the Department of Commerce to investigate their regulated entities under the consumer protection act.

Thus, you will find beginning with section 17<sup>32</sup> and going through section 21 reference specifically to the various regulated entities under that Department and the power to conduct investigations under the MCPA. After an investigation was concluded each relevant section provides that the Departmental agency must refer the matter back to the Attorney General for prosecution under the Act.

If the theme of the act was to exempt these regulated entities as the court says in *Smith v. Globe Life Insurance* 460 Mich 446, 597 NW2d 28 (1999) it is totally an absurd result to permit their investigation under the act and reference to the Attorney General for enforcement action under the Act if the Act was inapplicable in the first place. In short, the court's reasoning is nonsensical. And this is particularly true with respect to the Insurance industry which was the subject of the court's inquiry. Section 21 authorized the Insurance Commissioner to investigate an insurance company whom the commissioner believes is *engaging, or is about to engage in a method, act or practice which is unlawful under this act.*"

If that latter language is to have any meaning then, the exemption in section 4(1) could not mean what the court said it meant in *Smith v. Globe Life Insurance Co.*

In sum, the entire theme of the Consumer Protection Act was to determine whether the method, act or practice, or the transaction or conduct was prohibited by the act. All persons regardless of their form or regulatory status were intended to be covered under the act. Section 4(1)'s exemption for "a" specifically permitted transaction or conduct was to be ascertained by reference to the regulatory law which the defendant claimed allowed the particular transaction or occurrence. If that law permitted it, then the transaction or conduct at issue was exempted from the act. If it did not, then the transaction or conduct at issue was addressed by the act and if it fell within one or more of the defined prohibited methods, acts or practices, then there was liability under the act. The exemption applies only whether the particular transaction or conduct being challenged is specifically permitted by the regulatory statute governing the defendant.

Hopefully an avenue to overturn the Court's decision in *Smith v. Globe Life Insurance* arrives soon. If not legislation will be necessary to correct the enormous and unnecessary grievance the Court has caused to Michigan's consumer and businesses who expect fair competition in the marketplace.

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<sup>32</sup>MCLA §§ 445.917; 445.918, ;445.919; 445.920; 445.921.

