

Consumer Law Section Annual Meeting Notice

Thursday, September 17, 2009
2 p.m. Business meeting, program to follow
Hyatt Regency, Dearborn

Presentation of the Frank J. Kelley Consumer
Advocacy Award to Lorry S.C. Brown,
Michigan Poverty Law Program

Election of section officers and council
members

Consumer Arbitration Update
Presented by F. Paul Bland, Jr.

Mr. Bland, a national expert on the issues presented
by mandatory arbitration in consumer cases, will be
presenting an update on the current state of consumer
arbitration, including the impact of the recent Minnesota
Attorney General's settlement with the National
Arbitration Forum.

F. Paul Bland, Jr. to Speak at Section Annual Meeting Program



F. Paul Bland, Jr.

F. Paul Bland, Jr., is a staff attorney for Public Justice (formerly Trial Lawyers for Public Justice), where he handles precedent-setting complex civil litigation. He has argued or co-argued and won more than 20 reported decisions from federal and state courts across the nation, including cases in five of the federal circuit courts of appeal and seven different state high courts. He is a co-author of a book entitled *Consumer Arbitration Agreements: Enforceability and Other Issues*, and numerous articles. For three years, he was co-chair of the National Association of Consumer Advocates.

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Michigan's New Foreclosure Law¹

By Lorray S.C. Brown, Michigan Foreclosure Prevention Project
(a project of Michigan Poverty Law Program)

On May 20, 2009, the Governor signed into law amendments to the Michigan foreclosure by advertisement statute. The new law requires a mandatory 90-day pre-foreclosure process to allow the borrower and the mortgage holder to work together to avoid foreclosure. Frequently asked questions about the new law follow:

When does this law begin?

The new law takes effect July 5, 2009 – 45 days after it was enacted into law.

Is this a permanent change in Michigan's foreclosure law?

No. The law expires July 5, 2011 – 2 years after the effective date.

Does it apply to all foreclosures?

The 90-day pre-foreclosure process applies when the first notice of foreclosure by advertisement is published after July 5, 2009 and before July 5, 2011.

It does not apply if pursuant to these provisions the borrower and the mortgage holder previously agreed to modify the mortgage loan and for less than a year the borrower failed to comply with the terms of the loan modification.

What properties are covered?

It applies to property claimed as a principal residence exempt from taxes.

When can a mortgage holder or servicer begin proceedings to foreclose by advertisement?

Generally, before beginning proceedings to foreclose by advertisement, a mortgage holder or servicer must comply with a 90-day pre-foreclosure process to attempt to avoid foreclosure. The mortgage holder or servicer first must serve a written notice on the borrower informing the borrower of his or her rights.

What information must be included in the written notice?

The written notice must contain all of the following information:

- Why the mortgage loan is in default and the amount due under the mortgage loan.
- The names, addresses, and telephone numbers of the mortgage holder, servicer or agent designated by mortgage holder or servicer.
- A designated contact person who has the authority to make agreements to modify the loan or other loss mitigation alternatives.
- A list of housing counselors approved by the United States Department of Housing and Urban Development (HUD) or the Michigan State Housing Development Authority (MSHDA).
- Notice that within 14 days after the written notice is mailed, the borrower may request a meeting with the designated agent to find a resolution to avoid foreclosure and also request a housing counselor to attend the meeting.
- Notice that if the borrower requests the meeting, foreclosure proceedings

will not begin until 90 days after the date the notice is mailed to the borrower.

- Notice that if the borrower and the designated agent agree to modify the loan, and the borrower complies with the terms of the loan, the mortgage will not be foreclosed.
- Notice that if the borrower and the designated agent do not agree to modify the loan but it is determined that pursuant to the statute the borrower is eligible for a loan modification, the mortgage holder or servicer cannot foreclose by advertisement, and must instead foreclose by filing a court action.
- Notice that the borrower has a right to contact an attorney along with the telephone numbers for the Michigan Bar Lawyer Referral Service and a local legal services office.

How must the mortgage holder or servicer provide notice to the borrower?

The mortgage holder or servicer must mail the notice both by first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower to the borrower's last known address.

Is the mortgage holder or servicer also required to notify the borrower through publication?

Yes. Within 7 days after mailing the written notice, the mortgage holder or servicer must publish a one time notice informing the borrower of his or her rights in a newspaper published in the county where the premises is located. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county.

What happens if the mortgage holder or servicer does not serve the borrower with the written notice?

If the mortgage holder or servicer does not serve the written notice upon a borrower but proceeds to foreclose by advertisement, the borrower may bring a court action to stop the foreclosure.

What is the borrower required to do?

A borrower who wishes to negotiate a loan modification must contact a housing counselor from the list provided within 14 days after the list is mailed to the borrower. The borrower may also contact the designated agent to request a meeting and also request a housing counselor to attend the meeting. Upon request, the borrower must give the designated agent, documents needed to determine whether the borrower is eligible for a loan modification.

What is the housing counselor required to do?

Within 10 days after being contacted by a borrower, a housing counselor must inform the designated agent in writing of the borrower's request to negotiate a loan modification. A housing counselor must also schedule a meeting between the borrower and the designated agent.

Where will the meeting take place?

The meeting must be held at a time and place convenient to all parties, or in the county where the property is located.

What happens if the process does not result in a loan modification agreement?

If the process does not result in a loan modification agreement, the designated agent must work with the borrower to determine whether the borrower would have otherwise qualified for a loan modification under the mortgage holder's loan modification program or process. The designated agent must then provide to the borrower a copy of any loan modification calculations made under this section.

What type of loan modification program will the mortgage holder use?

The mortgage holder must evaluate for a loan modification program that includes all of the following features:

- A debt-to-income ratio of 38% or less. The debt includes mortgage principal and interest, property taxes, insurance, and homeowner's fees.
- To reach the 38% target, the loan modification program may include 1 or more of the following features:
 - A reduction of interest rate (subject to a floor of 3%), for a fixed term of at least 5 years.
 - An extension of the loan term up to 40 years from the date of the loan modification.
 - Deferral of some portion of the unpaid principal balance up to 20%, until maturity, refinancing of the loan, or sale of the property.
 - Reduction or elimination of late fees.
- If the mortgage loan is pooled for sale to an investor that is a governmental entity (e.g. Government National Mortgage Association – Ginnie Mae), then the designated agent must use the modification guidelines dictated by the governmental entity.
- If the mortgage loan has been sold to a government-sponsored enterprise (e.g., Fannie Mae, Freddie Mac), then the designated agent must use the modification guidelines dictated by the government-sponsored enterprise.

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How will the borrower know which loan modification program or guidelines are being used?

Upon the borrower's request, the designated agent must provide to the borrower a copy of the loan modification program or guidelines to be used.

Are the parties limited to loan modifications only?

No. The law does not prohibit a loan modification on other terms or another loss mitigation strategy if agreed to by the borrower and the designated agent.

What happens if the borrower is eligible for a loan modification?

If the borrower is eligible for a loan modification, the mortgage holder or servicer cannot foreclose by advertisement but may foreclose by bringing a court action.

What happens if the borrower is not eligible for a loan modification?

If the calculations show that the borrower is not eligible for the modification the mortgage holder or servicer may foreclose by advertisement.

Can the mortgage holder or servicer foreclose by advertisement even when the borrower is eligible for a loan modification?

Yes. If the borrower is eligible for a modification, the mortgage holder or servicer may proceed to foreclose by advertisement if 1) the designated agent has in good faith offered the borrower a modification agreement prepared in accordance with the modification determination, and 2) for reasons not related to any action or inaction of the mortgage holder or servicer, the borrower did not execute and return the modification agreement within 14 days after the borrower received the agreement.

What happens if the mortgage holder or servicer does not comply with the new law?

If the mortgage holder or servicer begins to foreclose by advertisement in violation of the law, the borrower may file an action in circuit court to convert the foreclosure proceedings to a judicial foreclosure.

If a borrower files an action and the court determines that the borrower participated in the process, a modification agreement was not reached, the borrower is eligible for modification and the borrower timely executed and returned the modification agreement, the court must enjoin the foreclosure by advertisement and order that the foreclosure proceed judicially.

Under the new law, what defenses to foreclosure can the borrower now raise when a mortgage holder or servicer is foreclosing by advertisement?

A borrower can argue that the mortgage holder or servicer cannot foreclose by advertisement because one or more of the following exists:

- A notice has not been mailed to the borrower.
- After a notice is mailed to the borrower, the time for a housing counselor to notify the designated agent of the borrower's request to meet has not expired.
- Within 14 days after the notice is mailed to borrower, the borrower has requested a meeting with the designated agent and 90 days have not passed after the notice was mailed.
- The borrower has requested a meeting, the borrower has provided documents requested by the designated agent, and the designated agent has not met or negotiated with the borrower.
- The borrower and mortgage holder have agreed to modify the loan and the borrower is not in default under the modified agreement.
- Calculations show that the borrower is eligible for a loan modification and the borrower timely executed and returned the modification agreement.

How will the borrower know who owns the loan?

The law requires that the written notice to the borrower provide the name, address and telephone number of the mortgage holder or an agent designated by the mortgage holder. The law defines a mortgage holder as "the owner of the indebtedness or of an interest in the indebtedness that is secured by the mortgage."

How can the borrower be assured that the person he or she is negotiating with has the authority to enter into any loan modification agreement?

The law requires that the written notice designate a person that the borrower must contact and that person must have the authority to make agreements.

Endnotes

- 1 Act No. 29, Public Acts of 2009, amends MCL 600.3204 and adds section 3205, and sections 3205a to 3205e.

Smith v Khouri,¹ The Supreme Court Adopts a Modified Lodestar Likely to Produce Lower Fee Awards

By Gary M. Victor

Introduction

For over 25 years Michigan trial courts have calculated reasonable attorneys' fees using the factors developed in *Crawley v Schick*², subsequently approved by our Supreme Court in *Wood v. Detroit Automobile Inter-Ins Exc*³; and/or the factors contained in the Michigan Rules of Professional Conduct [MRPC 1.5(a)].⁴ While trial courts are not limited to these factors,⁵ few, if any, cases can be found where courts consider additional criteria. This system is far from precise and gives an enormous amount of discretion to the trial court. Consumer lawyers as well as attorneys working under other fee-shifting statutes have long argued for what was believed to be a more precise and dependable method of calculating reasonable attorneys' fees—the lodestar approach.⁶ Under that approach, used in most federal cases, the product of reasonable hours times a reasonable hourly rate would be a presumptively reasonable fee subject to adjustment as the circumstances might require.⁷

Consumer lawyers initially advocated for the lodestar because they often represented clients with potentially low economic outcomes where even a moderately strenuous defense would result in attorney fee petitions far in excess of the recovery for the client.⁸ It was quite common for trial judges to use the “amount in question and the results achieved” *Crawley* criteria⁹ to support very low attorney fees awards in consumer cases. This problem was at least partially ameliorated by the Court of Appeals decision in *Jordan v Transnational Motors, Inc*¹⁰, a case brought under the Michigan Consumer Protection Act¹¹ and Magnuson-Moss Warranty Act¹². The Court in that case instructed trial courts to focus on the remedial nature of the statutes involved rather than only the amount recovered.¹³ Even with this modification, the lodestar seemed preferable. Although in a few instances higher courts have mentioned the lodestar approach with approval,¹⁴ they have generally rejected that approach in favor of the *Crawley*/MRPC criteria.¹⁵ The wish for a loadstar seemed to be forever unavailable.

We all have heard the old adage: “You need to be careful of what you wish for.” In *Smith v Khouri*,¹⁶ the Supreme Court “fine-tuned”¹⁷ attorney fee calculations in Michigan, including the adoption of a modified lodestar; but did so in a way that one might say was at least unexpected. While it is a laudable goal to develop a procedure for attorney fee calculations that will provide more precision, more uniformity and reduced incentive for further litigation; the *Khouri* Court appears to have accomplished the exact opposite. Moreover, the *Khouri*

Court's new fine-tuned approach is more likely to produce lower attorney fee awards than the prior method.¹⁸

The Case

Khouri involved an appeal of attorney fees awarded as part of case evaluation sanctions under MCR 2.403(O) in a dental malpractice case. The principal bone of contention was the trial court's determination that the lead trial attorney was entitled to a reasonable hourly rate of \$450.00 per hour.¹⁹ Plaintiff's fee petition was supported by the lead attorney's curriculum vitae showing his extensive experience in trying dental malpractice cases and copies of three circuit court judgments awarding him attorney fees: a 1985 case awarding \$200 an hour, a 1998 case awarding \$300 an hour, and a 2004 case awarding \$400 an hour.²⁰ Defendants made numerous objections but did not request a hearing leaving the attorney fee decision to the court. In granting the requested \$450.00 rate, the trial court took judicial notice that senior trial attorneys in Oakland County bill at \$450 per hour and that the lead attorney was a recognized practitioner in the area of dental malpractice that had a superlative standing in that area, having tried numerous cases.²¹

Defendants appealed to the Court of Appeals claiming the trial court erred in its determination of hourly rates and attached a copy of the survey contained in the November 2003 issue of the *Michigan Bar Journal*²² (known as the “Snapshot”) showing that the median hourly billing rate for equity partners in Michigan was \$200.²³ The Court of Appeals affirmed in an unpublished opinion.²⁴ The Supreme Court granted leave to appeal—limited to the case-evaluation-sanctions issue, asking the parties to address several issues relating to the *Wood*²⁵ factors, and also inviting briefs from several amici curiae. Clearly, the Court had decided to use *Khouri* as a platform from which to launch a new approach to attorney fee calculations.

Although the Court characterized its new attorney fee calculation method as “fine-tuning”²⁶, the impact of this new process on all fee shifting statute cases and court rule cases²⁷ is sure to be far from minor. In a dissent joined by Justices Weaver and Kelly, Justice Cavanagh argues that the Court's new method “changes little” still leaving the trial court with wide discretion.²⁸ This author respectfully disagrees. While the majority's holding may not appear to be a major departure from the previous process, when the lead opinion is examined piece by piece it becomes apparent that this new method could well have a dramatic effect

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on attorney fee calculations. Most importantly, the new process forces trial courts to rely on bad “empirical” data and little else in making attorney fee determinations most likely resulting in lower fee awards.

The Holding

The new process set out in the lead opinion seems relatively benign.

We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.²⁹

As benign as this process may seem, “the devil is in the details” on how the process is supposed to work. This can be better understood when the core of the new process is examined and the Court’s guidance to the trial court on remand.

How the New Process is Supposed to Work

The unmistakable core of the Supreme Court’s this new attorney fee calculation process is the use of empirical data, in particular the Michigan Bar Survey, to establish the hourly rate for the “average” attorney performing similar work.³⁰ This hourly rate is then multiplied by the number of reasonable hours consumed. The Court views the product of this calculation is the “starting point” to upward or downward adjustments based on “the remaining *Wood*/MRCP factors”, but offers little guidance on how those adjustments are to be determined. However, the Court does provide some new parameters to guide trial courts in making their fee calculations.

The Court forbids trial courts from taking judicial notice of hourly rates in the area for similar services.³¹ Trial courts must require fee applicants to “present something more than anecdotal statements to establish the customary fee for the lo-

cality.³² Trial courts are not supposed to rely on the attorney’s evidence of awards in similar cases without determining whether fees in those cases “might have been justified by the particular circumstances of the earlier cases, such as the complexity and the skill.”³³ How trial courts are to make such determinations and what to do with the information once such a determination is made is left unclear. Trial courts can not base fee award adjustments on the professional manner in which cases are conducted as all attorneys are required to act that way.³⁴ After making their adjustments to the new “lodestar” based on one or more of the *Wood*/MRPC factors, trial courts are required to briefly discuss their views of the remaining factors.³⁵ The Court does not address whether those brief discussions should consist of the remaining factors in *Wood* or under MRPC 1.15(a) or both.

Criticism of the New Approach

It is reasonable to say that the manner in which the new attorney fee calculation method is described above contains within it a preview of the criticism to come. In addition to the lack of clarity on how the process is actually supposed to work, the most significant defects of the Court’s new method are the requirement that the calculation start with the hourly rate for the “average” attorney doing similar work and the use of badly flawed data to get to that point. While quoting federal cases using a lodestar starting with the reasonable hourly rate charged by “lawyers of reasonably comparable skill, experience and reputation”,³⁶ the Supreme Court majority instead selects the “average” attorney without regard to whether such average attorney is of comparable skill, experience or reputation. The Court provides no rationale for this departure but simply indicates that upward adjustments to its modified lodestar might be possible if the attorney in question were determined by the trial court to be “the truly exceptional lawyer.”³⁷ Unlike Lake Wobegon where all the children are above average, attorneys in Michigan applying for fee awards are either average or truly exceptional. Given this and other burdens placed on fee applicants under the new rule, fee awards are sure to be lower.

While using the average lawyer as a starting point is questionable at best, the fact that no reliable data exists to get to that point may be a more significant problem with this new system. The only empirical data referenced by the Court was the 2003 Michigan Bar survey (the “Snapshot”). The dissent discussed the flaws in that study as follows:

. . . Apparently by way of example, the majority points to the survey described in the Snapshot conducted by the state bar. While the state bar’s surveys are very useful in giving a broad picture of the financial status

of the practice of law in Michigan, I would not cede our courts' discretion in assessing reasonable attorney fees to surveys that derive their conclusions from voluntary submissions. In fact, the survey was sent to only 25 percent of the members of the Michigan bar. What is more, only 20 percent of those surveys were returned. Thus, this "reliable" source is based on the responses of only 5 percent of the legal practitioners in this state. This is a stunningly low sample from which to assess the "fee customarily charged in the locality for similar legal services" . . . Also, the survey's ability to give average hourly fees in a particular locality is limited because in many of its localities it received only a small number of responses. For instance, in Muskegon County the hourly fee is based on a paltry four responses, which supposedly gives the average of all types of practices in that locality. In fact, in 12 of the 30 localities sampled, the survey reports less than 10 responses.³⁸

The dissent also noted that the survey did not include a significant number to practice categories, including such major categories a medical malpractice.³⁹

It is reasonable and desirable to attempt to provide guidance for a difficult process through the use of reliable empirical data. Unfortunately, when it comes to the hourly rates earned by Michigan lawyers, there is no such data at the moment. To the extent that the Court requires the use of defective data, whatever uniformity the Court's new procedure will produce, if any, will also be defective—"garbage in; garbage out". While it is possible that the new lodestar will produce more consistent fee awards, those awards are most likely to be lower and to bear less relationship to the skill, experience and reputation of the fee applicant than the current process.

Other constraints placed on fee applicants and trial courts by the new system are sure to complicate the attorney fee award process and tend to "lock in" the average survey hourly rate as the basis for the final fee award. For example, a normal part of a fee application, especially in fee shifting statute cases, would include the submission of evidence of fee awards in other, similar cases by the same attorney. Generally, trial courts would take this evidence at face value. Under the Court's new process, they may longer do so.

The trial court also erred in relying on previous awards Mr. Gittleman obtained without considering whether those fees might have been justified by the particular circumstances of the earlier cases, such as the complexity and the skill required.⁴⁰

Without any guidance on how it supposed to do so, the Supreme Court now directs trial courts to reexamine the fee award decisions in each of the prior cases submitted by fee applicant's to

determine whether the hourly rates awarded in those cases are truly comparable to the present case. Clearly the fact that all the prior cases in *Khoury* were dental malpractice cases was, in the mind of the Supreme Court majority, insufficient to establish their comparability. Without further guidance, trial courts will be reluctant to undertake this daunting task and instead rely on the survey's average attorney rate.

The Court's new process may well eliminate another common practice of fee applicants in fee shifting statutes cases. Fee applicants will often submit testimony or affidavits from other attorneys doing similar work attesting to the hourly rates they have received in their prior cases. Since under the Court's new method prior cases involving the fee applicant are insufficient evidence of comparability without further inquiry by the trial court into the surrounding circumstances of those cases, how can prior cases of other attorneys be treated as comparable? At a minimum, the trial court will be required to conduct a further inquiry into these cases as well.

The Court's lead opinion has further complicated the fee applicant's task by diminishing the value of the applicant's affidavit. In order to show the hourly rates requested are consistent with the rates charged for similar services within the community, the fee applicant must "produce satisfactory evidence-in addition to the attorney's own affidavits"⁴¹ The Court instructs that this other evidence can be "testimony or empirical data found in surveys and other reliable reports."⁴² As the Court's other directives have decreased or eliminated the ability of fee applicants to rely on evidence of fee awards in their own prior cases or those of other attorneys, the Court again puts the Bar survey in the preeminent position. Thus, as is the case with the other constraints placed on fee applicants and trial courts, reducing the value of the fee applicant's affidavit also tends to "lock-in" the Bar survey's average rate as the final rate to be use by trial courts thereby generally producing lower fee awards.

Another major problem with the Court's new attorney fee method is that it is sure to engender new litigation. As noted above, our courts have more than 25 years of experience dealing with the *Wood/MRPC* method of determining reasonable attorneys' fees. Generally, whenever a long-standing process of making a common legal determination is changed to a new method, additional litigation will come along. At a minimum, cases in the pipeline that used the old method will be remanded so that the new method can be applied.⁴³ In *Khoury*, the Court has provided several new directives for attorney fee calculations without putting flesh on how those directives are to be carried out. It is reasonable to expect that a significant number of post-*Khoury* attorney fee awards will be appealed as litigants try to define the new process in a manner consistent with their interests

Conclusion

In *Smith v Khouri*,⁴⁴ the Supreme Court claimed it was “fine-tuning” Michigan’s reasonable attorney fee calculations system. Instead, it made a major overhaul which is likely to keep fee awards low and engender more attorney fee litigation. Fee shifting statute attorneys have long argued for the adoption of a lodestar approach to fee calculations where a reasonable hourly rate for the fee applicant would be multiplied by the reasonable hours worked and the result would create a presumptively reasonable fee. However, the modified lodestar adopted by the *Khouri* Court is likely to work to their disadvantage.

The focus of the Supreme Court’s new lodestar is the average hourly rate for similar services multiplied by the reasonable hours consumed with the result subject to an upward adjustment for the “truly exceptional lawyer”.⁴⁵ While the Court emphasized the use of reliable empirical data to determine average hourly rates, the only data referenced by the Court was the 2003 Michigan Bar “Snapshot” which was far from reliable.⁴⁶ Using reliable empirical data to make attorney fee calculations might be a laudable goal, however, there simply is no such data at the present time leaving trial courts with the unreliable 2003 study and those that came after it as the only data to use.

The Court’s new approach also put additional impediments on fee applicants and trial courts. Trial courts can not longer take a fee applicant’s evidence of awards in similar cases at face value. They are instructed to examine each of those prior cases in order to determine if they are truly comparable. This requirement to examine of prior fee awards makes offering evidence of fee awards by attorneys other than the applicant even more problematic. By removing or limiting these two arrows from the fee applicant’s quiver, the Court’s new method is very likely to keep fee awards lower than they might otherwise have been.

Additionally, the Court’s new process is sure to result in additional litigation and has already done so with regard to attorney fee appeals that were in the process at the time of the *Khouri* decision.⁴⁷ The new requirements placed on fee applicants and trial courts are mostly left undefined by the Court which will likely result in additional litigation to fill in those holes. All-in-all, the Court’s new attorney fee calculation method appears to be a boon to fee opponents and a bane to fee applicants. At best, it could be argued that the Court’s attempt to “quantify” the attorney fee process was simply premature due to the current absence of reliable empirical data. However, given the past history of this Court it is just as likely that the new *Khouri* process was designed to keep fee awards low.

Endnotes

- 1 481 Mich 519 (2008).
- 2 48 Mich.App. 728 (1973). Those factors include: (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.
- 3 413 Mich. 573, 588 (1982).
- 4 MRPC 1.5(a) lists the following factors: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.
- 5 *Wood, supra*, at 588.
- 6 See, e.g., Victor, *In Search of the MCPA Attorney Fee Lodestar*, 2 Consumer Law Newsletter, 2-3 (June 1998).
- 7 The federal courts use the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc*, 488 F2d 714 (CA5 1974) to make adjustments upward or downward adjustments to the lodestar.
- 8 For example, under the Michigan Consumer Protection Act (MCL 445.901, *et seq.*) many consumers would not be able to recover more than the statutory minimum of \$250. MCL 445.111(2).
- 9 See, *supra*, fn 2.
- 10 212 Mich App 94 (1995). See also, Victor, *Court of Appeals Gives New Economic Life To Consumer Protection Cases*, 30 MTLA Quarterly 11 (October, 1996)
- 11 MCL 445.901, *et seq.*
- 12 15 USC 2301 *et seq.*
- 13 The court stated:
In consumer cases such 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 App at 98-99.

- 14 See, eg, *Howard v Canteen Corp*, 192 Mich App 427 (1992) overruled in part on other grounds, *Rafferty v. Markovitz*, 461 Mich. 265 (1999).

The most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. *Id* at 437

Later references to *Howard* emphasize the fact that it was a civil rights cases and was looking to the federal lodestar approach.

- 15 In *Smolen v Dalhmann Apartments, L Ltd*, 186 Mich App 292 (1990), this author as counsel for plaintiffs, argued for the adoption of the lodestar which was rejected by the Court.

We reject the application of any rigid formula, whether based on a contingent fee arrangement or an hourly formula, that fails to take into account the totality of the special circumstances applicable to the case at hand. Further, we decline to hold that the product of multiplying reasonable hours by a reasonable hourly rate is presumed to provide a reasonable fee. *Id* at 297 (citation omitted).

See also, *Dep't of Transportation v. Randolph*, 461 Mich. 757 (2000) where the Court rejected the lodestar approach stating: "We likewise reject the MDOT's argument that the "lodestar" method is the "preferred" way of determining the reasonableness of requested attorney fees." *Id* at 766, fn 11.

- 16 481 Mich 519 (2008).

17 *Id* at 530.

- 18 This may well have been the Court's overall intention. See Justice Corrigan concurrence in which Justice Markman joined where she states her view that all attorney fee awards are "inherently punitive". *Id* at 542.

- 19 The appellant also challenged the rate for another partner and two associates. As insufficient evidence was provided regarding these second, third and fourth chair attorneys' hourly rates, the case would have been remanded for a new attorney fee calculation in any event. See the dissent of Justice Cavanagh, 481 Mich at 545

20 *Id* at 523.

21 *Id* at 524.

- 22 Stiffman, *A snapshot of the economic status of attorneys in Michigan*, 82 Mich. B. J. 20 (November 2003).

23 *Id* at 525.

- 24 *Smith v. Kbouri*, unpublished opinion per curiam, issued November 16, 2006 (Docket No. 262139), 2006 WL 3333669.

25 413 Mich. 573, 588 (1982).

26 481 Mich at 530.

- 27 The lead opinion was clear that the new process would apply to other fee-shifting statutes cases and court rule cases in addition to the MCR 403(O) as the opinion made specific exceptions to its new process which would apply to MCR 2.403(O) cases. See 481 Mich 534, fn 20.

28 481 Mich at 544.

29 *Id* at 530-531.

30 *Id* at 534.

31 *Id* at fn 18, p 533.

32 481 Mich at 532

33 *Id* at 533.

34 *Id*.

- 35 481 Mich at 531. The dissent finds this requirement particularly useless.

It is illogical that a trial court would be required to articulate its analysis of the remaining factors that it found to be inapposite. I would not require the trial court to state that it found a particular factor inapplicable, when simply not discussing that factor would suffice to convey that point. 481 Mich at 586, fn 6.

36 *Id* at 536.

37 *Id* at 535.

38 *Id* at 553.

- 39 *Id* at 553-554. As there was no category for Consumer Law in the 2003 survey as well as previous surveys, when the author was applying for fees in *Smolen v Dalhmann Apartments, L Ltd*, 186 Mich App 292 (1990), the defense suggest the use of real estate lawyer numbers. It is unlikely that the category of Consumer Law will appear in any Michigan Bar survey any time soon.

40 *Id* at 533.

- 41 *Id* at 531. Justice Cavanagh takes umbrage to this position of the majority.

... The majority does not explain why a sworn affidavit by an officer of the court and member of the bar is not sufficient proof of the facts attested to within it, especially when those assertions are not countered by competing evidence.

42 *Id* at 531-532.

- 43 This has already started. See, eg, *Egeler Wylie*, 2009 WL 724114 (Mich.App.); *Green v Belfor USA Group, Inc*, 2008 WL 4684070 (Mich.App.); and *Augustine v Alstate Ins Co*, 2008 WL 3876105 (Mich.App.).

44 481 Mich 519 (2008).

45 *Id* at 535.

46 See the dissent at 552-554.

47 See, *supra*, fn 43.

Consumers at Risk: Are Most of Michigan's Worst Business Practices Exempt from Our Consumer Protection Act?

A report of the State Bar of Michigan Consumer Law Section

By Gary M. Victor,¹ Gary M. Maveal,² and Frederick L. Miller³

[In May, the Consumer Law Section released a study of the impact of Michigan Supreme Court decisions drastically limiting the coverage of the Michigan Consumer Protection Act. Below are excerpts from the study, which can be found on the section website at http://www.michbar.org/consumer/pdfs/pubpolicy_CPA.pdf.]

Every state in the country has a comprehensive consumer protection statute that has general application to businesses and merchants called Unfair and Deceptive Acts and Practices, or UDAP, laws.⁴ Consumer protection advocates and state Attorneys General rely on them to hold businesses accountable for fundamentally unfair dealings with consumers. Often these UDAP statutes are the best, if not the only, manner by which consumers can effectively redress unfair or deceptive business practices. Michigan's UDAP law is the Michigan Consumer Protection Act (MCPA).⁵

Unfortunately for Michigan consumers, the reach of the MCPA has been drastically limited by two Michigan Supreme Court decisions. The Court has interpreted an exemption provision very broadly, so that any business with significant state or federal agency regulation – or which simply holds an occupational license - is now likely to be beyond the reach of the MCPA.

This report seeks to test whether the MCPA is still capable of addressing the types of businesses that consumers find to be their biggest problems, given the broad exemption found by the Court.

Each year, the Michigan Attorney General sums up the complaints received by that office during the previous year to create a list of the Top Ten Consumer Complaints. This list sets out 10 categories of Michigan businesses that are the subjects of most consumer complaints.⁶

For this report, the Michigan State Bar Consumer Law Section Council obtained a detailed list from the AG's office of the categories and sub-categories of businesses that made up each of the 10 worst offenders in the Attorney General's 2008 list. We then attempted to determine to what extent, if at all, these businesses remain covered by the MCPA in light of the Michigan Supreme Court's interpretation of the statute. We also tallied the number of complaints against each category of business, and calculated the percentage of the entire Top Ten list that is likely exempt from coverage by the Consumer Protection Act.

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Prior to 1999, Michigan courts focused on whether the alleged conduct was "specifically authorized" and applied the MCPA to such regulated businesses as automobile dealers⁷, real estate brokers⁸, mortgage brokers⁹ and lenders¹⁰, even though each is licensed by a regulatory board or officer to do business in their field. In 1999, the Michigan Supreme Court changed the focus of the inquiry and ruled that the sale of credit insurance by a licensed insurance company was completely exempt from the MCPA, no matter what unfair or deceptive conduct may have been engaged in during the sale. *Smith v. Globe Life Insurance Co.*¹¹

In *Smith*, a majority of the Supreme Court essentially re-wrote §904(1)(a) so as to make entire businesses exempt from the MCPA's coverage as long as the general transactions of that business were specifically authorized by statute.

[W]e 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.¹²

Based on the Supreme Court's new interpretation of the §904(1)(a) exemption, lower courts in succeeding years found that real estate brokers are in fact completely exempt¹³, along with banks¹⁴, plumbers¹⁵, and casinos.¹⁶

In 2007, the Supreme Court confirmed the breadth of its interpretation of the §904(1)(a) exemption in *Smith* by ruling that residential builders and home improvement contractors, and all other business licensed under the Michigan Occupational Code, are exempt from the MCPA. *Liss v Lewiston-Richards, Inc.*¹⁷

Under the analysis in *Smith* and *Liss*, whenever a business engages in a general type of transaction that it is allowed to do by a state or federal law administered by a board or officer, it is exempt from the MCPA, no matter what unfair or deceptive

conduct it may have used during the transaction. This interpretation of the MCPA leaves consumers with few if any effective remedies to redress unfair or deceptive practices they may have been subjected to by such regulated businesses.

Is Anyone Still Covered after *Globe Life & Liss*? Evaluating MCPA Applicability to the Ten Top Violators

[The report then examined each of the Top Ten categories of businesses that generated the most complaints from Michigan consumers.]

. . . .

How Many of the AG's Top Ten Have Escaped from MCPA Scrutiny?

Tallying the Numbers for an Overall Picture

A total of 13,122 consumer complaints were received by the Attorney General's office in 2008 that involved the businesses in the Top Ten List (not counting the Small Business Service Provider category, which mostly involves businesses serving other businesses, not consumers).

Using figures provided by the Attorney General's office for each subcategory, we tallied the number of complaints that involved businesses likely exempt from the MCPA under the *Smith* and *Liss* decisions.

We found that at least 9,468 of the consumer complaints were against businesses that are likely exempt from the Michigan Consumer Protection Act. **Our conclusion is that Michigan's central consumer protection law is now useless in addressing at least 72% of the businesses that Michigan consumers complain about most.**

Are Michigan Consumers Protected? Analyzing the Weakness of the MCPA and its Consequences

Our review of the impact of Supreme Court exemption decisions on the Attorney General's Top Ten Consumer Complaint list demonstrates that the ability of the MCPA to address the business practices that consumers complain about most has been crippled.

As originally enacted the MCPA was one of the best UDPA statutes in the country. The MCPA gives the attorney general the ability to bring actions to enjoin businesses from violating the Act, to bring class action suits, to act as the class representative and seek restitution for consumers. Consumers can bring individual actions and receive actual damages or \$250 for violations, together with reasonable attorneys' fees. Consumers can also bring class actions as well as actions for injunctive and declaratory relief.

As a result of the decisions of the Michigan Supreme Court in *Smith* and *Liss*, the effectiveness of the MCPA as a tool for the attorney general and Michigan consumers has been severely

limited. The large majority of businesses that consumers complain about most are now exempt from coverage by the MCPA. In five of the top nine consumer complaint categories, most, if not all, of the businesses are likely exempt. Each of these categories rated at the bottom of MCPA coverage. Furthermore, many of the businesses in the four remaining categories are exempt as well.

Given the wording of the MCPA as a whole and the pro-consumer atmosphere which prevailed in the Michigan Legislature at the time of its passage, it is inconceivable that lawmakers intended to pass the toothless statute resulting from the Supreme Court's interpretation in *Smith* and *Liss*. Until the Legislature fixes the MCPA both consumers and businesses will be in jeopardy.

Endnotes

- 1 Professor, Eastern Michigan University College of Business, solo practitioner and of counsel to Lyngklip & Associates Consumer Law Center
- 2 Professor and Associate Dean, University of Detroit Mercy School of Law
- 3 Attorney and Litigation Coordinator, UAW Legal Services Plan
- 4 See National Consumer Law Center, *Consumer Law in the States*, <http://www.consumerlaw.org/issues/udap/content/50-statesummariesFeb09.pdf>
- 5 MCL 445.901 et. seq.
- 6 http://www.michigan.gov/ag/0,1607,7-164-46849_47203-210159--,00.html
- 7 *Temborius v Slatkin*, 157 Mich App 587; 403 NW 2d 821 (1986)
- 8 *Attorney General v Diamond Mortgage*, 414 Mich 603; 327 NW2d 805 (1982); *Price v Long Realty*, 199 Mich App 461; 502 NW2d 337 (1993)
- 9 *Allan v M & S Mortgage Co*, 138 Mich App 28; 359 NW 2d 328 (1984)
- 10 *Rutter v Troy Mortgage Servicing*, 145 Mich App 116; 377 NW2d 846 (1985)
- 11 460 Mich 446; 597 NW2d 28 (1999)
- 12 460 Mich at 465
- 13 *Love v. Ciccarelli*, No. 243970, 2004 Mich. App. LEXIS 1152 (Mich. Ct. App. May 6, 2004)(unpublished)
- 14 *Newton v. Bank West*, 262 Mich App 434; 686 NW2d 491 (2004).
- 15 *Woods v. William & Sons Plumbing & Heating, Inc.*, No. 256394, 2007 Mich. App. LEXIS 127; 2007 WL 162237 (Mich. Ct. App. Jan. 23, 2007)(unpublished), lv den, 479 Mich. 862; 735 N.W.2d 240 (Mich. 2007).
- 16 *Kraft v. Detroit Entertainment, LLC*, 261 Mich App 534; 683 NW2d 200 (2004).
- 17 478 Mich 203; 732 NW2d 514 (2007)



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Consumer Law Section Election Notice 2009 Annual Meeting Officer and Council Election Thursday, September 17, 2009 ■ 2 p.m. ■ Hyatt Regency, Dearborn

Nominees for Officers

Chair-Elect: Karen Merrill Tjapkes

Secretary: Dani K. Liblang

Treasurer: Lawrence J. Lacey

Additional nominations for officers may be made at the meeting.

Section Council Nominees

Four section council seats will also be filled by elections at the Annual Meeting.

Term Expiring 2010: Gary M. Victor

Term Expiring 2012: Julie A. Petrik
Lynn H. Shecter
Frederick L. Miller

Additional nominations may be made from the floor.