

Report on Public Policy Position

Name of section:

Consumer Law Section

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Regarding:

Report of Michigan Consumer Protection Act Exemptions Issue

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13 Voted for position

0 Voted against position

0 Abstained from vote

2 Did not vote

Position:

See attached.

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. Victor¹, Gary M. Maveal², and Frederick L. Miller³***

Every state in the country has a comprehensive consumer protection statute that has general application to businesses and merchants.⁴ These broad consumer laws are called Unfair and Deceptive Acts and Practices, or UDAP, laws. 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 in the past 10 years. 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

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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

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.

**Who's In and Who's Out?
The MCPA Loophole Created by the Michigan Supreme Court**

Passed with strong bipartisan support in 1976, the MCPA was designed to combat unfair, unconscionable, or deceptive practices in the sale of goods and services. The Act defines and prohibits 38 unfair “methods, acts, or practices,” e.g., charging a grossly excessive price, using boilerplate forms that tend to confuse consumers of their legal rights, or representing that goods are new when they are not.

The Act’s prohibitions of unfair and deceptive acts apply to any merchant in “trade or commerce,” which is defined broadly as “the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes . . .” However, some activities that otherwise would be within the broad definition of trade or commerce were exempted. The key exemption is found in MCL § 445.904, subsection (1)(a):

(1) This act does not apply to . . . the following:

(a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States. . . .

The clear goal of this subsection was to prevent the broad proscriptions of the MCPA from conflicting with existing laws or regulations. This was to protect businesses from the dilemma of engaging in a practice which was *specifically authorized* by a statute and at the same time could be interpreted to violate the MCPA. For example, there is a statute that specifically allows an auto repair shop to charge up to 10% above its written estimate (up to \$10.00) without the written or oral consent of the customer.⁷ The MCPA exemption section – §904(a)(1) -- would preclude the consumer from claiming that the shop’s conduct was somehow unfair or deceptive under the MCPA.

Prior to 1999, Michigan courts focused on whether the alleged conduct was “specifically authorized” and applied the MCPA to such regulated businesses as automobile dealers⁸, real estate brokers⁹, mortgage brokers¹⁰ and lenders¹¹, even though each is licensed by a regulatory board or officer to do business in their field. In 1999, the

⁷ MCL §257.1332(1).

⁸ *Temborius v Slatkin*, 157 Mich App 587; 403 NW 2d 821 (1986)

⁹ *Attorney General v Diamond Mortgage*, 414 Mich 603; 327 NW2d 805 (1982); *Price v Long Realty*, 199 Mich App 461; 502 NW2d 337 (1993)

¹⁰ *Allan v M & S Mortgage Co*, 138 Mich App 28; 359 NW 2d 328 (1984)

¹¹ *Rutter v Troy Mortgage Servicing*, 145 Mich App 116; 377 NW2d 846 (1985)

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.*¹²

In *Smith*, a majority of the Supreme Court essentially rewrote §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.¹³

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 exempt¹⁴, along with banks¹⁵, plumbers¹⁶, and casinos.¹⁷

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.*¹⁸

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**

In this section, we examine each category in the Attorney General’s Top Ten Consumer Complaints list to see whether the businesses that received so many consumer complaints are exempt from the MCPA under the Court’s interpretations in *Smith* and *Liss*.

¹² 460 Mich 446; 597 NW2d 28 (1999)

¹³ 460 Mich at 465

¹⁴ *Love v. Ciccarelli*, No. 243970, 2004 Mich. App. LEXIS 1152 (Mich. Ct. App. May 6, 2004)(unpublished)

¹⁵ *Newton v. Bank West*, 262 Mich App 434; 686 NW2d 491 (2004).

¹⁶ *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).

¹⁷ *Kraft v. Detroit Entertainment, LLC*, 261 Mich App 534; 683 NW2d 200 (2004).

¹⁸ 478 Mich 203; 732 NW2d 514 (2007)

These categories are:

1. Credit and Finance
2. Gasoline, Fuel and Energy
3. Telecommunications, Satellite and Cable TV
4. Retail
5. Internet
6. Mail Order
7. Motor Vehicles
8. Personal Services
9. Small Business Providers
10. Contractors and Home Improvement

We have ranked the businesses subject to these consumer complaints into three categories:

- 1: All or nearly all of the businesses in the category are likely now exempt under *Smith* and *Liss*, and thus cannot be touched by the MCPA, no matter how bad their conduct.
- 2: Some businesses are likely to be exempt, but not all.
- 3: Few or none of the businesses in this category are likely exempt from the Act, so most businesses are covered.

1. Credit and Finance

The largest number of consumer complaints involved credit and financial companies, including banks, mortgage lenders and brokers, payday lenders, and related companies like credit reporting agencies, credit repair companies and debt collectors.

The great majority of these companies must be licensed, and are regulated by state or federal agencies. Both federal and state governments charter banks¹⁹ and credit unions.²⁰ Non-bank mortgage lenders and brokers are licensed by the state²¹, as are payday lenders.²² Debt collectors are licensed by the state²³, and closely regulated by the federal government, and debt management companies must also have state licenses.²⁴

¹⁹ See, e.g., 12 USC 21 et. seq. (national banks); MCL 487.11101 et. seq. (Michigan Banking Code)

²⁰ 12 USC 1751 et. seq. (federal credit unions); MCL 490.101 et. seq. (Michigan Credit Union Act)

²¹ MCL 445.1651 et. seq.

²² MCL 487.2121 et. seq.

²³ MCL 339.901 et. seq.

²⁴ MCL 451.411 et. seq.

Since nearly all the businesses in this category are subject to licensing and other regulation, they are exempt from the MCPA under the Michigan Supreme Court interpretation.

The MCPA exemption rating for this category of businesses is 1.

2. Gasoline Fuel and Energy

This category includes energy producers and utilities and other sellers, but most complaints in this category had to do with alleged price gouging by gasoline stations. Gasoline stations are licensed and regulated by the state Agriculture Department.²⁵ Most other businesses in this category, including electricity providers and oil and gas companies, are regulated by the Public Service Commission.²⁶

This category of business also gets a MCPA exemption rating of 1.

3. Telecommunications and Cable and Satellite TV

The third largest category of complaints involves telephone, cell phone, cable and satellite services and telemarketing. The communications industry is largely regulated by the Federal Communications Commission, under a series of laws starting with the Communications Act of 1934 and updated most recently by the Telecommunications Act of 1996.²⁷ Landline telephone providers are licensed and regulated by the Michigan Public Service Commission.²⁸ Cable TV providers operate under agreements with local governments overseen by the MPSC.²⁹ Telemarketers aren't licensed, but operate within restrictions set by the Telephone Consumer Protection Act of 1991,³⁰ the FCC's Telemarketing Sales Rule and state law. Whether the regulation of telemarketers is sufficient to lead to an exemption from the MCPA is not clear. However, most businesses in this category will come under the *Smith* and *Liss* rule exempting those whose general transactions are allowed by state or federal law administered by a board or officer.

This category of business also gets a MCPA exemption rating of 1.

4. Retail

The level and nature of regulation of retail establishments varies greatly depending on the type of sales. Almost any place having food as a large part of the business is licensed, either by the state or by local governments

²⁵ MCL 290.646

²⁶ MCL 460.1 et. seq.

²⁷ 47 USC 151 et. seq.

²⁸ MCL 484.2101 et. seq.

²⁹ MCL 484.3301 et. seq.

³⁰ 47 USC 227

given the task under state statutes. Pharmacies, mobile home dealers and rent-to-own stores³¹ are licensed by the state. However, most retail licensing is done by local municipalities, under the authority of state statutes.³² For instance, the city of Detroit’s ordinances require licenses, issued by the Consumer Affairs Department, for the sale of used jewelry³³ and appliances,³⁴ for television repair shops³⁵ and dry cleaners.³⁶ Grand Rapids requires licenses for movie theaters³⁷ and car rental agencies,³⁸ among other businesses.

This category of business gets a MCPA exemption rating of 2.

5. Internet

Internet Service Providers are essentially unregulated by either the Federal Communication Commission³⁹ or by the Michigan Public Service Commission.⁴⁰ The FCC and the Federal Trade Commission investigate complaints and deceptive advertising of internet service and the FCC polices the sale of non-FCC certified electronic communications devices and equipment. Michigan law requires internet companies to avoid mailing to registered children’s e-mail addresses when marketing products or services which are is illegal for minors to view or buy.⁴¹ In addition, the Michigan Liquor Control code regulates internet sales of wine.⁴²

³¹ MCL 445.951 et. seq.

³² MCL 67.2 (licensing by villages); MCL 91.2-91.4 (licensing by cities)

³³ Detroit Ordinances §49-3-18

³⁴ Detroit Ord. §49-2-21

³⁵ Detroit Ord. §54-3-1

³⁶ Detroit Ord. §28-2-17

³⁷ GR City Code §7.342

³⁸ GR City Code §7.361

³⁹ See <http://www.fcc.gov/cgb/internet.html>. The FCC is currently taking public comment on parental controls for video and audio programming delivered over the internet as required by the Child Safe Viewing Act of 2007, P.L. 110-452, 122 Stat. 5025 (December 2, 2008). See FCC Notice of Inquiry, No. 09-26.

⁴⁰ MPSC website, <http://www.michigan.gov/mpsc/0,1607,7-159-16372-42859--,00.html>.

⁴¹ Children’s Protection Registry Act. It is designed to prevent spam email offering sale of tobacco, pornography, etc. (MCL 752.1061, et seq.)

⁴² MCL 436.1203. It also prohibits licensed small distillers from conducting sales over the internet. (MCL 436.1534Other merchants doing business over the internet).

This category of complaints includes a substantial number involving "internet retail." Such sellers may or may not be selling goods or services for "personal, family or household" use so as to be subject to the MCPA. If they are selling goods, they may well fall under rules regulating mail orders (see Category 6); if they are selling services, they may subject to licensure (see Category 8).

The Internet category of business gets an MCPA exemption rating of 2.

6. Mail Order

Mail order practices are principally regulated by the Federal Trade Commission under its Mail or Telephone Order Merchandise Rule which regulates such contracts in detail.⁴³ Though its name does not suggest, this FTC Rule also covers ordering goods over the Internet by means of a computer telephone connection.⁴⁴

In addition, some complaints on the Attorney General's list for mail orders might fall under the mail fraud investigative authority of U.S. Postal Inspectors, but such companies are not likely otherwise licensed or regulated by federal law. Aside from sales tax licenses, mail order sales are not generally subject to regulation by the State of Michigan. However, companies selling particular mail order items (such as food) may be subject to the same state or local licensing as other retail outlets selling the same products.

The mail order category of business gets an MCPA exemption rating of 2.

7. Motor Vehicle or Automotive

Businesses in this category are generally regulated by the Michigan Secretary of State. Most of the complaints involve used car dealers, new car dealers, and auto repair and body shops, all state-licensed.⁴⁵ Automobile repair facilities are specifically regulated under the Motor Vehicle Service and Repair Act.⁴⁶

The Motor Vehicle/Automotive category of businesses gets an MCPA exemption rating of 1.

8. Personal Service Providers.

⁴³ 16 C.F.R. 435.1, et seq. The principal regulation of the Mail or Telephone Merchandise Rule - which also applies to Internet sellers of goods - is mandating that the seller must have a reasonable basis for stating that a product can be shipped within a certain time. If the advertising doesn't clearly state the shipment period, the seller must have a reasonable basis for believing that it can ship the goods within 30 days.

⁴⁴ 16 C.F.R. 435(2)(b).

⁴⁵ MCL 257.248 (car dealers)

⁴⁶ MCL 257.1306

This category includes many trades and services regulated by state licensure requirements. These consumer services providers include personnel agencies,⁴⁷ barbers,⁴⁸ cosmeticians,⁴⁹ dry cleaners,⁵⁰ funeral homes,⁵¹ and tattoo artists⁵² All of these occupations are subject to licensure and thus likely exempt from the MCPA.

In addition, truck rentals for moving household goods are regulated to a substantial degree. Federal law governs interstate movers under which U.S. Department of Transportation regulations provide a measure of consumer protection.⁵³ Michigan law requires intrastate moving companies obtain a certificate of authority from the Michigan Public Service Commission⁵⁴ and abide by other rules.⁵⁵ Beyond vehicle licensure, there is little regulation of truck or trailer rental for do-it-yourself moving.⁵⁶

The category of Personal Service Providers gets an MCPA exemption rating of 2.

9. Small Business Providers

This category generally covers complaints about businesses that provide services to other businesses. It does not generally involve consumer matters. The provision of services to businesses is outside the MCPA,⁵⁷ with the exception of the sale of a “business opportunity”, defined narrowly as the sale of certain types of business start-up goods and services.

Since this category is generally outside the scope of the MCPA to begin with, and therefore not affected by the exemption for regulated and licensed businesses, we will not rate it in this study.

10. Contractors/Home Improvement

⁴⁷ MCL 339.1003, et seq.

⁴⁸ MCL 339.1101, et seq.

⁴⁹ MCL 339.1207.

⁵⁰ MCL 13301, et seq.

⁵¹ MCL 339.1801, et seq.

⁵² 333.13101, et seq. (licensure of "body art facilities").

⁵³ Regulations of the DOT's Federal Motor Carrier Safety Administration, 49 C.F.R. 375.201, et seq.

⁵⁴ MCL 476.1.

⁵⁵ MCL 797.7.

⁵⁶ Note that the MCPA regulates car rental companies' charges for recovering the costs of licensing their vehicles. MCL 445.903h.

⁵⁷ *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72 (1999)

Residential building construction contractors were the primary subject of consumer complaints to the Attorney General. As discussed previously in this report, the Supreme Court has clearly exempted residential builders and home improvement contractors from the coverage of the MCPA.⁵⁸ Specialty contractors such as electricians must also hold business licenses and are thus immune from charges of unfair trade practices.⁵⁹ In addition, plumbing, heating and air conditioning contractors, the third highest source of complaints in this category, are also immune under the Supreme Court's approach to the exemption.⁶⁰ In a case from the Michigan Court of Appeals, dismissal of a claim against a plumbing and heating contractor was explained as follows:

Because the defendants ... conducted the plumbing renovation, installation, and repair project, however irresponsibly or inadequately, pursuant to their licensure and subject to the authority of the state plumbing board, the MCPA does not apply.⁶¹

**The Contractors/Home Improvement category of business gets an MCPA exemption rating of 1.
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.

⁵⁸ *Liss v Lewiston-Richards, Inc.*, 478 Mich 203; 732 NW2d 514 (2007)

⁵⁹ MCL 338.887(g).

⁶⁰ MCL 338.3525 (plumbers) and MCL 338.977 (heating and air conditioning contractors).

⁶¹ *Woods v. William & Sons Plumbing & Heating, Inc.*, 2007 Mich.App. LEXIS 127 (Michigan Court of Appeals No. 256394, January 23, 2007), *lv. denied*, 479 Mich. 862; 735 N.W.2d 240 (2007), cert. denied, 128 S. Ct. 2484 (2008).

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.

The danger to consumers is obvious. Consumers are left without a viable remedy for most unfair or deceptive practices. There is also a danger to businesses as well. Less than honorable business people may adopt unfair or deceptive practices with impunity in order to obtain a competitive advantage. Honorable business people will be forced to adopt similar practices or be put at a disadvantage in the marketplace. Business practices and consumer-friendly businesses will suffer.

In examining the current interpretation of the MCPA in relation to the Attorney General's list of the 10 highest business areas of consumer complaints, this report has shown that the MCPA is no longer available to redress the most common consumer complaints. As a result of the Supreme Court's interpretation of the MCPA in *Smith* and *Liss*, consumers are left adrift and good business practices are threatened. Only when the public and its legislators understand the magnitude of the problem will there be any chance for change.