Consumer Law Newsletter

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State Bar of Michigan Consumer Law Section

Congress Toughens Credit Reporting Law

New Tools for Consumers and Their Lawyers

By Peter Bagley
UAW-GM Legal Services Plan

Studies have shown that as many as 50% of credit reports are inaccurate. If you have a common last name (*e.g.*, Smith, Jones, Perez, Rodriguez, *etc.*), your chance of having an accurate credit report is probably one in five.

Under the Fair Credit Reporting Act, 15 USC Section 1681, et seq., credit reporting agencies have always had an obligation to provide accurate information. The standard has been and remains that credit bureaus must use reasonable procedures to assure "maximum possible accuracy." Despite the clear language of the Act, the credit reporting industry has failed miserably in maintaining accurate records.

Part of the problem is that, once the inaccurate information is in the system, it is very difficult for the credit reporting industry to delete it. It is easily deleted from the computers, but then it is periodically reentered as the creditors continue to report the inaccurate information on computer tapes.

As part of legislation passed on the last day of the 1996 congressional session, the Fair Credit Reporting Act has become

(Continued on Page 4)

SJI Subcommittee Reviews Consumer Protection Jury Instructions

By Frederick L. Miller
Chairperson, Consumer Law Section

Draft standard jury instructions for Consumer Protection Act cases are now under review by a subcommittee of the Standard Jury Instruction Committee established by the Michigan Supreme Court.

The set of instructions being reviewed and revised was written by the Michigan State Bar Consumer Law Committee, before the committee was replaced by the Consumer Law Section. The Committee adopted the draft in April, 1995. A number of lawyers have already made use of the Consumer Committee instructions, and several judges have approved them for use in cases in their courts.

The full text of the draft instructions as approved by the Consumer Committee was reprinted in the last Consumer Law Section newsletter. Copies are available on request to the Section. You are welcome to use them or to comment on them. Judge Denise Langford-Morris is the chairperson of the SJI subcommittee reviewing the Consumer Committee draft. Joseph Galvin, R. Emmet Hannick, Jeannette Paskin and I are the other SJI subcommittee members. Sharon Brown is the reporter.

Mark Your Calendar!

1998 Annual Meeting
Lansing
September 16-18, 1998

CONTENTS

From the Chair 2

Annual Meeting 3

Fair Debt "Hot Issues" 3

Consumer Protection Act Liabilities at Hand 5

Special Insert: Member Survey. Please respond no later than May 1!

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From the Chair

Changing Views of Consumer Law

By Frederick L. Miller
Section Chairperson

Attorneys who have practiced consumer law on behalf of consumers for any length of time know what it's like to be in front of a skeptical judge. Most judges are unfamiliar with consumer statutes. Some seem to find nearly any violation of consumer laws to be *de minimus.* But even judges more open to arguments of consumer advocates are often reluctant to impose statutory damages, attorneys fees and cancellation remedies available in the law. Judges reflect the general attitude within the profession, and the lack of prominence given to consumer law practice.

One goal in creating the Consumer Law Section was to raise the profile of consumer law practice within the profession, and thus change attitudes. I am pleased to report that a start has been made. The Section attracted well over 200 members in its first year. Our newsletter has been circulated beyond our membership. Our program at the State Bar Annual Meeting in September attracted a packed house. We are represented in Bar Association meetings and Bench-Bar conferences.

There is much more to do. If more members contribute, the newsletter can be expanded and improved. A World Wide Web page is available to the Section as part of the State Bar web site (www.michbar.org). The State Bar Journal has asked the Section to help put together a consumer law issue, to which any interested member can contribute.

The State Bar is focusing considerable energy on burnishing the image of the profession with the public. The Section can play a key role in this effort, and in the process help the bar and the judiciary to recognize the importance of consumer law to the lives of ordinary citizens. The Section has been requested to write some of the columns that the Bar Association will circulate to daily and weekly newspapers, as a service and to show people that the Bar is interested in helping the public understand the legal system.

So far, the work of the Section has been done by members of the Section Council. That need not continue. All members of the Section can contribute, serving on a committee, writing for the newsletter. Section Council meetings are open, but you need not come to a Council meeting to get involved. Just call me (313-872-0500, ext. 418) or other Council members with your offer of assistance.

Our profession needs a better appreciation for consumer law. Judges need to know that each time they enforce the consumer laws broadly to protect consumers they may have a positive effect on thousands of consumer transactions that involve too little money ever to be seen in a courtroom. The Bar and the business community need to understand that lax enforcement of consumer protection laws hurts legitimate businesses, depriving them of a level playing field with those who would mislead consumers and ignore the law. Our Section can make a difference, both within the Bar and beyond.

Section Holds Lively Annual Meeting

By Sharon Horner Gant

The second Annual Meeting of the State Bar Consumer Law Section was well-attended and energetic. We even had a contested election for one Section Council seat. Our officers for 1997-98, by unanimous vote, are Fred Miller, Chairperson; Laurin' Roberts, Chair-Elect; Norman Harrison, Secretary; and Clarence Constantakis, Treasurer. Council members re-elected unanimously were Robert Constan, Sharon Horner Gant and Roger Gross. Ian Lyngklip won the contested council seat vacated by our Treasurer.

The remaining business focused on setting up committees to keep the Section abreast of proposed and pending legislation, and to work on the Section newsletter and a Section web page as part of the Bar Association web site. Participation in these activities by Section members is welcome. Robert Constan and Laurin' Roberts head the legislative committee, Steve Lehto and Fred Miller are in charge of the newsletter and Ian Lyngklip and Sharon Horner Gant are developing the web page.

Our outgoing Chairperson, Steve Lehto, was honored with the distinguished "Lemon Soap-on-a-Rope Car" Award for his relentless pursuit of consumer justice in that area as well as his dedicated service to the Section. Nothing is too good for our past chairs.

Following the business meeting, members were treated to an efficient yet thorough review of the federal Fair Debt Collection Practices Act by our guest speaker, a well-seasoned consumer and class action attorney, O. Randolph Bragg, now practicing with a Chicago firm. Mr. Bragg prepared an extensive booklet on his topic for distribution to attendees. If there is sufficient interest, the Section will look into printing additional copies and making them available to Section members.

Those in attendance agreed that the event was time well spent.

Fair Debt "Hot Issues"

From the Annual Meeting Presentation

O. Randolph Bragg, a Chicago consumer lawyer with a national practice, and a pioneer in use of the federal Fair Debt Collection Practices Act, 15 USC 1692, *et. seq.*, was the featured speaker at the annual meeting of the Consumer Law Section. Rand Bragg gave an extensive overview of litigation under the Act, and discussed several of the "hot issues" recently resolved or yet to be resolved by the federal courts. Here are a few of these issues.

Mass mailings by collection attorneys.

Recent suits have examined the legality of mass-produced attorney collection letters in consumer cases. The Seventh Circuit ruled in 1996 that form letters sent at the behest of a collection agency, without review of the file by the attorney whose name appeared at the bottom, were deceptive in violation of 15 USC 1692e**. Avila v Rubin**, 84 F3d 222 (7th Cir, 1996).

Scope of "debts" covered.

Dicta in a Third Circuit case, **Zimmerman v HBO Affiliate Group**, 834 F2d 1163, said that the only debts covered by the Act were consumer debts involving "an extension of credit." A number of district courts cited this case in holding that collection efforts for other debts, such as those from bounced checks or condominium charges, that don't involve credit, were not covered. Recent cases have debunked this theory. See **Bass v Stolper, Koritzinsky, Brewster & Neider**, 111 F3d 1322 (7th Cir 1997) (bounced check); **Charles v Lundgren & Associates**, 119 F3d 739 (9th Cir 1997) (bounced check); **Brown v Budget Rent-a-Car**, 119 F32d 922 (11th Cir 1997) (rental fees).

Bona fide error defense.

In **Heintz v Jenkins**, ___ US ___, 115 S Ct 1489, 131 L Ed 2d 395 (1995), the Supreme Court applied the Fair Debt Act foursquare to the practices of collection attorneys. On remand, however, the district court and the Seventh Circuit read the bona fide error defense provisions of the Act broadly to protect the attorneys. The Seventh Circuit said that the attorney was entitled to rely on the client bank's representations that charges included in the underlying suit were justified under the installment contract involved, in the absence of proof that the attorney knew otherwise. **Jenkins v Heintz**, 1997 WL 526182 (7th Cir 1997).

Class actions.

The Act provides for class actions, but limits damages to 1% of the debt collector's net worth or $500,000, whichever is less. Collection agencies facing class actions contend that their net worth is small. The Seventh Circuit recently ruled, however, that class actions under the Act may cover only a single state, making recoveries per consumer higher. **Mace v Van Ru**, 109 F3d 338 (1997). The Court also said that class actions can proceed even where the collector's net worth and the number of class members would render recovery per class member *de minimus.*

Fair Credit Reporting Law—

continued from page 1

more useful. Many attorneys have been aware of the problem with the credit reporting industry, but it has been difficult to bring lawsuits under the Fair Credit Reporting Act because of the difficulty in showing actual damages. Frequently a client has poor credit regardless of whether the incorrect information is included or deleted. Other clients may have stellar credit worthiness but for the inaccurate information, but cannot point to any actual damages other than embarrassment and inconvenience. Reasonable actual attorney fees have always been available to the prevailing plaintiff, but the plaintiff was required to show actual damages.

The amendments which took effect on September 30, 1997, add a provision of providing up to $1,000 in statutory damages, even for plaintiffs who can show no actual damages. This is a major change to law and will result in a significant increase in litigation. The new statutory damages will make it much easier to collect attorney fees as it will be easier for plaintiffs to show they have "prevailed." On the other hand, defendants can get attorney fees if a plaintiff files a case in "bad faith or for the purpose of harassment." Simply prevailing, however, does not provide a defendant with attorney fees.

In order to be entitled to statutory damages, a plaintiff will have to show that the violation of the Act is "willful." Presumably, a credit bureau that makes a simple mistake and quickly corrects it, will not be liable for a willful violation. However, if the credit bureau is informed that the information is inaccurate and the credit bureau fails to perform an adequate investigation, or performs it but does not put in adequate safeguards to prevent that information from reappearing down the line, the violation will be considered "willful."

The amendments also prevent improper use of credit reports. Businesses are entitled to use credit reports for legitimate business purposes. Employers may check the credit records of their employees and job applicants for certain purposes but they must tell the employee that they are doing the credit check. If they fire or refuse to hire someone based on the results of a credit check, they have to tell them about the negative information and give them a chance to refute it. Employers who disregard these rules can be liable for statutory damages under the new law. It is also illegal for litigants to obtain credit reports on their opponent pending the litigation. Merchants, of course, access credit reports all the time. However, this is not always proper and legal. For example, a car dealer cannot run a credit check on all of its customers, whether or not they wish to buy on credit, solely in order to find out how much they can afford to pay for a car.

The amended Act also clarifies how long a delinquency may be reported on a credit report. A delinquency may be reported for seven years. However, when does the seven year period begin? Does it begin at the point of default, the beginning of collection activity, or not until the debt is charged off. Under the new rule, the seven year period commences 180 days from the delinquency itself.

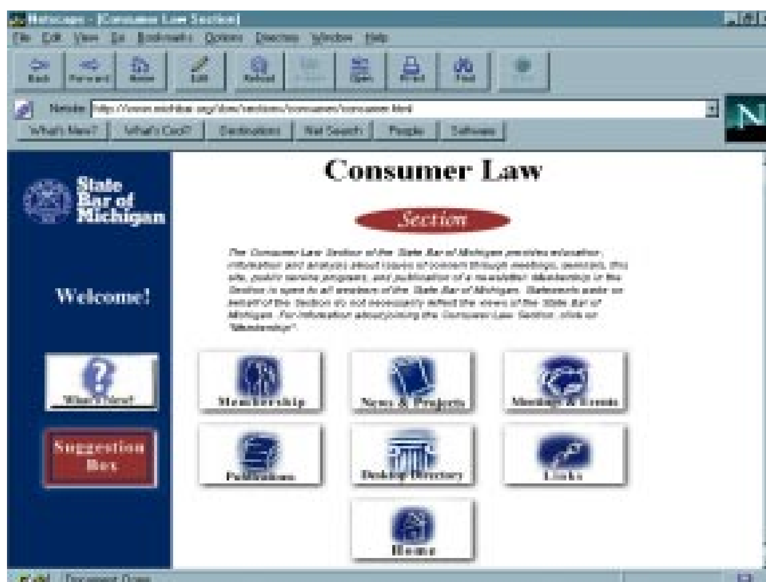
When a consumer disputes the accuracy or completeness of information maintained by the credit bureau, a reinvestigation has always been required. The new law expands the requirements of a proper reinvestigation, and also establishes an "expedited dispute resolution" which can be used if the agency decides to simply and quickly delete the challenged information. The reinvestigation must be done free of charge. It also must be completed in 30 days.

Congress was clearly fed up with the accuracy problems which plagued the credit reporting industry. The amendments seek to force the industry to clean up its act. The amendments also clearly encourage attorneys to take these cases if the industry fails to police itself. Hopefully, the end result will be improved accuracy in credit reporting.

Welcome to Our Home!

www.michbar.org

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



Insurance Companies and Regulated Industries Beware— Consumer Protection Act Liabilities at Hand

Kekel is Dead—Long Live *Diamond Mortgage*

By Gary Victor

When the Legislature enacted the Michigan Consumer Protection Act[1] (MCPA) in 1977, it created a potentially powerful tool for redressing the many unfair and deceptive practices that consumers are subject to in the marketplace. As amended, the act prohibits over thirty types of conduct as "unfair, unconscionable or deceptive."[2] It provides for declaratory judgments,[3] injunctions[4], individual damage actions[5], and class actions.[6] Perhaps most importantly given the economics of the legal profession, it also provides for attorney fee awards in conjunction with individual damage suits.[7]

With specific guidelines from Michigan's higher courts that the MCPA is to be liberally construed to effectuate its purpose of protecting consumers in the marketplace,[8] it is not difficult to show a violation of the act entitling plaintiffs to damages, including reasonable attorneys' fees.[9] All that must be shown is: (1) the plaintiff is a person who has suffered a loss;[10] (2) the defendant was engaged in "trade or commerce";[11] and, (3) the defendant's conduct falls within the meaning of one the over thirty types of prohibited conduct[12] few of which require a showing of knowledge or intent.[13] The burden of showing an exemption from the act is squarely placed on the defendant.[14]

One would wonder why with the availability of attorneys' fees and the relative ease of proof that the MCPA has not been used more often as the sole or at least one of the causes of action in many complaints. Perhaps the main stumbling block to the use of the MCPA has been the legal quagmire on the exemption issue. Until recently there was a question regarding whether regulated industries were exempt from the act. This state of confusion was created by the Court of Appeals decision in *Kekel v Allstate Insurance Co*[15] and remedied by the same Court in the recent case of *Smith v Global Life Insurance Co.*[16] This article will discuss the exemption issue and the relationship between these two cases.

The Liabilities of Insurance Companies and Regulated Industries Under the MCPA is at Hand

The exemption section of the MCPA contained two subsections,[17] each of which will be discussed separately below. The first subsection exempts:

> *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.*[18]

The focus of this exemption is on the "transaction or conduct." It is a narrow exemption designed to protect business people from suit under the MPCA when they engage in a transaction or conduct which is specifically authorized under another law.[19]

The controlling case interpreting this subsection is the Supreme Court's decision in *Attorney General v Diamond Mortgage.*[20] This case concerned the question of whether real estate brokers are exempt from liability under the MCPA because real estate brokers are subject to regulation under the Michigan Department of Licensing and Regulation. In holding that real estate brokers are subject to liability under the MCPA, the Supreme Court reasoned as follows:

> *We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act, While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of §4(l) becomes meaningless.* ***While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." (***emphasis added*)*[21]

All would have been well with the world regarding this exemption and it was until along came the Court of Appeals decision in *Kekel v Allstate Insurance Co.*[22] *Kekel* concerned the question of whether an insured could sue his no-fault insurance company under the MCPA. If ever a Court of Appeals panel attempted to reverse a decision of the Supreme Court, it was the panel in *Kekel*. The *Kekel* Court totally ignored the analysis of *Diamond Mortgage* which focused of whether the transaction or conduct is "specifically authorized" by law;[23] instead, *Kekel* adopted a new focus based on whether the conduct is "subject to regulatory control."[24] After *Kekel,* not only insurance companies[25] but other regulated industries such as the sale of securities, were held exempt from MCPA liability.[26] Fortunately, this sad state of affairs has been corrected by the recent Court of Appeals case of *Smith v Global Life Insurance Co.*[27]

In *Smith*, like *Kekel,* the case involved an action by an individual against an insurance company claiming violations of the MCPA. The trial court relying on *Kekel* had granted summary disposition for the insurance company. Plaintiff claimed that *Dia-*

mond Mortgage was controlling and that the Court of Appeals had erred in *Kekel.* The *Smith* Court agreed reasoning as follows:

> *Section 4(l)(a) exempts from the MCPA's provisions a transaction or conduct that is "specifically authorized," but it says nothing about transactions or conduct that is subject to regulation. The language is clear and unambiguous, so it must be enforced as written. Our Supreme Court's interpretation of the MCPA in* Diamond Mortgage *follows the rules of statutory construction; this Court's interpretation in* Kekel *did not. The rationale in* Diamond Mortgage *must control. The trial court erred, therefore, when it did not apply the* Diamond Mortgage's *court's interpretation of §4(l)(a) to the instant case.*[28]

The *Smith* Court's intention to "reverse" *Kekel* and reinstate *Diamond Mortgage's* interpretation of this exemption subsection was clear. The Court stated:

> *This Court is bound to follow decisions of our Supreme Court, Furthermore, this Court is not bound to follow* Kekel *according to Administrative Order 1990-6, as extended....*
>
> *Based upon the foregoing, we believe that* Kekel *erroneously interpreted the MCPA's § 4(l)(a). This Court should, instead, follow the reasoning from* Diamond Mortgage *as a more correct statutory interpretation that ascertains and gives effect to the Legislature's intent and plain language.*[29] *(citations omitted).*

After *Smith,* courts will return to the *Diamond Mortgage* "specifically authorized" standard in interpreting this exemption subsection. The *Kekel* "subject to regulatory control" approach which led to the confusion in this area is, fortunately, now dead. We can now turn to an examination of the other MCPA exemption subsection.

This subsection[30] reads:

> *Except for the purposes of an action filed by a person under section 11, this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:*
>
> *(a) The insurance code*[3]*...*
>
> *The banking code*[32] *...*
>
> *[statutes regulating utilities]*[33] *...*
>
> *(a) The motor carrier act*[34] *....*
>
> *[statutes regulating nonprofit dental corporations].*[35]

This subsection is even more narrow than the first. It applies only to actions brought by the attorney general or prosecuting attorneys, not actions by consumers. This conclusion is based on the wording of its first clause: "Except for the purposes of an action filed by a person under section 11." Section 11 of the MCPA[36] is the consumer remedy section. As actions brought by consumers under section 11 are not covered by this exemption subsection, such actions may still be brought leaving consumers free to pursue their MCPA remedies. The only other entities that can file actions under the MCPA, the only people subject to this exemption, are the attorney general and prosecuting attorneys.[37]

Even though the wording of the subsection allowing suits by consumers is clear, here again *Kekel*[38] made another, and even grosser, misinterpretation. In an action brought by a consumer against his no-fault insurance carrier, the *Kekel* Court held the insurance company exempt under this subsection. The *Kekel* Court simply edited out the first clause of the subsection. Like *Kekel's* misinterpretation of the subsection discussed earlier, this misinterpretation remained in effect until also corrected by *Smith v Global Life Insurance Co.*[39]

The Smith Court's analysis on this subsection was as follows:

> *Clearly, the MCPA's §11 allows private actions to be brought tinder § 4(2). Thus, the MCPA allows private parties to proceed where a state-initiated prosecution would be precluded .... Moreover, we believe this conclusion is logical because allowing a suit to be initiated by the government where the industry is already regulated by governmental entities would be redundant. A governmental agency could bring action against a regulated industry so there would be no need for intervention by the Attorney General. In those areas regulated by governmental agencies, however, claims by individuals for money damages provides a form of relief that cannot be achieved by the Attorney General....*
>
> *The foregoing analysis leads us to conclude that the MCPA's § 4(2) must be interpreted to permit an individual's cause of action under §11 against an insurance company. . .*[40] *(citations omitted).*

CONCLUSION

The MCPA, providing for mandatory attorneys' fees to the prevailing party and relative ease of proof, should be an arrow in the quiver of most plaintiff trial attorneys. One reason that has not been the case is because the question of the exemption of regulated industries has been in a state of confusion. The misinterpretation of the MCPA exemption sections made in *Kekel v Allstate Insurance Co,*[41] were nullified by *Smith v Global Life Insurance Co,*[42] which clarified the interpretation standard created by the Supreme Court in *Attorney General v Diamond Mortgage*.[43] The exemption question is now clear.[44] Insurance companies and regulated industries beware, MCPA liability is now at hand.

Footnotes

[1] MCL 445.90*1, et seq.;* MSA 19.418(l), *et seq*

[2] MCL 445.903(l)(a)-(ee); MSA 19.418(3)(1)(a)-(ee).

[3] MCL 445.911 (1)(a); MSA 19.418(l1)(1)(a).

[4] MCL 445.911 (1)(b); MSA 19.418(l 1)(1)(b).

[5] MCL 445.911(2), MSA 19.418(11)(2).

[6] MCL 445.911(3); MSA 19.418(11)(3).

[7] MCL 445.911(2); MSA 19.418(11)(2) provides that a person who has suffered a loss as a result of a violation of the MCPA may recover "actual damages or $250, whichever is greater, together with reasonable attorneys' fees." Although the MCPA does not specifically provide for attorney fee awards in class actions, such fees are generally awarded from the fund recovered on behalf of the class.

[8] *See, e.g., Dix v Am Bankers Life Assurance Co.,* 429 Mich 410, 418; 415 NW2d 206 (1987) and *Price v Long Realty, Inc,* 199 Mich App 461, 471; 502 NW2d 337 (1993).

[9] See Mikos v Chrysler Corp, 404 NW2d 783 (1987).

[10] MCL 445.911(2); MSA 19.418(11)(2).

[11] MCL 445.902(d), MSA 19.418(2)(d).

[12] MCL 445.903(l)(a)-(ee); MSA 19.418(3)(1)(a)-(ee).

[13] *See* MCL 445.903(l)(g), (h), (q) (v) and (x); MSA 19.418(3)(1)(g), (h), (q), (v) and (x).

[14] MCL 445.904(3); MSA 19.418(4)(3).

[15] 144 Mich App 379, 375 NW2d 455 (1985).

[16] ___ Mich App ___; ___ NW2d ___ (1997).

[17] MCL 445.904(1)(a), MSA 19.418(4)(1)(a) and MCL 445.904(2); MSA 19.418(4)(2).

[18] MCL 445.904(1)(A), MSA 19.418(4)(1)(A).

[19] An example of a transaction or conduct which would be exempted from MCPA coverage as "specifically authorized" can be found in the Motor Vehicle Service and Repair Act [MCL 257.1332(l); MSA 9.1720(32)(1), the MVSRA]. The MVSRA establishes an extensive regulatory scheme for motor vehicle repair facilities, This scheme is enforced by the Bureau of Automotive Regulation and Consumer actions. The written estimate section of the MVSRA specifically authorizes motor vehicle repair facilities to charge "10% or $10, whichever is less" over a written estimate without obtaining "the written or oral consent of the customer…unless specifically requested by the customer." Charging any amount above a written estimate without obtaining the consent of the consumer could be argued to be in violation of several subsections of the MCPA. As charging a certain amount in excess of a written estimate is "specifically authorized" under the MVSRA, motor vehicle repair facilities that make such charges are exempt from suit under the MCPA.

[20] 414 Mich 603, 327 NW2d 805 (1982).

[21] *Id* at 617.

[22] 144 Mich App 379, 375 NW2d 455 (1985).

[23] In fact, the *Kekel* Court apparently adopted the losing party's arguments from *Diamond*. See *Diamond* at 416-417.[24] The *Kekel* Court stated:

> *We first look to the exemption language of § 4(l)(a) to determine if plaintiffs' complaint speaks to a transaction or conduct which would be the* subject of regulatory control *"under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." (emphasis added) 144 Mich App at 383.*

[25] *Bell v League Life Ins Co,* 149 Mich App 481, 387 NW2d 154 (1986).

[26] *See, e.g., Caproni v Prudential Securities, Inc,* 15 F3d 614 (1994), *Silverman v. Aliswonger,* 761 FSupp 464 (ED Mich, 1991).

[27] _____ Mich App _____, _____NW2d_____(1997).

[28] *Id* at ____.

[29] *Id at* _____.

[30] MCL 445.904(2); MSA 19.418(4)(2).

[31] Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

[32] The banking code of 1969, Act No. 319 of the Public Acts of 1969, as amended, being sections 487.301 to 487.598 of the Michigan Compiled Laws.

[33] Act No. 3 of the Public Acts of 1939, as amended, being sections 460.1 to 460.8 of the Michigan Compiled Laws.

[34] The motor carrier act, Act No. 254 of the Public Acts of 1933, as amended, being sections 475.1 to 479.20 of the Michigan Compiled Laws.

[35] Act No. 125 of the Public Acts of 1963, being sections 550.351 to 550.373 of the Michigan Compiled Laws.

[36] MCL 445.911; MSA 19.418(1 1).

[37] *See, supra,* f n. 5 1.

[38] 144 Mich App 379, 375 NW2d 455 (1985).

[39] _____Mch App _____; _____ NW2d _____ (1997).

[40] *Id* at ____ .

[41] 144 Mich App 379, 375 NW2d 455 (1985).

[42] _____ Mch App _____; _____ NW2d _____ (1997).

[43] 414 Mich 603, 327 NW2d 805 (1982).

[44] It should be noted that while the meaning of the statutory exemptions has been made clear by *Smith,* in an earlier case, *Nelson v Ho,* Mich App _ (1997) the Court of Appeals created a new exemption which applies to members of the "learned professions" except when engaged in entrepreneurial activities. See the first Section Newsletter.

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Consumer Law Section Winter 1998 Newsletter