

**THE COURT OF APPEALS PROVIDES GUIDANCE INTERPRETING
POTENTIAL VIOLATIONS OF THE MCPA**

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INTRODUCTION

During 1999, the Michigan Consumer Protection Act (MCPA)¹ was the subject of considerable attention by the Court of Appeals.² As is usually the case with Court of Appeals' opinions, this past year's decisions were a mixed bag. What those of us that work or may work on MCPA cases hope for in appellate opinions is a reasoned analysis of the statute given its legislative intent. In deciding how to proceed as a practitioner, it is the well reasoned analysis that is most helpful. Unfortunately, many courts simply make conclusionary holdings with little analysis; still others are bold enough to ignore the plain wording of the MCPA to create interpretations made of whole cloth.³ In terms of the quality of its analysis, *Zine v Chrysler Corp*⁴ is may be the most important MCPA decision of 1999.

In *Zine*, the Court had to interpret three MCPA subsections defining unfair and deceptive trade practices.⁵ In doing so it provided guidance on four questions:

- (1) What is the meaning of the word "transaction" in the MCPA?
- (2) Can conduct after a transaction is completed lead to MCPA liability under MCL §§445.903(1)(n) or (cc).
- (3) Whether omissions, as opposed to representations, can cause a probability of confusion as to the rights, obligations, or remedies of a party to a transaction?
- (4) What does the word "material" mean in the context of the MCPA?

The Court's analysis of these four questions will be discussed below.

THE CASE

The plaintiffs in *Zine* were purchasers of new motor vehicles. Along with their vehicles, the plaintiffs also received informational brochures describing their rights under the lemon laws of several states. Notably, there was no summary of their rights under Michigan law. The plaintiffs brought action under MCPA. They claimed that the brochure was misleading and confusing to Michigan consumers in violation of §§MCL 445.903(1)(n), (s) and (cc) of the act. These sections read as follows:

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

* * *

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

The Court rejected the plaintiffs' case almost entirely. Nonetheless, the case represents an import addition to the statute's jurisprudence. The Court took great care in laying out the defects of the claim, and in so doing, also gave a road map to pleading violations under the act.

WHAT IS THE MEANING OF “TRANSACTION”?

The word “transaction” is contained many of the thirty plus subsections of §445.903(1) defining unfair and deceptive trade practices.⁶ The *Zine* Court looked to both legal and general dictionaries in determining the meaning of the term.⁷ The Court concluded

that “a ‘transaction’ is the business conducted between the parties.”⁸ Applying this definition, the Court held that the “transaction” was “the negotiations that concluded in Zine’s agreement to buy the truck.”⁹ Having defined “transaction” as the sale of the vehicle, the Court next addressed whether post sale conduct could lead to MCPA liability.

CAN POST SALE CONDUCT GIVE RISE TO LIABILITY?

Chrysler claimed that it's post-sale statements could not give rise to liability under subsections 903(1)(n) and (cc), since these provisions refer to information relevant to the "transaction". Essentially, Chrysler claimed that post-sale conduct is irrelevant to transaction. The Court rejected this blanket immunity and proceeded to analyze these two subsections on their own terms.

Subsection (cc) prohibits omissions material to the transaction in light of representations made positively. The Court interpreted the subsection to refer only to "information withheld during the negotiations and up to the time of the transaction"¹⁰ In this case, the "positive" statements--those contained in the brochure--were made after the transaction. Therefore, the omitted information could not have been material to the sale and did not trigger subsection (cc). For purposes of subsection 445.903(1)(cc), then, post-sale conduct cannot give rise to MCPA liability.

But the Court’s analysis of MCL §445.903(1)(n) was quite different. That subsection creates liability for causing a probability of confusion as to the legal rights, obligations or and remedies of a party to a transaction. The Court held that both pre-sale and post sale conduct could cause such a probability of confusion.¹¹ So, for purposes of subsection (n), post sale conduct can give rise to liability under the MCPA. Having found that post-sale conduct could

lead to liability under the MCPA, the Court next considered whether that conduct could consist of omissions or had to be affirmative representations.

CAN OMISSIONS CAUSE A PROBABILITY OF CONFUSION?

Chrysler also claimed that a mere omission could not cause of a probability of confusion within the meaning of subsection (n). It asked the Court to adopt a position requiring an affirmative statement or misrepresentation of rights as a prerequisite to this type of claim. The Court rejected this view. Instead the Court held that both representations and omissions could cause a probability of confusion as to legal rights, obligations or remedies of a party to a transaction.¹² Therefore, for purposes of subsection (n), a plaintiff can allege that either or both an omission or an affirmative representation caused the probability of confusion.

WHAT IS THE MEANING OF THE WORD MATERIAL?

Perhaps most importantly, the *Zine* Court gave the first clear definition of materiality under the act. Several subsections of §445.903(1) require a showing materiality. These include two of those relied upon by *Zine's* plaintiffs—subsections (s) and (cc). In considering the issue of materiality, the Court analyzed misrepresentation cases and arrived at the following standard:

By analogy, then, a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer's decision to enter into the transaction.¹³

This standard is quite similar to the proposed MCPA standard jury instruction on materiality:

Materiality

(A section) (Sections) of the Act which Plaintiff claims (was) (were) violated prohibit(s) (misrepresentation of) (failure to disclose) a material fact.

A material fact is one which is important to the transaction, or one which the Defendant knew or should have known would influence the Plaintiff in entering into the transaction. It need not be the sole or a major reason for the transaction.¹⁴

Both *Zine* and the instruction allow a plaintiff to meet his burden by showing that the information was "important" to the transaction. *Zine* differs in allowing the plaintiff to show that the information would "affect" the decision to enter into the transaction while the instruction allows the plaintiff to show that the defendant should have known it would have affected the Plaintiff's decision. In this respect *Zine* is may be viewed as more favorable to the consumer in that it appears to rely on the consumer's subjective decision to buy rather than focusing on the seller's knowledge of the consumer's needs.

CONCLUSION

While the plaintiffs in *Zine* did not prevail on most of their claims, the case provides important and reasoned guidance on four issues of regarding the interpretation of the MCPA. The Court interpreted the word "transaction" in the context of the facts of *Zine* to be that period starting with negotiations and ending with the consummation of the sale. The Court held that post-sale conduct can give rise to liability under the act where that conduct causes a probability of confusion as to the legal rights, obligations or remedies of the parties. The Court also held that omissions—rather than just affirmative misrepresentations—can cause a probability of confusion under the act. Finally, and perhaps most importantly, the Court has

defined materiality under the MCPA. Under the holding in *Zine*, to be material a fact is one that is “important to the transaction or affects the consumer’s decision to enter into the transaction.”¹⁵ This standard appears to incorporate the subjective analysis of whether the plaintiff would have entered into the contract had the true facts been known.¹⁶ If the answer is “No”, then the fact omitted or stated is material.

¹ MCL §445.901, *et seq.*

² *See, e.g., Zine v Chrysler Corp*, 236 Mich App 261 (1999); *Nesbitt, v American Community Mut Ins Co*, 236 Mich App 216 (1999); *Aaronson v Lindsay & Hauer Lintern Ltd*, 235 Mich App 239 (1999); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94 (1999); and *Jackson County Hog Producers v Consumers Power Co*; 234 Mich App 72 (1999).

³ *See Smith v Globe Life Ins*, 460 Mich 446 (1999).

⁴ 236 Mich App 261 (1999).

⁵ MCL §§445.903(1)(n), (s) and (cc).

⁶ *See, e.g.,* §§445.903(1)(m), (n), (o), (q), (t), (u), (w), (x), (y), (bb) and (cc).

⁷ 236 Mich App at 279-281.

⁸ *Id* at 280.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id* at 281

¹² *Id* at 281-282.

¹³ *Id* at 283.

¹⁴ Proposed MCPA Standard Jury Instruction Defining Materiality.

¹⁵ 336 Mich App at 283.

¹⁶ *Id.*