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What's left after Smith v Globe?

BY GARY M. VICTOR

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hen the Michigan Consumer Protection Act (MCPA)1 was passed in 1977, it appeared to be one of the broadest and most powerful consumer protection acts in the country. It prohibits more than 30 types of conduct as unfair and deceptive practices when committed in trade or commerce.² It defines "trade or commerce" very broadly, including nearly all types of economic activity providing goods or services for "personal, family, or household" purposes.3 It provides remedies in the form of declaratory judgments, injunctions, individual damages, and class actions.⁴ Perhaps most importantly, in individual actions it provides for a minimum amount of damages of \$250 together with reasonable attorneys' fees.5

Over the last 25 years, the MCPA has been the subject of numerous decisions, but until recently maintained much of its intended benefits for consumers. This may have come to an end with the Supreme Court's 1999 decision in *Smith v Globe*.⁶ This article will consider principal issues and decisions concerning the MCPA and what is left after *Smith*. "person" to include "natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity."9

In the first major case to consider the meaning of "person," *Catallo Associates, Inc v MacDonald & Goren, PC,*¹⁰ the court of appeals held that businesses could sue for damages regarding goods or services purchased for use by the business.¹¹ *Catallo* was, in essence, overruled by the subsequent court of appeals case of *Jackson County Hog Producers v Consumers Power Co.*¹² There remains a question, however, of whether businesses can sue other businesses under the MCPA.¹³

"Trade or Commerce"

The MCPA defines "trade or commerce," in part, to mean the "conduct of a business providing goods or services primarily for personal, family, or household purposes."¹⁴ It includes just about every type of business imaginable. Even so, in 1997 the court of appeals went outside the wording of the act in order to create a "learned professions" exception to the broad definition of "trade or commerce." If goods or services are sold primarily for the personal, family, or household use of consumers, they fit within the meaning of trade or commerce.¹⁷ An individual consumer who buys goods or services and uses them for primarily business purposes may not sue under the act.¹⁸

What Types of Conduct Are Prohibited?

As mentioned above, more than 30 types of conduct are prohibited by the MCPA.¹⁹ The types of conduct the act prohibits are extremely wide and varied. The breadth of the MCPA prohibitions is so great that it is arguable that almost any breach of contract will be a violation of the act. For example, in *Mikos v Chrysler Corp*²⁰ the court held that a breach of an implied warranty of merchantability constituted a failure to "provide the promised benefits" within the meaning of MCL 445.903(1)(y), entitling the plaintiff to attorneys' fees.

Generally, there is no requirement to show intent or knowledge in order to establish a violation of the MCLA. Few MCPA subsections include the word "intent."

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Who Can Sue Under the MCPA?

Any "person" may sue under the MCPA to obtain declaratory judgments or injunctions.⁷ On the other hand, only a "person who suffers a loss" may sue for individual or class damages.⁸ The act very broadly defines In *Nelson v Ho*,¹⁵ the issue concerned the liability of physicians under the MCPA. The court held that the professional practice activities of physicians are not included in the meaning of trade or commerce, and that physicians can only be sued under the MCPA for their entrepreneurial activities.¹⁶

Remedies Available Under the MCPA

Declaratory Judgments and Injunctions

Since the MCPA provides that a "person" rather than a "person who suffers a loss" may seek declaratory or injunctive relief, no

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contractual or other relationship with the defendant is necessary for standing to seek these types of relief.²¹ The problem with these remedies is that there is no provision for attorneys' fees.

Individual Damage Claims

The act provides that a person who suffers a loss may bring an individual action "to recover actual damages or \$250, whichever is greater, together with reasonable attorneys' fees."²² The availability of attorneys' fees allows consumers to obtain access to the courts by offering attorneys the promise of attorneys' fees if they take MCPA cases and win.²³

Non-Economic Damages

In Avery v Industry Mortgage Co,²⁴ the federal district court held that non-economic damages were available because MCPA cases were more analogous to tort claims than pure contract suits. Avery will provide guidance on this issue until a Michigan appellate court holds otherwise.²⁵

Class Actions

The MCPA specifically provides for class actions.²⁶ In *Dix v American Bankers Life Assurance Co*,²⁷ the Supreme Court emphasized the importance of MCPA class actions in providing a remedy for unfair and deceptive trade practices.²⁸ One of the major problems with class actions in general is the cost of notice to class members. To remedy this problem, the MCPA allows the cost of notice to be shifted to the defendant where the plain-tiff can show by preponderance of the evidence that he will succeed on the merits.²⁹

Attorneys' Fees Under the MCPA

Given the economics of the legal profession, perhaps the most important question an attorney must consider before taking a case is whether he or she will be able to be compensated for his or her efforts. The MCPA has a fee shifting provision that offers attorneys the promise of reasonable attorneys' fees should they succeed.³⁰

The first case to provide an extensive analysis of how attorneys' fees were to be calculated under the MCPA was *Smolen v Dahlmann Apartments, Ltd.*³¹ The *Smolen* court held that trial courts should consider the guidelines established in *Crawley v Schick*,³² but were not limited to those factors. However, the *Smolen* court made it clear that CPA attorneys' fees were available for work performed on appeal. While the court noted that fee enhancements might be available in some circumstances, it generally left trial courts with wide discretion to consider all aspects of the case.³³

Both before and after *Smolen*, many trial courts based low MCPA attorney fee awards on the "amount in question and results achieved" *Crawley* criteria. That approach is no longer permitted. The court of appeals, in *Jordan v Transnational Motors, Inc*,³⁴ held that trial courts cannot focus only on the amount involved; they must make awards based on the remedial nature of the statute.³⁵ This was a very important development on the attorney fee issue.

Class Actions

Although there is no specific provision of the MCPA providing for attorneys' fees in class actions, fees should generally be available as a percentage of the amount collected for the class—the common law common fund theory. Under this theory, class action plaintiffs are usually awarded attorneys' fees as a percentage of the fund recovered by the class.³⁶

Who is Exempted from MCPA Liability?

As originally passed, the MCPA exemption section, MCL 445.904, read, in pertinent part, as follows:

(1) This act does not apply to either of 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....
- (2) ... 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) Chapter 20 of the insurance code...
 - (b) The banking code
 - (d) The motor carrier act....(emphasis added).

The exemption section was designed to be very narrow and had two purposes. The first subsection was designed to protect businesses from potential liability under the MCPA when they engaged in conduct that was "specifically authorized" by law.³⁷ The second subsection³⁸ applied only to the attorney general or prosecutors and exempted certain regulated industries from suit by those entities. The clear purpose here was to avoid conflicts between the attorney general or prosecutors and regulatory agencies with regard to the listed industries. Under this subsection, individuals were still permitted to sue those industries.³⁹

The exemption section has been the subject of substantial and confusing litigation. The Supreme Court, in *Attorney General v Diamond Mortgage Co*,⁴⁰ dealt with the "specifically authorized" language of the first exemption subsection. The court gave this language a narrow interpretation consistent with the act's remedial purpose. Under *Diamond*, a transaction or conduct was only exempt from the MCPA if it was "specifically authorized" by law. Here is the court's analysis:

Fast Facts

- Any person may sue under the MCPA to obtain declaratory judgments or injunctions.
- An individual consumer who buys goods or services and uses them for primarily business purposes may not sue under the act.
- The MCPA has a fee shifting provision that offers attorneys the promise of reasonable attorneys' fees should they succeed.

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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.)41

Despite its inferior status, a later court of appeals case, Kekel v Allstate Ins Co,42 appeared to make holdings directly contrary to Diamond.43 With regard to the "specifically authorized" language, the Kekel court rendered a holding that would allow virtually any regulated business to avoid MCPA liability. It accomplished this by simply deleting the statutory words "specifically authorized" and substituting "subject to regulatory control"44 Continuing in that vein, the Kekel court went on to completely leave the introductory clause "Except for the purposes of an action filed by a person under section 11" out of the second exemption subsection holding that individuals' suits against insurance companies were not permitted.45

It seemed that this confusion created by Kekel was cleared up when the court of appeals rendered its decision in Smith v Globe Life Insurance Co.46 Like Kekel, Smith involved a suit by an individual against an insurance company. Smith concerned the sale of credit life insurance. This panel sided with the Diamond's interpretation of "specifically authorized" and held that the Kekel court was clearly in error when it held that individual actions could not be brought against insurance companies.⁴⁷ Unfortunately, the court of appeals' decision in Globe was reversed by the Supreme Court.48 As a result of this reversal, the MCPA has entered a new era. Indeed, there may be little left of the power to protect consumers that the legislature had in mind when it passed the act.

The Smith Supreme Court dealt its major blow to the MCPA with its interpretation of the "specifically authorized" language in the first exemption subsection. Under the court's interpretation of "specifically authorized," the inquiry on the issue of exemption is not whether the defendant's alleged deceptive conduct was "specifically authorized" by law,

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but whether the general transaction was specifically authorized. The court stated:

Contrary to the "common-sense reading" of this provision by the court of appeals, we 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.49

Applying the Smith analysis, if the general transaction is specifically authorized by statute, e.g., selling credit life insurance; then even if the defendant has engaged in unfair or deceptive trade practices in selling the credit life insurance, the transaction is exempt from MCPA liability.

Having created a gaping hole in the MCPA by its interpretation of the first exemption subsection,50 the court turned to the second subsection. The problem here was the fact that the language clearly allowed individual MCPA suits against insurance companies.⁵¹ The court resolved this apparent dilemma by holding that the second subsection created an exception to the broad, blanket exemption it had "legislated" in its interpretation of "specifically authorized." In other words, any industry that has its general transactions specifically authorized by law is exempt from suit under the MCPA except for those industries listed in the second subsection such as insurance and banking.52

The question left by *Smith* is what types of businesses will be entitled to its blanket exemption from MCPA liability. Any attorney considering taking an MCPA case involving a regulated industry must consider not only whether the trial court may find an exemption under Smith; but the likelihood, should the plaintiff prevail in the trial court, that the defendant may be willing to pursue

the case to the higher courts in order to obtain an exemption.

The MCPA and Other **Causes of Action**

Leaving aside the Smith problem for the moment, the use of the MCPA with other causes of action should be considered. Violations of many statutes will also violate the MCPA. In Smolen v Dahlmann Apartments, Ltd,53 for example, the court held that a failure to return security deposit monies within the Landlord-Tenant Relationships Act54 timeframe was a "failure to promptly return a deposit" within the meaning of MCL 445.903(1)(u) of the MCPA. In motor vehicle repair cases, the MCPA can be used in conjunction with violations of the Motor Vehicle Service and Repair Act.55 Violations of the Pricing and Advertising Act⁵⁶ also lend themselves to use of the MCPA. In cases involving breaches of warranty, the MCPA can be used as a complement to the Magnuson-Moss Warranty Act.⁵⁷ In all such statutory violation cases, however, the Smith issue must be investigated.

Evaluating an MCPA Case

The general considerations in deciding whether to work on an MCPA case are similar to those of other cases. Several items that are more unique to the MCPA, especially for those not experienced in litigating MCPA cases, are as follows:

- Does the defendant's conduct fall within the meaning of the acts prohibited under the MCPA?
- Does it appear that other similarly situated consumers have been subjected to the same type of conduct? This is the primary consideration for class treatment?
- · To what extent is the defendant's business activity regulated?

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- How far will the defendant go to avoid liability? Many cases that appear to be quite simple will generate considerable litigation? This is especially true because defense firms do not know how to litigate MCPA cases.
- If there are several theories of liability, will the inclusion of an MCPA court contribute to the ability to settle or ease of trying the case?
- Are other attorneys who are familiar with MCPA cases available for participation or advice? Generally, there are a number of experienced consumer attorneys who are willing to provide advice and support to other attorneys working on MCPA cases.

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Footnotes

- 1. MCL 445.901, et seq.
- 2. See MCL 445.903(1)(a) through (cc).
- 3. MCL 445.902(c).
- 4. MCL 445.911.
- 5. MCL 445.911(2).
- 6. 460 Mich 446; 597 NW2d 28 (1999).
- 7. MCL 445.911(1)(a) and (b).
- MCL 445.911(2) and (3). See Mayhall v A H Pond Co, Inc, 129 Mich App 178; 341 NW2d 268 (1983).
- 9. MCL 445.902(c).
- 10. 186 Mich App 571; 465 NW2d 28 (1990).
- Catallo was decided prior to the 1990 Administrative Order on court of appeals decisions. See, MCR 7.215(H).
- 12. 234 Mich App 72; 592 NW2d 112 (1999).
- See, e.g., John Labatt Ltd v Molson Breweries, 853 F Supp 965 (ED Mich 1994) and Action Glass v Auto Glass Specialists, 134 F Supp 2d 892 (WD Mich 2001).
- 14. MCL 445.902(c).
- 15. 222 Mich App 74; 564 NW2d 482 (1997).
- 16. See Victor, Nelson v Ho—The Court of Appeals Creates a "Learned Professions" Exception to the Michigan Consumer Protection Act, 32 MTLA Quarterly 19 (Winter, 1998). Nelson may have be come moot as a result of Smith v Globe Life Insurance Co, 460 Mich 446; 597 NW2d 28 (1999). See infra.
- 17. See, e.g., *Noggles v Battle Creek Wrecking, Inc,* 153 Mich App 363; 395 NW2d 322 (1986), and

McRaild v Shepard Lincoln Mercury, Inc, 141 Mich App 406; 367 NW2d 404 (1985).

- See Zine v Chrysler Corp, 236 Mich App 261; 600 NW2d 384 (1999).
- 19. See MCL 445.903(1)(a) through (cc); MCL 445.903(b).
- 20. 158 Mich App 781; 404 NW2d 783 (1987).
- See MCL 445.911(1)(a) and (b). See also, Victor, The Michigan Consumer as a Private Attorney General, 4 Colleague 13 (December, 1991).
- 22. MCL 445.911(2).
- 23. See infra.
- 24. 135 F Supp 2d 840 (WD Mich 2001).
- 25. See Victor, A Federal Judge Holds Non-Economic Damages Available Under the MCPA, 6 Consumer Law Newsletter 2 (August, 2001).
- 26. MCL 445.911(3).
- 27. 429 Mich 410; 367 NW2d 896 (1987).
- 28. The Dix court said:
 - The Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons. Id. at 417–418.
- 29. MCL 445.911(5).
- 30. MCL 445.911(2).
- 31. 186 Mich App 571; 465 NW2d 28 (1990).
- 32. These are: (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. 48 Mich App 728; 211 NW2d 217 (1973).
- See Victor, Attorneys' Fees Under the Michigan Consumer Protection Act, and Other Recent Developments on Attorneys' Fees, 4 Colleague 8 (May, 1991).
- 34. 212 Mich App 94; 537 NW2d 471 (1995). 35. The *Jordan* court stated:

In consumer protection (sic) 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. Id. at 98-99.

See also, Victor, *Court of Appeals Gives New Economic Life To Consumer Protection Cases*, 30 MTLA Quarterly 11 (October, 1996).

 See, e.g., In re Attorney Fees of Kelman, Loria, Downing, Schneider & Simpson, 406 Mich 497, 503–504; 280 NW2d 457 (1979); Amerisure Ins *Co v Folts*, 181 Mich App 288, 291; 448 NW2d 829 (1989).

- 37. For example, the Motor Vehicle Service and Repair Act (MVSRA)—MCL 257.1301, et seq. authorizes a repair facility to charge 10 percent or \$10 over a written estimable without getting the permission of the customer. See MCL 257.1332(1). That conduct could constitute a violation of several sections of the MCPA. See, e.g., MCL 445.903(1)(s), (bb) and (cc).
- 38. MCL 445.904(2).
- 39. As section 11 of the act, MCL 445.911 authorizes actions by individuals, the language "Except for the purpose of an action filed by a person under section 11" clearly means that this exemption subsection does not affect the right of individuals to sue the listed industries under the MCPA.
- 40. 414 Mich 603; 327 NW2d 805 (1982).
- 41. Id. at 617.
- 42. 144 Mich App 379; 375 NW2d 455 (1985).
- 43. In fact, the *Kekel* court apparently adopted the losing party's argument from *Diamond*. See *Diamond* at 416–417. One federal judge has made it clear that "*Kekel* simply can not be reconciled with *Diamond Mortgage* in any principled manner." *Lauson v American Sec Ins Co*, No. 88-CV-10280-BC (ED Mich, 1989).
- 44. In a rather brazen act of judicial legislating the *Kekel* panel stated:
 - We first look to the exemption language of § 4(1)(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." MCL 445.904(1)(a); MSA 19.418(4)(1)(a). Id. at 383. (Emphasis added.)
- 45. Here the *Kekel* court simply ignored the introductory clause of the statutory provision stating:
 - As indicated above, the Michigan Consumer Protection Act specifically exempts transactions between an insurance company and its insured which are covered under the Uniform Trade Practices Act of the Insurance Code. Id. at 385.
- 46. 223 Mich App 264; 565 NW2d 877 (1997).
- See Victor, The Liability of Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act, 77 Michigan Bar Journal 69 (1998).
- Smith v Globe Life Insurance Co, 460 Mich 446; 597 NW2d 28 (1999).
- 49. Id. at 465.
- 50. See Justice Cavanagh's opinion concurring in part and dissenting in part, Id. at 475–483.
- 51. See supra, n 63.
- 52. Effective March 28, 2001, the MCPA was amended to read:

This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act or practice that is made unlawful the chapter 20 of the insurance code.

- 53. 127 Mich App 108; 338 NW2d 892 (1983).
- 54. MCL 554.601, et seq.
 - 55. MCL 257.1301, et seq.
 - 56. MCL 445.351, et seq.
 - 57. 15 USC 2301 et seq. See Jordan v Transnational Motors, Inc, 212 Mich App 94 (1995).