

Venue for Michigan Consumer Protection Act Cases

By Mark S. Baumkel

Introduction

The primary legal tool for victimized consumers in Michigan is the Michigan Consumer Protection Act (MCPA)¹. By creating a statutory cause of action, the MCPA can in many cases serve as a sword to be wielded by consumers against deceptive sellers of products and services. Typically, the plaintiff files a complaint alleging that adverse properties of a product/service were concealed or misrepresented, amounting to a breach of an express or implied warranty (or both) and a violation of the MCPA.²

Venue for cases “based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death” is governed by MCL 600.1629—generally, the county where the cause of action arose. Venue in all other cases (except for specific statutory exceptions not relevant here) generally falls under MCL 600.1621—any county where the defendant resides or conducts business. The MCPA, however, does not specify venue except for actions brought by the attorney general (in which venue is statutorily specified to be where the defendant is established or conducts business).³

MCPA Venue Caselaw

The only Michigan decision I can find that appears to have dealt at all with proper venue under the MCPA is *Lash v Gen Motors Corp.*,⁴ which reversed the unpublished decision of the Court of Appeals. *Lash* was a typical product liability case involving wrongful death/personal injury alleged to have been caused by vehicle defects. The case was filed shortly before the March 28, 1996, effective date of the product liability “tort reform” statutes widely seen as ushering in the demise of many, if not most, personal injury products liability cases because of the new procedural hurdles created by the “reforms” the statutes contained.⁵ In a one-paragraph decision, the Supreme Court summarily reversed the judgment of the Court of Appeals, concluding that all the causes of action in the case, including an MCPA count, arose in Macomb County, Michigan, where General Motors Corporation designed the product. Despite inclusion of an MCPA count in addition to the normal injury counts, the trial court, the appellate courts, and the parties treated as a given that *Lash* was a “tort” case, with venue determined under the usual tort/product liability venue statute (meaning that venue lay solely in Macomb County, where the cause of action arose).⁶ There was no discussion, and apparently no consideration, of whether the MCPA count was a “tort” claim appropriately lumped in with all the traditional

Fast Facts:

- Except for actions brought by the attorney general, the Michigan Consumer Protection Act (MCPA), MCLA 445.901, *et seq.*, does not specify venue.
- The MCPA applies solely to purchases by consumers for personal nonbusiness use of a product or service, but it can and should be inferred that non-personal-injury MCPA cases, like cases involving products purchased for business use, are not products liability or tort cases and, therefore, venue is under MCL 600.1621; MSA 27A.1621—any county where defendant resides or conducts business.

tort counts for purposes of determining venue. For this reason, it is doubtful that *Lash* can be seen as providing guidance for the typical non-personal-injury MCPA case dealing solely with economic damages resulting from alleged deception in the sale of a defective product.

Economic Loss Doctrine Cases

The Michigan Supreme Court has held that non-personal-injury lawsuits seeking recovery for defective products are not products liability cases and are not tort cases. In *Neibarger v Universal Cooperatives, Inc.*, the Court expressly held that actions for purely economic injury to the alleged defective product are not injuries to “property” under the products liability statute.⁷ In *McGhee v Gen Motors Corp.*, the Court of Appeals wrote:

The sound reasoning that underlies this position was set forth in *Mid-Continent Aircraft Corp v Curry County Spraying Service, Inc.*, 572 SW2d 308, 312 (Tex, 1978), in which a used airplane failed and crashed without injury to its pilot:

“The nature of the loss resulting from damage that a defective product has caused to itself has received the attention of several commentators. Dean Page Keeton writes:

“A distinction should be made between the type of “dangerous condition” that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage limited solely to the property, recovery should be available, if at all, on a contract-warranty theory.” [Keeton, *Annual survey of Texas law on torts*, 32 SW L J 1, 5 (1978)].”⁸

Similarly, the Court of Appeals stated in *Sullivan Industries, Inc v Double Seal Glass Co, Inc.*, “Allegations of only economic loss do not implicate tort law concerns with product safety, but do implicate commercial law concerns with economic expectations.”⁹

Neibarger and *Sullivan* involved cases in which the courts disallowed noncontractual tort-type damages remedies under the so-called “economic loss doctrine,” which limits damages solely to economic loss in a commercial transaction situation. The MCPA applies solely to noncommercial settings involving ordinary purchases by consumers for personal, nonbusiness use of the product or service.¹⁰ Since *Neibarger* and the other economic loss doctrine cases dealt solely with matters arising in a commercial setting, it might be argued that they are not precedent for cases under the MCPA. This seems like a losing argument, since the determination in those cases that matters involving damage solely to the product are not like product liability or tort actions is equally apt for distinguishing MCPA cases from product liability cases.

Tort vs. Contract

There is precedent that breach of warranty contract claims are cognizable MCPA claims in matters alleging damages for the purchase price of a defective product.¹¹ It would be anomalous to recognize that MCPA cases involving damage solely to the product are like breach of warranty contract claims for purposes of stating a cause of action but not for determining venue.

In *Mayball v A H Pond, Inc.*,¹² the Court of Appeals analogized a claim under the MCPA to a fraud claim. Arguably, this supports the view that MCPA claims be treated for venue purposes like typical tort claims. However, the Court merely ruled that a compensable *injury* under the MCPA is similar to a common-law fraud claim in that, like a fraud claim, it “does not require injury to the plaintiff’s pocketbook. Instead, the injury may consist in



plaintiff's unfulfilled expectations."¹³ Even if a particular MCPA action involves express allegations of tortious intentional misrepresentation by the seller of the allegedly defective product, the tort venue statute includes only those actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death...."¹⁴ This would appear to exclude the typical MCPA case involving only defects in the product given the reasoning applied in the economic loss cases like *Neibarger*—i.e., such cases, whether considered to be a "tort" or a "contract" case, do not involve a claim that is "seeking damages for personal injury, property damage, or wrongful death...."

Venue in MCPA Actions by the Attorney General

Also, it may be significant that the MCPA requires the attorney general to follow the contract principle of venue when bringing actions under the MCPA: venue lies where the defendant is established or conducts business.¹⁵ It would be perverse to then infer that private party actions should use the different tort/product liability venue principles. The MCPA expressly contemplates that a private party pursuing enforcement under the MCPA is acting as the alter ego of the attorney general because the clerk of the court must give notice of the filing to the attorney general.¹⁶

Conclusion

It may be tempting for defendants to argue that MCPA cases involving damage solely to the allegedly defective product are product liability actions, subject to the tort venue statute dictating venue where the cause of action arose rather than wherever the defendant is located or conducts business, which is the rule in nontort cases. It would be a mistake to treat an MCPA action as a product liability action for purposes of venue simply because of the superficial connection that both actions involve a product. As discussed earlier, the tort venue statute covers product liability and tort cases involving "personal injury, property damage, or wrongful death...."¹⁷ As noted by the Supreme Court in the economic loss doctrine context, a case involving damage solely to the product at issue is not a product liability case.¹⁸ It would be illogical to treat that distinction differently simply because a particular case asserts a claim under the MCPA.

The better view, therefore, is that in MCPA cases dealing solely with damage to or diminished value of the allegedly defective product, venue is under the general venue statute permitting venue in any county where the defendant is located or conducts business. ■



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FOOTNOTES

1. MCL 445.901 *et seq.*
2. *Mikos v Chrysler Corp.*, 158 Mich App 781; 404 NW2d 783 (1987).
3. MCL 445.905(1).
4. *Lash v Gen Motors Corp.*, 461 Mich 1020; 617 NW2d 690 (2000).
5. MCL 600.2945 *et seq.*
6. MCL 600.1629.
7. *Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512, 528–529; 486 NW2d 612 (1992).
8. *McGhee v Gen Motors Corp.*, 98 Mich App 495, 505–506; 296 NW2d 286 (1980).
9. *Sullivan Industries, Inc v Double Seal Glass Co, Inc.*, 192 Mich App 333, 344; 480 NW2d 623 (1991).
10. *Zine v Chrysler Corp.*, 236 Mich App 261; 600 NW2d 384 (1999).
11. *Mikos*, 158 Mich App at 784–785 (also citing similar holdings under state consumer protection laws throughout the country).
12. *Mayhall v A H Pond, Inc.*, 129 Mich App 178, 183; 341 NW2d 268 (1983).
13. *Id.*
14. MCL 600.1629.
15. MCL 445.905(1).
16. MCL 445.912.
17. MCL 600.1629.
18. *Neibarger*, 439 Mich at 528–529.

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