The MCPA So Long, It's Been Good to Know Ya!

By Daniel J. Andrews

This article is not intended to be a legal analysis of the evolution of appellate caselaw involving the Michigan Consumer Protection Act (MCPA). That task is best left to the legal scholars and academics who are much better equipped for such an undertaking. Rather, this is more in the nature of a funeral dirge mourning the demise of the act as seen from afar.

Two principal cases have severely limited the scope and intent of the MCPA from what its drafters originally designed and intended. The first is *Smith v Globe Life Ins Co,*[1] in which the Michigan Supreme Court essentially determined that any industry or business that is in any way regulated by the state is exempt from liability under the act. For a more in-depth explication of the mental gymnastics employed by the Court to reach this conclusion, I would refer the reader to the illuminating article by Gary M. Victor entitled "The Michigan Consumer Protection Act: What's Left After *Smith v Globe*?"[2] One should also review the testimony of Gary M. Maveal, professor and associate dean for academic affairs at the University of Detroit Mercy School of Law, before the Michigan House Judiciary Committee in 2009.[3] The second case is *Liss v Lewiston-Richards, Inc,*[4] which effectively pulled the plug on a historic piece of consumer legislation that was once recognized as a model to be emulated across the nation.

I was introduced to the MCPA in 1997 when a young woman came to me because she was being sued by a major bank for a substantial credit card debt that had been incurred by her former boyfriend on an account on which she had co-signed. Being smart enough to recognize my own limitations and ignorance of

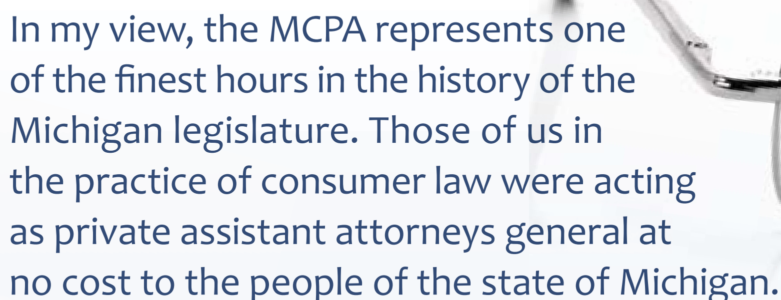
consumer law, I contacted an old friend and colleague from Dearborn Heights, Clarence Constantakis, who I knew was active in the State Bar Consumer Law Section. Together, we set out our defenses to the complaint and filed a counter-complaint alleging violations of the federal Fair Debt Collection Practices Act and the MCPA. The case had been filed in the 35th District Court (district courts being the typical venue for consumer-related cases in light of the dollar amounts involved). Only two witnesses were called, both by the plaintiff bank. Through our cross-examination, we were able not only to establish the factual bases for our defenses to the complaint, but we also established the essential elements of our counter-complaint. As we were breaking for lunch recess, the judge suggested that the bank might wish to consider the possibility of settling the matter as it was obvious that the bank not only failed to substantiate its case against our client, but that we had been successful in proving our counter-complaint from the bank's own witnesses. When court reconvened, we were able to place a settlement on the record that included a dismissal of the complaint; the payment of damages to our client on the counter-complaint in the amount of $1,500; and the payment of attorney fees in the amount of $5,000. The rest, as they say, is history.

Over the next several years, we handled dozens of cases involving application of the MCPA and related consumer legislation, thus disproving the adage about the old dog and new tricks. The vast majority of the cases involved either residential maintenance and alteration contractors (home improvement contractors) who were suing to collect balances claimed to be due or clients seeking reimbursement for shoddy workmanship, jobs not completed properly, and similar claims, all of which were recognized at that time as viable causes of action under the MCPA. Our adverse parties included landscapers, replacement window contractors, roofing contractors, builders, and flooring contractors, as well as debt collectors, banks, and other assorted businesses. The dollar amounts ranged from a few hundred dollars to $20,000 or more.

Two situations particularly stand out during this period. An elderly couple was in the process of extensive repair and renovation of their lifelong home, including the installation of several thousand dollars' worth of floor coverings in their large country kitchen and attached family room. The flooring buckled, separated from the subflooring, wrinkled, and was, in all, an unsatisfactory job. As a part of our preparation, we engaged the services of a well-qualified expert in the flooring business who testified to the improper installation of the flooring, to the fact that the job would have to be completely redone, and that the improper installation rendered the originally installed product unsalvageable. Following trial in the 16th District Court in Livonia, we obtained a judgment of some $4,500 on behalf of our clients; recovery of our costs; and substantial, but reasonable, attorney fees. I dare say that, out of this one case, we developed at least a dozen more based on referrals and recommendations from our extremely satisfied clients.

Interestingly enough, sometime after the judgment had been satisfied, the defendant contractor called me to retain my services to represent him and, among other things, review his advertising, proposal, and contract documents to determine whether they might place him in jeopardy under the MCPA. We enjoyed a mutually satisfying relationship until I retired in 2004. While there were a few claims made against him during that time, including claims under the MCPA, we were able to resolve them without the need for court process, and he came to understand that really good work translated to really good business. In that regard, I believe that the MCPA created a win-win situation for business and consumer alike. If you know the rules, you can play the game. My client learned the rules and played the game very successfully thereafter.

During the same period, it became evident that consumer-related legislation and the MCPA in particular filled an extremely valuable and necessary niche in Michigan jurisprudence. In my view, the MCPA represents one of the finest hours in the history of the Michigan legislature. Those of us in the practice of consumer law were acting as private assistant attorneys general at no cost to the people of the state of Michigan. To me, this is what government is all about. With a realistic and enforceable provision for the recovery of reasonable attorney fees, the old shibboleth that "there are no small cases" took on added substance and meaning. The courthouse doors were opened to thousands of



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Michigan citizens to whom justice would otherwise be denied based solely on the economics of law practice. Since the majority of the cases involved much less than $10,000, successful prosecution depended on the fact that attorney fees and costs would not render the rather modest judgments involved virtually meaningless to the client. The years I spent handling consumer cases were among the most satisfying of my nearly 40 years in the practice of law. And I suspect that I am far from being the Lone Ranger in this regard.

Then along came *Smith v Globe* and its progeny, and the handwriting was on the wall in stark capital letters. In essence, the Supreme Court has determined that the mere act of licensing or permitting a trade, business, or occupation is tantamount to regulation by the licensing or permitting authority. Taking it one step further, the Court has decided that no matter how despicable, shady, underhanded, or even illegal the specific transaction or course of conduct by the licensee or permittee may be, those transactions and courses of conduct are "authorized by law" and, therefore, are exempt from the protections of the MCPA. The Michigan Occupational Code and related legislation license or permit dozens of trades, businesses, and occupations that deal primarily with individual consumers. These range from barbers and mortuaries to residential maintenance and alteration contractors, and the list goes on. To suggest that the Michigan legislature did not intend to include these businesses within the purview of the MCPA would be laughable, but that is exactly what the Supreme Court has decided—a conclusion that flies in the face of logic and the legislative history.

The Court even had the temerity to suggest that there are adequate remedies available through the enforcement provisions of the various licensing acts. My own experience has been that those provisions and procedures are clumsy, inefficient, inconvenient, and seldom provide substantive relief for the aggrieved consumer. We handled a number of claims in which complaints had been filed with the appropriate state agencies and virtually nothing had been done for months and even years until we filed suit under the MCPA. It was only then that our clients stood any chance of being made whole.

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The only real avenue of relief is now in the hands of the Michigan legislature to draft and adopt the relatively simple amendments necessary to once again make the MCPA what it was intended to be and to rectify the mistakes of the Supreme Court. There are efforts now underway by Reps. Robert Jones of Kalamazoo and Robert Constan of Dearborn Heights, among others, to do just that. In relation to this effort, I call on the State Bar Board of Commissioners to remind Bar members of President Charles Toy's commentary in his May 2010 President's Page column entitled "Justice for Whom?"[5] While he rightly praises pro bono work by selfless Michigan lawyers and preaches the need to close the "justice gap," the State Bar could go a long way toward reaching those goals by officially endorsing the proposals to amend the Michigan Consumer Protection Act. There should not and cannot be equivocation or fence-sitting by the Bar in regard to this matter. ■

Daniel J. Andrews is an emeritus member of the State Bar of Michigan, having retired to Florida in 2004 after nearly 40 years in the practice of law, the last several of which were spent primarily practicing consumer law. He is a former member of the Consumer Law Section Council and remains a member of the section. He is a graduate of the University of Detroit (PhB, 1962) and the University of Michigan Law School (JD, 1965) and is thoroughly enjoying his retirement.

Mr. Andrews wishes to thank his old friend and colleague, Clarence Constantakis, for his encouragement and assistance in the preparation of this article.

FOOTNOTES

1. *Smith v Globe Life Ins Co,* 460 Mich 446; 597 NW2d 28 (1999).
2. Victor, *The Michigan Consumer Protection Act: What's Left After* Smith v Globe?, 82 Mich B J 22 (September 2003).
3. Testimony of Gary M. Maveal, professor and associate dean for academic affairs at the University of Detroit Mercy School of Law, before the Michigan House Judiciary Committee in 2009, available at <http://www.house.mi.gov/SessionDocs/2009-2010/Testimony/Committee14-10-28-2009-3.pdf> (accessed August 7, 2010).
4. *Liss v Lewiston-Richards, Inc,* 478 Mich 203; 732 NW2d 514 (2007).
5. Toy, *Justice for Whom?*, 89 Mich B J 19 (May 2010).