



Preemption and the Michigan Franchise Investment Law

By Derek D. McLeod and Brian Witus

The scenario looks something like this: plaintiff-franchisee files suit against defendant-franchisor. In count one, the franchisee asserts a claim under the comprehensive antifraud provisions of the applicable franchise investment law. Specifically, the franchisee alleges that the franchisor made misrepresentations and omissions of fact in connection with the offer and sale of the franchise opportunity. This count unquestionably is governed by the four-year repose provision prescribed in the franchise statute.

In other counts, the franchisee alleges identical fraud claims, except these claims are not asserted under the franchise statute. Rather, they are pled as common-law fraud claims and, thus, are subject to a different—and longer—six-year limitations period. In addition to the fraud claims alleged against the franchisor, the franchisee alleges claims against the individuals materially responsible for offering and selling the franchise, including claims for concert of action and civil conspiracy.

Under this hypothetical scenario, the question is whether the common-law claims alleged in connection with the offer and sale of the franchise are preempted by the franchise statute. From time to time, including recently, this very issue has arisen under the Michigan Franchise Investment Law (MFIL).¹

Although most franchise law practitioners would agree that the MFIL is a comprehensive statute, opinions tend to diverge on the question of whether it preempts common-law claims in connection with the offer and sale of a franchise. In fact, a pair of 2011 decisions—one from a state trial court and the other from a federal court—demonstrate that the preemption question has not been definitively answered.

In the authors' opinion, the answer to the preemption question is, "Yes, the MFIL preempts common-law claims relating to the offer and sale of franchise opportunities." This article seeks to clarify the contours of the question in the absence of definitive guidance from the courts.

Statutory preemption of common-law claims generally

Obviously, common-law claims may be preempted by statute in Michigan.² The question, therefore, turns on whether the legislature intended to preempt the common law as to a particular subject matter.³ When the legislature abrogates the common law, it should speak “in no uncertain terms.”⁴ This does *not* mean the legislature must explicitly state that “[t]his act shall preempt the common law as it relates to x-y-z” for a court to conclude that preemption of the common law was intended. Rather, in the absence of such an explicit statement of legislative intent, courts must decide whether the legislation at issue is “comprehensive.”⁵

Comprehensiveness in the preemption context, as articulated and analyzed by the Michigan Supreme Court, means that the legislation establishes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions.⁶ In other words, courts and practitioners must discern the legislature’s intent, which necessarily is an inquiry into the language of the statute at issue.⁷

The comprehensiveness of the MFIL in general

First enacted in 1974, the MFIL currently contains almost 40 separate sections, covering virtually all—if not all—aspects of the offer and sale of franchises in Michigan.⁸ To be certain, section 4 of the MFIL states, in relevant part and in no uncertain terms, that “[t]his act applies to *all* written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise....”⁹

The MFIL contains other indicia of comprehensiveness, including definition sections,¹⁰ specific private rights of action for violations,¹¹ remedies,¹² and a repose period.¹³ It also contains a section setting forth the disclosures that must be addressed in the franchisor’s written franchise offering documents known as the franchise disclosure document.¹⁴

The MFIL is comprehensive as it relates to the offer and sale of franchise opportunities

In the words of one Michigan appellate court decision, the MFIL “sets forth the various requirements a franchisor must meet in order to sell a franchise in this state” and “[t]he Legislature also set forth the appropriate penalties for violation of the various requirements.”¹⁵ This is absolutely true. Section 5 of the MFIL prescribes a cause of action for fraud—misrepresentations and omissions—in connection with the offer and sale of a franchise.¹⁶ Section 8 requires that certain and specific disclosures be made in the offer and sale of a franchise opportunity.¹⁷ This statutory section also states that a franchise may not be sold in Michigan without first providing the prospective franchisee copies of the written disclosure statements and all proposed agreements relating to the sale of the franchise at least 10 business days before execution of any agreement.¹⁸ Section 32 prescribes liability against individuals—officers, directors, and persons occupying similar status and functions—who “materially aid” in the act or transaction constituting the violation of the MFIL.¹⁹

Claims alleged under these sections of the MFIL are governed by its four-year statute of repose (or limitations), which states: “Any action shall not be maintained to enforce a civil or criminal liability created under this act unless brought before the expiration of 4 years after the act or transaction constituting the violation.”²⁰ A franchisee successfully asserting a claim under MFIL sections 5, 8, or 32 is entitled to statutorily prescribed remedies, including the alternative remedies of either damages or rescission plus statutory interest, reasonable attorney fees, and court costs.²¹

Although the MFIL contains a statutory prohibition against fraud in connection with the offer and sale of a franchise—for which the four-year repose period exists and for which a successful franchisee may maintain specific statutory claims and recover certain statutorily prescribed remedies—common-law fraud and other claims, unless preempted, remain in play. This is significant for several reasons, most notably because common-law fraud claims are subject to a longer six-year statute of limitations as opposed to the statute’s four-year period.²² In other words, if the MFIL does not preempt all common-law claims in connection with the offer and sale of franchises (and the authors believe it does), then the MFIL’s four-year claims period would be rendered a nullity and surplusage or inconsequential.

Franchise preemption cases

The Michigan Supreme Court has yet to decide a MFIL case, and no Michigan appellate court has addressed the preemption question discussed in this article. Nevertheless, two trial courts—one state and one federal—have endeavored to do so. Before looking at those two decisions, however, it is appropriate to consider *Samica Enterprises, LLC v Mail Boxes Etc USA, Incorporated*,²³ a 2008 decision of the U.S. District Court for the Central District of California.

FAST FACTS

The Michigan Franchise Investment Law (MFIL) applies to all written or oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise.

Claims relating to the offer and sale of franchises in Michigan are governed by a four-year claims period, whereas common-law fraud claims are subject to a general six-year statute of limitations.

Although the MFIL ostensibly preempts certain claims relating to the offer and sale of franchises, it does not completely preempt all common-law claims.

In *Samica*, the court held that the California Franchise Investment Law (CFIL) preempts common-law fraud, misrepresentation, and omission claims, as well as rescission claims “based on CFIL...while claims independent of CFIL violations are not” preempted.²⁴ The *Samica* court arrived at this conclusion after considering the almost identical CFIL analogue to section 34 of the MFIL. Section 34 states:

Except as explicitly provided in this act, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this act or a rule or order hereunder. Nothing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect.²⁵

field.”²⁶ Although *Samica* analyzed the CFIL’s statute, its analysis is instructive and summarized here:

- The first statutory clause “clearly suggests that the CFIL shall be the exclusive remedy for claims alleging misrepresentations violative of ‘any [CFIL] provision.’”²⁷
- The second clause—the saving clause—“merely qualifies the first by assuring the [continuing] validity of those claims that are not expressly preempted.”²⁸
- “Rather than render [the analogue to MFIL section 34] inconsequential by interpreting its saving clause as superseding the preemption language, the court concludes that [the relevant CFIL section] bars claims that may otherwise be brought under the CFIL—i.e., those claims alleging misrepresentations and omissions covered by such provisions” in the statute.²⁹
- “The saving clause is properly read as ensuring that any claims beyond the CFIL’s coverage may be brought independently.”³⁰

The *Samica* court then summarized and explained that if the claims based on CFIL violations were not preempted, franchisees “could simply circumvent the CFIL’s statutory scheme (and its statutes of limitations) by styling their CFIL claims as common law fraud.”³¹ *Samica* further held that because the plaintiffs’ fraud claim appeared to rest exclusively on alleged misrepresentations and omissions covered by the CFIL, the analogue to section 34 of the MFIL preempted the other common-law claims.³²

In April 2011, a Michigan circuit court found *Samica* persuasive and ruled from the bench, in part, that the MFIL preempted the plaintiff-franchisee’s common-law misrepresentation and omission claims, its claim for rescission, and its concert of action claim.³³ In June 2011, a federal district court sitting in Michigan rejected the Michigan circuit court’s MFIL preemption holding, stating that “it is not controlling authority and this Court disagrees with its holding.”³⁴ The Michigan federal court did not address or discuss *Samica* except to state that the Michigan circuit court’s preemption holding was based, in part, on *Samica*. The federal court read the saving clause in the second sentence of MFIL section 34 as “not limit[ing]” any common-law cause of action, and held that the plaintiff-franchisee’s common-law claims were not preempted.³⁵

Of course, in the absence of a holding from a Michigan appellate court, the question of MFIL preemption of common-law claims in connection with the offer and sale of franchises remains technically unresolved.

Conclusion

The MFIL is a comprehensive statute. It establishes in detail a course of conduct concerning the offer and sale of franchises in Michigan. It prescribes remedies for violations of its antifraud and delivery provisions (sections 5 and 8) and the liability of individuals (section 32). The legislature further intended that “before

Unsurprisingly, the second sentence—the saving clause—generates confusion in analyzing preemption of the common law in connection with the offer and sale of franchises.

The *Samica* court addressed this issue head-on when it analyzed the California analogue to MFIL section 34. There, the court held that the MFIL analogue “is best understood as displacing those claims that rest on misrepresentations or omissions covered by the several provisions of the CFIL, and the saving clause merely clarifies that the CFIL does *not* completely preempt the



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the expiration of 4 years after the act or transaction constituting the violation” of the statute, “[a]n action shall not be maintained to enforce a civil or criminal liability created under” the MFIL.³⁶

Based on the Michigan Supreme Court’s analytical framework for deciding whether particular legislation preempts the common law as to certain subject matter, courts should find that the MFIL preempts common-law claims, including fraud claims, arising in connection with the offer and sale of franchises. ■



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ENDNOTES

1. MCL 445.1501 *et seq.* The authors have served as counsel for Wireless Toyz and its officers in each of the *Wireless Toyz* cases cited in this article. In *David Abbo v Wireless Toyz*, which is currently pending before the Michigan Supreme Court on a leave application (Case No. 149536), Wireless Toyz asks the Court to, among other things, hold that the MFIL preempts common-law fraud claims arising from the offer and sale of franchises.

2. E.g., *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (“The Legislature has the authority to abrogate the common law.”); see also *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 543–551; 683 NW2d 200 (2004).
3. See *Kyser v Kasser Twp*, 486 Mich 514, 539; 786 NW2d 543 (2010), citing *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987).
4. *Hoerstman Gen Contracting*, 474 Mich at 74.
5. E.g., *id.* at 74 [noting that article 3 of the UCC is “comprehensive,” “is intended to apply to nearly every situation involving negotiable instruments,” and that one of its provisions “completely covers the details of accord and satisfaction”].
6. *Kyser*, 486 Mich at 539.
7. See, e.g., *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011) (“The words of a statute provide the most reliable evidence of its intent . . .”).
8. See MCL 445.1501 through MCL 445.1546.
9. MCL 445.1504(1) (emphasis added); see also MCL 445.1504(2) (“An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.”).
10. MCL 445.1502 and MCL 445.1503. The statute defines “offer” and “offer to sell” to “include[] an attempt to offer to dispose of or solicitation of an offer to buy, a franchise or interest in a franchise for value.” MCL 445.1503(3). “Sale” and “sell” “include[] a contract or agreement of sale of, contract to sell, or disposition of, a franchise or interest in a franchise for value.” MCL 445.1503(8).
11. MCL 445.1531; MCL 445.1532; MCL 445.1534.
12. MCL 445.1531; see also MCL 445.1505 and MCL 445.1508.
13. MCL 445.1533; see also MCL 445.1505; MCL 445.1508; MCL 445.1531.
14. MCL 445.1508.
15. *Maidis Int’l, Inc v Saunders, Inc*, 224 Mich App 508, 512; 569 NW2d 857 (1997).
16. MCL 445.1505; see also MCL 445.1503 (defining, *inter alia*, “offer” and “sale”).
17. MCL 445.1508(2).
18. MCL 445.1508(1).
19. MCL 445.1532. Section 32 of the MFIL is hardly a model of clarity, and the legislature should endeavor to streamline its language.
20. MCL 445.1533. In analyzing MFIL preemption, a related question is whether section 33 of the statute constitutes a statute of repose, which is not subject to tolling, or a statute of limitations, which is subject to equitable tolling. Although this is an important question, it is not one the authors have space to explore in this article. But see *Toyz, Inc v Wireless Toyz, Inc*, 799 F Supp 2d 737, 743–744 [ED Mich 2011] (citing a federal district court decision for proposition that “[t]he only Michigan case which has cited [MCL] 445.1531, has referred to it as a statute of limitations”).
21. MCL 445.1531; see also MCL 445.1505 and MCL 445.1508.
22. See *Kuebler v Equitable Life Assurance Soc of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996) (holding the six-year statute of limitations prescribed in MCL 600.5813 applied to fraud claim).
23. *Samica Enterprises, LLC v Mail Boxes Etc USA, Inc*, 637 F Supp 2d 712 [CD Cal, 2008].
24. *Id.* at 721.
25. MCL 445.1534; accord Cal Corp Code § 31306.
26. *Samica*, 637 F Supp 2d at 721.
27. *Id.*, quoting Cal Corp Code § 31306.
28. *Id.* at 721–722 (citations and quotation marks omitted).
29. *Id.* at 722.
30. *Id.*
31. *Id.*
32. *Id.*
33. See *R&B Communications, Inc v Wireless Toyz Franchise, LLC*, unpublished opinion and order of the Oakland County Circuit Court, issued April 13, 2011 [No. 10-113623-CK] (hearing transcript on file with authors).
34. *Toyz, Inc*, 799 F Supp 2d at 745.
35. *Id.*
36. MCL 445.1533.