



The Michigan Consumer Protection Act is Virtually Dead Yet the Legislature, Executive Branch, and Many Attorneys Don't Seem to Know It

By Gary M. Victor and Ian B. Lyngklip

As originally enacted in 1976, the Michigan Consumer Protection Act (MCPA)¹ was one of the most powerful unfair and deceptive acts and practices (UDAP) statutes in the country. It prohibited 29 types of conduct as unfair and deceptive practices in trade or commerce.² It defined “trade or commerce” very broadly, including most types of economic activity providing goods, services, or property for “personal, family or household” purposes.³ The act’s private right of action section established numerous consumer remedies including declaratory judgments, injunctions, minimum damages in individual claims of \$250 together with reasonable attorneys’ fees, and class actions.⁴ Unfortunately for Michigan’s consumers, the MCPA—once a potent antidote to unfair conduct by businesses—now stands as one of the nation’s weakest UDAP statutes.⁵

This sharp turnabout stemmed from the Michigan Supreme Court’s 1999 decision in *Smith v Globe Life Ins Co.*⁶ If any doubt remained as to viability of the MCPA as a remedy for deceptive trade practices, the Court put them to rest in 2007 by reaffirming

Fast Facts:

The Michigan Consumer Protection Act (MCPA) functionally died in 1999. It was eviscerated by the Michigan Supreme Court in *Smith v Globe Life Ins Co.* The act no longer applies to regulated business activity. Extreme caution should be exercised when considering filing an MCPA case.

Smith in *Liss v Lewiston-Richards, Inc.*⁷ These cases eviscerated the MCPA by judicially expanding the MCPA’s exemption to exclude regulated businesses—and most businesses are regulated in some fashion. Thus construed, the exemption all but swallowed the entire act. Today, the MCPA no longer covers the most common forms of deceptive business practices. The initial legislative intent behind the MCPA of protecting consumers has been totally thwarted.

Inexplicably, the Michigan legislature, executive branch, and a number of attorneys have failed to take note of the MCPA’s demise. The legislature continues to heap substantive prohibitions on this dead letter like flowers on a casket. With each new amendment, the legislature enacts useless regulations that fall under the act’s expanded exemption. Similarly, the executive branch

departments have advised consumers to rely on MCPA remedies under circumstances in which the act could not conceivably apply. Also, attorneys keep filing MCPA suits against exempt businesses. It is a mystery why this conduct continues when a modicum of research would show the lack of wisdom in such actions.⁸ This is especially true regarding amendments to the MCPA, which are nullities from the get-go, as they should have been reviewed by both houses of the legislature as well as the governor's office.

This article will first discuss how the MCPA was killed by the Supreme Court. It will then provide examples of amendments to the act passed after the Supreme Court's decisions that fall within the act's exemption section, as well as government bulletins erroneously advising the use of the act. Last, several examples of lawsuits that should never have seen the light of day will be discussed.

How the Michigan Supreme Court Gutted the MCPA

The vehicle used by the conservative majority of the Supreme Court to kill the MCPA was MCL 445.904(1)(a) of the act's exemption section, which reads as follows:

This act shall not apply 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.

This subsection was intended to apply to those rare circumstances in which a statute specifically authorizes "[a] transaction or conduct" that could arguably fall within the meaning of one of the types of conduct prohibited under the MCPA.⁹ For example, the Motor Vehicle Service and Repair Act¹⁰ specifically authorizes a repair facility to charge 10 percent or \$10 over a written estimate without getting the customer's permission.¹¹ That conduct could be argued to constitute a violation of several sections of the MCPA.

In 1999, the Supreme Court examined the MCPA exemption section in *Smith v Globe Life Ins Co*,¹² a case brought by the personal representative of the consumer against the consumer's credit life insurance company. Even though the MCPA exemption section would ordinarily be given a narrow construction as the act is a remedial statute, the Court majority created an exemption large enough to swallow the rule with the following language:

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.¹³

Justice Cavanagh clarified any confusion as to the scope of *Smith's* interpretation of the MCPA exemption section in his opinion concurring in part and dissenting in part:

The majority does not direct us to a law administered by the insurance commissioner that provides that "sale of insurance is authorized." Like most businesses, it is merely regulated.¹⁴

One wonders how these amendments could be reviewed by both houses of the legislature and the various legislative services available to those bodies and then signed by the governor when they have no effect whatsoever.

Simply put, *Smith* exempted any business activity already subject to regulation.¹⁵

The unspoken prayers of consumer advocates that *Smith* might be limited or reversed went unanswered when the Supreme Court revisited the exemption section in the 2007 case of *Liss v Lewiston-Richards, Inc.*¹⁶ *Liss*, a case against a home builder, reaffirmed *Smith*, making it clear that the MCPA does not cover any business for which the general transaction is specifically authorized by law—interpreting "specifically authorized" to mean "explicitly sanctioned."¹⁷

The demise of the MCPA apparently went unnoticed by the legislature. After *Smith*, the legislature continued to pass amendments to the act regarding regulated business activities.

The Legislature Passes Useless Amendments to the MCPA

Once the Supreme Court in *Smith* pierced the heart of the MCPA rendering it functionally moribund, the legislature should have recognized that any amendment dealing with regulated conduct would fall outside the statute's purview. Even so, the legislature continued to pass numerous dead-on-arrival amendments to the act at a breakneck pace.¹⁸ Several of the more obvious ones will be discussed here. For example, MCL 445.903(1)(dd)(ii), amended in 2000, defines certain product packaging practices as unfair or deceptive:

For container holding devices regulated under part 163 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.16301 to 324.16303, representations by a manufacturer that the container holding device is degradable contrary to the definition provided in that act.

By its own express terms, this provision addresses packaging practices already regulated by the Environmental Protection Act. Consequently, *Smith* renders the amendment a self-evident nullity.

Another example is MCL 445.903(1)(gg), which was amended in 2002. That section reads:

Violating 1971 PA 227, MCL 445.111 to 445.117, in connection with a home solicitation sale or telephone solicitation, including, but not limited to, having an independent courier service or other third party pick up a consumer's payment on a home solicitation sale during the period the consumer is entitled to cancel the sale.

Here again, the legislature has seen fit to amend the MCPA while making specific reference to the very statute that renders the amendment beyond the act's scope.

One wonders how these amendments could be reviewed by both houses of the legislature and the various legislative services available to those bodies and then signed by the governor when they have no effect whatsoever. Are these branches of government disingenuous or simply blind to what the judiciary has wrought? Are they trying to convince consumers that they are acting on their behalf when they litter the law books with ineffectual laws or are they simply incompetent in conducting the people's business? Either alternative is uncomplimentary. We will now turn to the lack of wisdom when the executive branch acts on its own.

The Executive Branch Provides Misinformation to Consumers About Available MCPA Remedies

Irrespective of whether the legislature's enactment of useless MCPA amendments has been by design or a failure to conduct basic research, the executive branch has demonstrated raw ineptitude in its advice to consumers on this issue.¹⁹ On December 16, 2010, the Department of Energy, Labor & Economic Growth (DLEG) issued a bulletin in which Commissioner Ken Ross addressed the fraudulent car sales practice known as "spot deliv-

ery."²⁰ In that bulletin, the commissioner reviewed the state of the law concerning the practice and its legality under the MCPA. Writing as if he were totally unaware of the *Smith* exemption, Ross drew the remarkable conclusion that the MCPA governed car dealers and the practice of spot delivery:

Michigan's Consumer Protection Act includes several provisions applicable to spot delivery practices that would render the seller's actions "unfair, unconscionable, or deceptive," and thus violate the [MCPA].

Spot delivery practices engaged in by motor vehicle installment sellers violate...one or more provisions of the Consumer Protection Act.²¹

Under *Smith* and *Liss*, car dealers are unquestionably exempt from the MCPA because they are subject to regulation. It is one thing for the legislature to pass dead-on-arrival amendments to the MCPA that just lie on the books causing little damage; it is quite another for the executive branch to misinform the public regarding their rights under the act. To their detriment, consumers may rely on such a bulletin. This bulletin can also be dangerous to attorneys. The position that the practice of spot delivery violates the MCPA is not only false, it is so lacking in support that an attorney alleging so in a complaint could face court sanctions for filing a frivolous lawsuit. On the issue of attorneys and the MCPA, we will now move on to examples where lawyers have filed suits under the act that, after *Smith*, should never have seen the light of day.

Lawyers Filing Suits Under the MCPA Are Begging for Dismissal on Summary Disposition

As a practical matter, it is impossible to determine how many MCPA cases or claims have been dismissed on the basis of *Smith*, as few of these cases would have been reported. Those that have been reported involved a variety of business practices including the operation of slot machines,²² manufacture of prosthetic knee

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devices,²³ hospital billing practices,²⁴ and home builders.²⁵ In fact, the only reported MCPA cases to survive summary disposition have done so because the defendants failed to plead the exemption as an affirmative defense²⁶ and therefore waived it.²⁷

Some attorneys are filing MCPA suits that are totally without merit but so odd they receive attention in the press. For example, an account of a recent case in the *Detroit Free Press*²⁸ went viral and was recounted in numerous other outlets. The case claimed that a Livonia movie theater violated the MCPA by charging a price for Coca-Cola and Goobers grossly in excess of the prices "at which similar property or services are sold."²⁹ This case most likely will be dismissed under *Smith* because theater concessions, like most sellers of food, are regulated (as is the practice of pricing consumer goods). Given the current status of the MCPA, attorneys would be well advised to avoid filing MCPA suits or suits with MCPA claims unless, after careful analysis, they find an arguable way around *Smith*.

Conclusion

The MCPA was functionally put to death by the Michigan Supreme Court in *Smith* and *Liss* when it exempted regulated businesses from coverage under the act. Despite the demise of the MCPA, the legislature has continued to pass useless amendments to the act, executive branch departments have misinformed consumers regarding when they can use the act, and lawyers keep filing unsuccessful MCPA claims against regulated businesses. Hopefully, this article will inform these groups of the MCPA's impotence and contribute to changes in their behavior. ■



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FOOTNOTES

1. MCL 445.901 *et seq.*
2. See MCL 445.903(1)(a) through (cc).
3. MCL 445.902.
4. MCL 445.911(1) through (3).

5. See generally National Consumer Law Center, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (February 2009), p 26, available at <http://www.nclc.org/images/pdf/udap/report_50_states.pdf>. All websites cited in this article were accessed July 8, 2012.
6. *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).
7. *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007).
8. In addition to the fact that researching the MCPA itself would reveal *Smith* and *Liss*, several articles have been written regarding the effect of these cases on the MCPA. See, e.g., Victor, *Liss v Lewiston-Richards, Inc—The Supreme Court puts what might be the final nail in the coffin of the Michigan Consumer Protection Act*, 11 Consumer Law Newsletter 1 (2007), available at <<http://www.michbar.org/consumer/pdfs/aug07.pdf>>; Maveal, *Michigan Consumer Protection Act gutted by Supreme Court "globe-alization"*, 53 Wayne L R 833 (2006); Victor, *The Michigan Consumer Protection Act: What's left after Smith v Globe?*, 82 Mich B J 22 (September 2003).
9. See *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982); see also Victor, *The liability of professionals, insurance companies and other regulated industries under the Michigan Consumer Protection Act*, 77 Mich B J 69, 70–71 (1998).
10. MCL 257.1301 *et seq.*; MSA 9.1729(1) *et seq.*
11. MCL 257.1332(1); MSA 9.1720(32)(1).
12. *Smith*, n 6 *supra*.
13. *Id.* at 465.
14. *Id.* at 480.
15. Justice Cavanagh opined that "the majority cannot provide meaningful examples where a consumer would not be blocked by subsection 4(1)(a) under its reading of the terms 'specifically authorized.'" *Id.*
16. *Liss*, n 7 *supra*.
17. *Id.* at 213.
18. See, e.g., MCL 445.903(1)(dd), (gg), (hh), (ii), (jj), and (ll).
19. In addition to misinforming the public about the MCPA, the executive branch is busily attempting to deregulate certain businesses on the patently false conclusion that they are already covered by the MCPA. For example, a recent recommendation of the Office of Regulatory Reinvention regarding occupational licensing has proposed deregulating vehicle protection product warrantors now covered under MCL 257.1243 *et seq.* because this business is already subject to the MCPA. See Office of Regulatory Reinvention, *Recommendation of the Office of Regulatory Reinvention Regarding Occupational Licensing* (February 2012), p 50, available at <http://www.michigan.gov/documents/lara/ORR_Occupational_Licensing_Recommendations_382437_7.pdf>. These warrantors are covered by the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*, and are therefore exempt from the MCPA.
20. Dep't of Energy, Labor & Economic Growth, Bulletin 2010-20-CF. The FTC recently conducted a series of roundtable forums concerning this fraudulent sales practice in anticipation of issuing regulations to curb the practice.
21. *Id.* at 2–3.
22. See *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534; 683 NW2d 200 (2004).
23. See *Peter v Stryker Orthopaedics, Inc*, 581 F Supp 2d 813 (ED Mich, 2008).
24. See *Burton v William Beaumont Hospital*, 373 F Supp 2d 707 (ED Mich, 2005).
25. See *Gleason v Nexes Realty Inc*, unpublished opinion of the Court of Appeals, issued December 6, 2005 (Docket No. 253877); 2005 WL 3304117.
26. "Thus, § 4(1)(a) provides an affirmative defense, which is waived, unless the party raised it in the party's first responsive pleading." *Liss*, n 7 *supra* at 208, n 13.
27. See, e.g., *Giura v Bartolomeo*, unpublished opinion of the Court of Appeals, issued September 28, 2010 (Docket No. 291952); 2010 WL 3767563; *Boillat v Kelly Automotive Group, Inc*, unpublished opinion of the Court of Appeals, issued May 7, 2009 (Docket No. 277916); 2009 WL 1262862.
28. Ashenfelter, *Filmgoer Takes Stand on Costly Snacks, Sues AMC Livonia Theater*, *Detroit Free Press*, March 4, 2012, available at <<http://www.freep.com/article/20120304/NEWS06/203040519/Filmgoer-takes-stand-on-costly-snacks-sues-AMC-Livonia-theater>>.
29. MCL 445.903(1)(z).