THE MICHIGAN CONSUMER PROTECTION ACT TWENTY FIVE YEARS AFTER AND WHAT IS LEFT AFTER *SMITH v GLOBE*?

By

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A. INTRODUCTION AND OVERVIEW

When 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 over thirty types of conduct as unfair and deceptive practices when committed in trade or commerce.[2] It defined "trade or commerce" very broadly including virtually all types of economic activity providing goods or services for "personal, family or household" purposes.[3] It provided remedies in the form of declaratory judgments, injunctions, individual damages and class actions.[4] Perhaps most importantly, in individual actions it provided for a minimum amount of damages of $250.00 together with reasonable attorneys' fees.[5]

During the early years of litigation under the MCPA, several important cases illustrated the great possibilities the MCPA could provide for redressing consumer complaints. *Smolen v Dahlmann Appartments, Ltd*,[6] for example, held that a violation of the Landlord-Tenant Relationships Act,[7] which does not provide for attorneys' fees, could also constitute a violation the MCPA which does. *Mikos v Chrysler Corp*[8] established the principle that a breach of an implied warranty of merchantability constituted a violation of the MCPA entitling the plaintiff to attorneys' fees. Also, the use of the MCPA in class actions to protect large groups of consumers damaged by unfair or

deceptive trade practices was supported by the Supreme Court in *Dix v American Bankers Life Assurance Co.*[9]

Unfortunately, during the first dozen years after the enactment of the MCPA, the Act's potential boon to consumers was limited by the refusal of courts to grant what amounted to really reasonable attorneys' fees. This problem was corrected to a great extent by *Smolen v Dalhmann Apartments*, Ltd,[10] which discussed the calculation of attorneys' fees under the MCPA and established the right to attorneys' fees on appeal; and *Jordan v Transnational Motors, Inc*,[11] which instructed trial courts to consider the remedial purpose of the MCPA rather than focusing on the amount of damages involved when determining attorneys' fees.

With the greater availability of reasonable attorney fee awards, litigation under the Act increased and business began to view the MCPA as a real danger. When the Supreme Court took on a conservative majority, and what some have argued to be an activist a pro-business agenda,[12] the days of the MCPA as a white knight for protecting consumer's rights were numbered. In *Smith v Globe Life Insurance Co*,[13] the new Court's first major case interpreting the MCPA, the Supreme Court rendered a decision which was totally inconsistent with both the plain wording of the act and its legislative purpose. Under *Smith* some, perhaps many or even all regulated businesses may be exempt from liability under the MCPA. Currently, the main question for consumer lawyers, or anyone else considering representing consumers under the MCPA, is to what extent *Smith* may have gutted the Act.

B. WHO CAN SUE UNDER THE MCPA?

Any "person" may sue under the MCPA to obtain declaratory judgments or injunctions.[14] On the other hand, only a "person who suffers a loss" may sue for individual or class damagers.[15] However, the loss suffered to have standing to sue under the MCPA need not necessarily be monetary.[16] The act very broadly defines "person" to include "natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity."[17]

Given the definition of "person", a question developed whether businesses could sue under the act, and if so, for what. In the first major case to consider the issue, *Catallo Associates, Inc v MacDonald & Goren, PC*, [18] the Court of Appeals held that businesses could sue for damages regarding goods or services purchased for use by the business. As *Catallo* was decided prior to the 1990 Administrative Order,[19] it was in essence overruled by the subsequent Court of Appeals case of *Jackson County Hog Producers v Consumers Power Co.*[20]Although it now apparent that businesses can not sue regarding goods or services purchased for their own business use, they still may be able to sue competitors who engage in unfair and deceptive trade practices. Many federal cases brought under the MCPA allow such suits to go forward.[21]

C. "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."[22] It goes on to include just about every type of business imaginable. Even so, in 1997, the Court of Appeal went outside the wording of the act in order to create an exception to the broad definition of "trade or commerce". In *Nelson v Ho*,[23] the Court created a "learned professions" exception to trade or commerce. The issue in *Nelson*

concerned the liability of physicians under the MCPA. The Court held that the professional practice activities of physicians are not included in meaning of trade or commerce, and that physicians can only be sued under the MCPA for their entrepreneurial activities. Although *Nelson* involved physicians, other professions are certain to claim entitlement to this exception.[24] It should be noted that *Nelson* and the entire issue of the liability of professionals may have become moot as a result of *Smith v Globe Life Insurance Co*[25] which will be discussed in greater depth below.

Personal, Family or Household Purposes. If the goods or services in question are sold primarily for the personal, family or household use of consumers, they fit within the meaning of trade or commerce.[26] An individual consumer that buys goods or services and uses them for primarily business purposes may not sue under the act.[27]

D. WHAT TYPES OF CONDUCT ARE PROHIBITED?

As mentioned above, over thirty types of conduct are prohibited by the MCPA as unfair, unconscionable or deceptive practices.[28] The types of conduct the Act prohibits are extremely wide and varied. Some of these are:

- Using deceptive representations or deceptive designations of geographic origin in connection with goods or services.[29]
- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has sponsorship, approval, status, affiliation, or connection which he does not have.[30]
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.[31]
- Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.[32]
- Representing that a consumer will receive goods or services "free", "without charge", or words of similar import without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions, terms, or

prerequisites to the use or retention of the goods or services advertised.[33]

- Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.[34]
- Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.[35]
- Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.[36]
- Failing to reveal facts which are material to the transaction in light of representations of fact made in a positive manner.[37]

The above sections represent less than a third of the types of conduct prohibited. The breath 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*[38]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); MSA 19.418(3)(1)(y) entitling the plaintiff to attorneys' fees.

Intent. Generally, there is no requirement to show to intent or knowledge in order to establish a violation of the MCLA. Few MCPA subsections include the word "intent". MCL 445.903(1)(g); MSA 19.418(3)(1)(g), for example, prohibits: "[a]dvertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented." Other subsections requiring a showing of intent or knowledge are: MCL 445.903(1)(h), (q), (v) and (x); MSA 19.418(3)(1)(h), (q), (v) and (x).

E. REMEDIES AVAILABLE UNDER THE MCPA

As mentioned above, the MCPA provides for declaratory judgments, injunctions, individual damages and class damages.

Declaratory Judgments and Injunctions. As the MCPA provides that a "person" rather

than a "person who suffers a loss" may seek declaratory or injunctive relief, no contractual or other relationship with the defendant is necessary for standing to seek these types of relief.[39] The MCPA is designed to encourage consumers to become public attorneys general and assist in the enforcement of the act.[40] The problem with these sections is that there is no provision for attorneys' fees. Therefore, generally cases seeking declaratory or injunctive relief also contain individual and/or class claims for damages.

Individual Damage Claims. MCL 445.911(2); MSA 19.418(11)(2) 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." 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. The issue of attorney fees under the MCPA will be discussed more extensively below. However, the nature of damages available under the act can be addressed here.

Until very recently there was a question of whether a consumer who has been subjected to unfair and deceptive trade practices would be entitled to non-economic damages. Although there are no Michigan cases on the issue, one federal case addresses the issue. In *Avery v Industry Mortgage Co,*[41] the 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.[42]

Class Actions. The MCPA specifically provides for class actions.[43] In *Dix v American Bankers Life Assurance Co*,[44] the Supreme Court emphasized the importance of MCPA

class actions in providing a remedy for unfair and deceptive trade practices. The Court stated:

> 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.[45]

One of the major problems with class actions in general is the cost of notice to class members. This can be particularly devastating in consumer class actions which often involve small amounts of money over a large group of individuals. To remedy this problem, the MCPA allows the cost of notice to be shifted to the defendant. The plaintiffs may petition the court to shift the cost of notice and the court may do so on considering the probability that plaintiffs will succeed on the merits.[46]

F. 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 will be able to be compensated for his efforts. The MCPA has a fee shifting provision which offers attorneys the promise of reasonable attorneys' fees should they succeed.[47] However, that promise must be evaluated in relation to other economic opportunities. Generally, attorneys are compensated on either an hourly or contingency basis. Hourly work offers the guarantee of payment without regard to success. Contingency work requires one to gamble on success, but usually provides what amounts to a higher hourly rate if success is achieved.

Work under the MCPA fee shifting provision usually provides the worst aspects of both of the other alternatives. Attorneys who take MCPA cases will not be entitled to

an attorney fee award unless they succeed, and usually courts base the awards on the hours worked without giving a multiplier to compensate for the contingency of success. Moreover, until the 1990s, MCPA cases met with a good deal of judicial resistance resulting in attorney fee awards considerably lower than what would be a reasonable hourly rate.

The first case to provide an extensive analysis of how attorneys' fees were to be calculated under the MCPA was *Smolen v Dalhmann Apartments*, *Ltd*[48]. The *Smolen* Court held that trial courts should consider the guidelines established in *Crawley v Schick*,[49]—(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. The Court indicated, however, that trial courts are not limited to those factors. On a positive note, the *Smolen* Court made it clear that MCPA attorneys' fees were available for work performed on appeal. However, the Court refused to hold that a "lodestar"—reasonable hours times a reasonable rate—was presumptively a reasonable fee. On this issue of reasonable rates, the Court referred the trial court to the Economics of Law Practice Survey. 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.[50]

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*, [51]

held that trial courts can not focus only on the amount involved; they must make awards based on the remedial nature of the statute. 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.[52]

There have not been any recent reported MCPA attorney's fee cases, however, cases dealing with other statutes have had an impact on the calculation of attorneys' fees under the act. For example, awards of double attorneys' fees—under both a fee shifting statute and under the court rules on mediation or offers of judgment—are generally no longer available.[53] The good news is that fee enhancements may be available, especially if necessary to attract competent counsel to such cases.[54] However, the possibility of a fee reduction for partial success must also be considered.[55]

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.[56]

There is a dilemma for attorneys contemplating MCPA class actions. This is because the statute is silent as to class action attorneys' fees, there are no class action cases holding that attorneys' fees can be awarded on the basis of the amount of work

involved and the only currently available theory for collecting attorneys' fees is the common fund approach. If the fund to be protected is not large and/or the amount of work to recover the fund is extensive, it may not be economically feasible for counsel to proceed. In such cases it may be possible to use a MCPA class claim in conjunction with another fee shifting statute. The use of the MCPA with other statutory claims is discussed below.[57]

G. WHO IS EXEMPTED FROM MCPA LIABILITY—THE BIG ISSUE OF THE DAY

As originally passed the MCPA exemption section, MCL 445.904; MSA 19.418(4), 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 have two purposes. The first was to protect businesses from liability under the MCPA when they engaged in conduct that was "specifically authorized" by law. For example, the Motor Vehicle Service and Repair Act[58] (MVSRA) authorizes a repair facility to charge 10% or $10.00 over a written estimable without getting the permission of the customer.[59] That conduct could constitute a violation of several sections of the MCPA.[60] Thus, under the first exemption subsection,[61] a repair facility that does what is specifically authorized under the MVSRA is exempt form MCPA liability for that conduct. The second subsection[62] applied only to the attorney general or prosecutors and exempted certain regulated

industries from suit by those entities. The clear purpose was to avoid conflicts between the attorney general or prosecutors and regulatory agencies with regard to the listed industries. Under this subsection, individuals where still permitted to sue those industries.[63]

The exemption section has been the subject of substantial and confusing litigation. The Supreme Court, in *Attorney General v. Diamond Mortgage Co*,[64] 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:

> We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of §4(1) becomes meaningless. **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)[65]

Despite its inferior status, a later Court of Appeals case—*Kekel v. Allstate Ins Co*,[66]—appeared make holdings directly contrary to *Diamond*.[67] With regard to the "specifically authorized" language, the *Kekel* Court rendered a holding which 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"[68]—a brazen act of judicial legislating. Continuing in that vein, the

Kekel Court when on to completely read 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.[69]

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.*[70] 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.[71] Unfortunately, the Court of Appeals' decision in *Globe* was reversed by the Supreme Court.[72] 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, 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.[73]

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 gaping hole in the MCPA by its interpretation of first exemption subsection,[74] the Court turned to the second subsection. The problem for the Court here was the fact that the language clearly allowed individual MCPA suits against insurance companies.[75] 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 which 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. The Court was apparently willing to sacrifice the listed industries in order to protect the vast majority of regulated industries not listed.

The insurance industry did not take kindly to its position as a sacrificial lamb and immediately began lobbying the Republican dominated legislature for an amendment to the MCPA exempting it from suit under the act. It did not take long before their lobbying efforts were rewarded. 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.[76]

The banking industry has not been so lucky and two recent cases have found MCPA liability under *Smith's* "exception to the exemption" approach. In *Dressel v Ameribank*,[77] the Court of Appeals reversed the trial court's grant of summary disposition to the bank, held the bank's practice of charging document preparation fees constituted

the unauthorized practice of law and remanded plaintiffs' claims under the MCPA. Also, in *Nelson v Associates Financial Services Co of Indiana*,[78] the Court of Appeals held that plaintiffs has stated a claim for relief under the MCPA regarding mortgage prepayment penalties.

The question left by *Smith* is what types of businesses will be entitled to its blanket exemption from MCPA liability. It is not unreasonable to predict that as long as the Supreme Court maintains its present conservative majority, any MCPA cases that reach the Court will result in exemptions for regulated industries.[79] Any attorney considering taking a MCPA case involving a regulated industry must consider not only whether the trial court may find an exemption under *Smith*; but the likelihood, should 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.

H. 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. The MCPA can be used as an additional count in conjunction with many other causes of action. As mentioned above, almost any breach of contract will also constitute a violation of the MCPA.[80] Certainly, cases involving fraud or misrepresentation lend themselves to MCPA counts. In many, if not most, cases combining the MCPA with other theories of liability, proving the MCPA count will be easier than the other counts, especially fraud.[81]

Violations of many statutes will also violate the MCPA. In *Smolen v Dahlmann Apartments, Ltd*,[82] for example, the Court held that a failure to return security deposit monies within the Landlord-Tenant Relationships Act[83] timeframe was a "failure to

promptly return a deposit" within the meaning of MCL 445.903(1)(u); MSA 19.418(3)(1)(u) of the MCPA. In motor vehicle repair cases, the MCPA can be used in conjunction with violations of the MVSRA. Violations of the Pricing and Advertising Act[84] 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.[85] In all such statutory violation cases, however, the *Smith* issue must be investigated.

I. WHAT TO CONSIDER WHEN EVALUATING A MCPA CASE

The general considerations in deciding whether to work on an MCPA case are similar to those of other cases. Attorneys must consider whether they want to establish a relationship with this client. Whether the plaintiff will be an asset in the case and provide the necessary cooperation are questions which must be answered. Since MCPA cases have an element of contingency, like any other contingent fee cases, the financial status of the defendant and/or any insurance carrier for the defendant must be considered. 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 the 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?
- 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 a MCPA count 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 other attorneys working on MCPA cases.

[1] MCL 445.901, *et seq*.; MSA 19.418(1), *et seq*.
[2] See MCL 445.903(1)(a) through (cc); MSA 19.418(3)(1)(a) through (cc) and MCL 445.903(b); MSA 19.418(3)(b).
[3] MCL 445.902(c); MSA 19.418(2)(c).
[4] MCL 445.911; MSA 19.418(11).
[5] MCL 445.911(2); MSA 19.418(11)(2).
[6] 127 Mich App 108; 338 NW2d 892 (1983).
[7] MCL 554.601, *et seq*.; MSA 26.1138(1) *et seq.*
[8] 158 Mich App 781; 404 NW2d 783 (1987).
[9] 429 Mich 410; 367 NW2d 896 (1987).
[10] 186 Mich App 292; 463 N.W.2d 261(1990).
[11] 212 Mich App 94; 537 N.W.2d 471 (1995).
[12] See Gurweitz. *Who Wins, Loses in Michigan Supreme Court*, 60 Mich AFL-CIO News 6 (No 9, 1999).
[13] 460 Mich 446; 597 NW2d 28 (1999).
[14] MCL 445.911(1)(a) and (b); MSA 19.418(11)(a) and (b).
[15] MCL 445.911(2) and (3); MSA 19.418(11)(2) and (3).
[16] See *Mayhall v A H Pond Co, Inc,* 129 Mich App 178; 341 N.W.2d 268 (1983).
[17] MCL 445.902(c); MSA19.418(2)(c).
[18] 186 Mich App 571; 465 NW2d 28 (1990).
[19] MCR 7.215(H),
[20] 234 Mich App 72; 592 NW2d 112 (1999).
[21] *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 Supp2d 892 (WD Mich 2001).
[22] MCL 445.902(c); MSA 19.418(2)(c).
[23] 222 Mich App 74; 564 NW2d 482 (1997).
[24] 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).
[25] 460 Mich 446; 597 NW2d 28 (1999).
[26] *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).
[27] See *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999).
[28] See MCL 445.903(1)(a) through (cc); MSA 19.418(3)(1)(a) through (cc) and MCL 445.903(b); MSA 19.418(3)(b).
[29] MCL 445.903(1)(b); MSA 19.418(3)(1)(b).
[30] MCL 445.903(1)(c); MSA 19.418(3)(1)(c).
[31] MCL 445.903(1)(e); MSA 19.418(3)(1)(e).
[32] MCL 445.903(1)(n); MSA 19.418(3)(1)(n).
[33] MCL 445.903(1)(r); MSA 19.418(3)(1)(r).
[34] MCL 445.903(1)(s); MSA 19.418(3)(1)(s).
[35] MCL 445.903(1)(y); MSA 19.418(3)(1)(y).
[36] MCL 445.903(1)(bb); MSA 19.418(3)(1)(bb).
[37] MCL 445.903(1)(cc); MSA 19.418(3)(1)(cc).
[38] 158 Mich App 781; 404 NW2d 783 (1987).
[39] See MCL 445.911(1)(a) and (b); MSA 19.418(11)(a) and (b).
[40] See Victor, *The Michigan Consumer as a Private Attorney General*, 4 COLLEAGUE 13 (December, 1991).
[41] 135 F Supp 2d 840 (WD Mich 2001).
[42] See Victor, *A Federal Judge Holds Non-Economic Damages Available Under the MCPA*, 6 Consumer Law Newsletter 2 (August, 2001).
[43] MCL 445.911(3); MSA 19.418(11)(3).

[44] 429 Mich 410; 367 NW2d 896 (1987).
[45] *Id* at 417-418.
[46] MCL 445.911(5); MSA 19.418(11)(5).
[47] MCL 445.911(2); MSA 19.418(11)(2).
[48] 186 Mich App 571; 465 NW2d 28 (1990).
[49] 48 Mich App 728; 211 NW2d 217 (1973).
[50] See Victor, *Attorneys' Fees Under the Michigan Consumer Protection Act, and Other Recent Developments on Attorneys' Fees*, 4 COLLEAGUE 8 (May, 1991).
[51] 212 Mich App 94; 537 N.W.2d 471 (1995).
[52] Id at 98-99. See also, Victor, Court of Appeals Gives New Economic Life To Consumer Protection Cases, 30 MTLA Quarterly 11 (October, 1996).
[53] See *McAuley v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998).
[54] See *Schellenberg v Elks Lodge No 2225*, 228 Mich App 20; 577 NW2d 163 (1998).
[55] *Id*. *See also*, Victor, *Recent Attorney Fee Cases and Their Potential Effect on the Calculation of Attorney Fees in Consumer Protection Cases*, 78 Michigan Bar Journal 278 (1999).
[56] *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
[57] *See infra*, Section H.
[58] MCL 257.1301, *et seq*; MSA 9.1729(1), *et seq.*
[59] MCL 257.1332(1); MSA 9.1720(32)(1).
[60] *See, e.g.,* MCL 445.903(1)(s), (bb) and (cc); MSA 19.418(3)(1)(s), (bb) and (cc).
[61] MCL 445.904(1)(a); MSA 19.419(4)(1)(a).
[62] MCL 445.904(2); MSA 19.419(4)(2).
[63] As secton 11 of the act, MCL 445.911; MSA 19.418(11), 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.
[64] 414 Mich. 603; 327 NW2d 805 (1982).
[65] *Id* at 617.
[66] 144 Mich App 379; 375 NW2d 455 (1985).
[67] 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." *Lawson v American Sec Ins Co*, No. 88-CV-10280-BC (ED Mich, 1989).
[68] 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". M.C.L. § 445.904(1)(a); M.S.A. § 19.418(4)(1)(a). *Id* at 383. (emphasis added).

[69] 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.

[70] 223 Mich App 264; 565 NW2d 877 (1997).
[71] See Victor, *The Liability of Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act*, 77 Michigan Bar Journal 69 (1998).
[72] *Smith v Globe Life Insurance Co*, 460 Mich 446; 597 NW2d 28 (1999).
[73] *Id* at 465.
[74] See Justice Cavanagh's opinion concurring in part and dissenting in part, *Id* at 475-483.
[75] *See supra*, f n 63.

[76] MCL 445.904(3); MSA 19,418(4)(3).
[77] 247 Mich App 133; 635 NW2d 328 (2001). Dessel is currently on appeal to the Supreme Court.
[78] ____ Mich App ____; ____ NW2d ____ (2002).
[79] A review of Justice Corrigan's concurrence in *Forton v Laszar*, 463 Mich 969; 622 NW2d 61 (2001) supports this prediction.
[80] See *Mikos v Chrysler Corp,* 158 Mich App 781; 404 NW2d 783 (1987).
[81] See *Dix v American Bankers Life Assurance Co*, 429 Mich 410; 367 NW2d 896 (1987).
[82] 127 Mich App 108; 338 NW2d 892 (1983).
[83] MCL 554.601, *et seq*.; MSA 26.1138(1) *et seq*.
[84] MCL 445.351, *et seq*.; MSA
[85] 15 USC 2301 *et seq*. See *Jordan v Transnational Motors*, *Inc*, 212 Mich App 94 (1995).