MICHIGAN CONSUMER PROTECTION ACT GUTTED BY SUPREME COURT "*GLOBE*-ALIZATION"

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I. INTRODUCTION

Until 1999, Michigan residents enjoyed the strong protection of the 1976 Consumer Protection Act.[1] The Michigan Supreme Court's decision in *Smith v. Globe Life Insurance Co.*[2] gutted the law by shielding virtually all licensed businesses from its reach.[3] Through a perverse reading of the Act, and by distorting its own precedent on the

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1. MICH. COMP. LAWS ANN. §§ 445.901-.922 (West 2002).
2. 597 N.W.2d 28 (Mich. 1999).
3. MICH. COMP. LAWS ANN. § 445.904(1)(a).

precise issue presented, the Court in *Globe Life* ignored the import of language that only transactions or conduct that were "specifically authorized" by law would be exempt from its coverage.[4] The Act's drafters rejected the notion that insurers and other businesses that were already subject to administrative regulation ought to be totally immune from the new statute. *Globe Life* failed to seriously consider the statute's entire framework and dismantled the crucial balance struck by the legislature in reaching compromise to pass the Act.

This article critiques the *Globe Life* ruling and surveys its fallout on Michigan consumers. After recounting the legislative history of the Consumer Protection Act, it details the Michigan Supreme Court's interpretation of the statutory exemption in question in its 1982 ruling in *Attorney General v. Diamond Mortgage Co.*[5] This paper reviews the briefs, oral arguments, and the Court's decision in *Globe Life*. After arguing that the case was erroneously decided in blatant disrespect of the legislature, it surveys the legacy and the Michigan Supreme Court's recent reaffirmance of its *Globe Life* ruling. This paper concludes that it is long past time that the Michigan legislature redress the court's ruling in *Globe Life* by corrective legislation.

II. MICHIGAN'S CONSUMER PROTECTION ACT ("MCPA") BACKGROUND AND OVERVIEW

The Federal Trade Commission Act of 1914 ("the FTC Act") was the forerunner of all U.S. consumer protection statutes.[6] The FTC Act empowered the Federal Trade Commission to prevent unfair practices in sweeping terms. The Act's broad prohibition of unfair competition and deceptive trade practices invited a case-by-case determination of whether the merchant or seller's conduct was in fact unlawful.[7] The primary remedy upon finding an unfair trade practice was administrative: an FTC

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4. *See Globe Life Ins. Co.*, 597 N.W.2d at 39.

5. 327 N.W.2d 805 (Mich. 1982).

6. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-58 (2006)); Federal Trade Commission Act, ch. 311, § 5(a), 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 45(a) (2006)). As originally enacted in 1914, the FTC Act protected the marketplace by prohibiting "unfair methods of competition." Federal Trade Commission Act, ch. 311, § 5(a), 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a) (2006)). In 1938, Congress amended the Act to also prohibit "unfair or deceptive acts or practices." Wheeler-Lea Amendments of Act, ch. 49, § 3, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

7. For example, according to the U.S. Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), an unfair act is determined as follows: "'(1) whether the [act or] practice, . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'" *Id.* at 244 (quoting Prohibited Trade Practices, 29 Fed. Reg. 8355 (July 2, 1964) (codified at 16 C.F.R. § 408 (1964)).

cease-and-desist order was enforceable by court injunction.[8] The Act's enforcement was strengthened by authorizing the Attorney General to pursue criminal penalties for willful violations.[9]

However, the FTC Act had no provision for judicial enforcement by consumers, and federal courts uniformly refused to infer a private right of action.[10] When the FTC began seeking restitution for victims, ancillary to injunctive relief, the federal courts denied the relief.[11]

In the early 1970's, the Federal Trade Commission proposed spurring interest among the states in crafting their own consumer protection statutes.[12] A group of state attorneys general and FTC attorneys drafted model state statutes authorizing public and private remedies for unfair sale practices.[13] These "little-FTC acts" were designed to supplement federal administrative enforcement through state attorneys general and direct actions by consumers; some statutes allowed only injunctive relief, while others allowed statutory damages or attorneys' fees as an incentive for private enforcement.[14] Little-FTC acts typically enacted a generic prohibition against "unfair" or "deceptive" business practices and looked to follow FTC rulings as precedents on specific conduct.[15] The Council of State Governments worked to promote adoption of one version of consumer legislation[16] and the

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8. Wheeler-Lea Amendments of Act, ch. 49, § 13(a), 52 Stat. 111, 115 (1938) (codified as amended at 15 U.S.C. § 53(a) (2000)).

9. Wheeler-Lea Amendments of Act, ch. 49, § 16, 53 Stat. 111, 116-17 (1938) (codified as amended at 15 U.S.C. § 56(5)(b) (2000)). *See* Martin J. Lindahl, *The Federal Trade Commission Act as Amended in 1938*, 47 J. POL. ECON. 497 (1939).

10. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Alfred Dunhill, Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974).

11. Peter C. Ward, *Restitution for Consumers under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U.L. REV. 1139, 1144 nn.23-24 (1992) (citing Heater v. FTC, 503 F.2d 321 (9th Cir. 1974); *In re* Matter of Holiday Magic, Inc., 84 F.T.C. 748, 1045 n.11 (1974)). In 1975, Congress authorized restitution to victims. *See* Federal Trade Commission Act, § 19, tit. II, § 206(a), 88 Stat. 2183, 2201 (1975) (codified as amended at 15 U.S.C. § 57b (2007)).

12. ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 528 (Stephen Brobeck, Robert N. Mayer & Robert O. Herrmann eds., ABC-CLIO 1997) ("The FTC was motivated in part by a desire to give power and responsibility to the states and localities as a way to save money for the federal government, which at the time was engaged in the costly Vietnam War.").

13. Edwin M. Bladen, *How and Why the Consumer Protection Act Came to be*, CONSUMER LAW SECTION OF THE STATE BAR OF MICHIGAN (2005), *available at* http://www.michbar.org/consumer/pdfs/HowWhy.pdf (last visited Jan. 8, 2008).

14. William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 274-76 (1971).

15. *Id*. at 274.

16. Michael M. Greenfield, *Unfairness under Section 5 of the FTC Act and its Impact on State Law*, 46 WAYNE L. REV. 1869, 1899 n.152 (2000) (citing Council on State Governments *XXIX Suggested State Legislation* in this regard).

Uniform Commission on Uniform State Laws promulgated a Uniform Consumer Sales Practices Act in 1970.[17]

Michigan had several statutes giving some measure of consumer protection in discrete businesses fields, e.g., the Motor Vehicle Service and Repair Act[18] and the Michigan's Uniform Trade Practices Act ("UTPA") which governs insurance companies.[19]

Of particular relevance to this paper, the UTPA was enacted as a part of the Insurance Code of 1956[20] and created a process of administrative regulation under the authority of the Insurance Commissioner of the Department of Commerce.[21] (While the Commissioner of Insurance has been replaced under Michigan law by the Commissioner of the Office of Financial and Insurance Services, this paper uses the former title throughout).

Under Michigan's Insurance Code, insurers are "authorized . . . to transact insurance"[22] and are required to submit certificates and policies to the Commissioner of Insurance, who may reject them if they are found to be confusing to consumers.[23] In addition, the UTPA prohibits a variety of unfair and deceptive practices, such as misrepresenting terms of a policy, advertising that is untrue or misleading, and misrepresenting the benefits or making incomplete comparisons between policies.[24] The UTPA empowers the Insurance Commissioner to investigate complaints,

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17. UNIFORM CONSUMER SALES PRACTICES ACT 1970 § 7A U.L.A. (West 2002). A previous model state statute - The Uniform Deceptive Trade Practices Act - was approved by the National Conference of Commissioners on Uniform State Law in 1964. National Conference of Commissioners on Uniform State Laws, Revised Uniform Deceptive Trade Practices Act, (Aug. 9, 1966), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf (last visited Jan. 8, 2008). It addressed insurance practices and was similar to one adopted by Michigan in 1956.

18. MICH. COMP. LAWS ANN. § 257.1301 (West 2001). In pertinent part, this act requires written estimates of automotive repairs and prescribes the circumstances under which mechanics can charge more than the estimate. *See* MICH. COMP. LAWS ANN. § 257.1332 (West 2001).

19. MICH. COMP. LAWS ANN. § 500.2001 (West 2002). Most states refer to their versions of this statute at DTPA or UDTPA, possibly to highlight a focus on targeting deceptive practices, rather than the fact that the statute is drawn from a uniform act.

20. MICH. COMP. LAWS ANN. § 500.2105 (West 2002).

21. Federal law has made clear since 1945 that the states are empowered to regulate the insurance trade although it may affect interstate commerce. *See* The McCarran-Ferguson Act, ch. 20, §1, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C.A. § 1011 (2007); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

22. MICH. COMP. LAWS ANN. § 500.108 (West 2002). This section of the Insurance Code distinguishes between authorized and unauthorized insurers; an authorized insurer is one with a certificate of authority from the Commissioner of Insurance "to transact insurance in this state." *Id.*

23. *See* MICH. COMP. LAWS ANN. § 500.2236(5) (West 2002).

24. *See* MICH. COMP. LAWS ANN. § 500.2005 (West 2002); MICH. COMP. LAWS ANN. § 500.2007 (West 2002).

to sue (through the attorney general) to enjoin violations, to impose fines, require refunds, or suspend an insurer's license.[25] However, it confers no private right of action upon insureds to sue to redress any such unfair business practices.[26]

By 1970, it was apparent that no comprehensive legal protections were afforded Michigan consumers.[27] Still, the Michigan Consumer Protection Act ("MCPA") was enacted only after protracted legislative debate and compromise. Its advocates included the Attorney General and the Michigan Consumers Council on which he served; opponents included the banking and insurance industries.[28]

In final form, Section 3(1) of the MCPA prohibited twenty-nine specific "unfair, unconscionable, or deceptive" trade practices.[29] The prohibited "methods, acts, or practices" were identified without regard to particular industries and apply to all persons in "trade or commerce," i.e., selling goods and property or services for personal, family, or household use.[30]

The MCPA granted the attorney general broad powers to investigate and seek injunctive relief against unlawful trade practices.[31] The Act also authorized the Attorney General, county prosecutors, and consumers to bring class actions for injunctive relief and civil penalties.[32] The attorney general's class action (under Section 10) could seek restitution, orders to

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25. MICH. COMP. LAWS ANN. §§ 500.2007, .2028-.2043 (West 2002).

26. *See* Dasen v. Frankenmuth Mutual Ins. Co., 197 N.W.2d 835 (Mich. Ct. App. 1972) (holding that section 230 of the Insurance Code precludes a private person from suing to redress violations of the UTPA). MICH. COMP. LAWS ANN. § 500.230 (West 2002).

27. The inadequacy of Michigan's legal protection for consumers as of 1970 was fully set forth in a student comment, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 MICH. L. REV. 926 (1970); the article was reprinted in Donnelly & Lyhn, *Consumer Rights: Battle in the Marketplace* (Consumer Alliance of Michigan 1972). *See also* Report of the Governor's Task Force on Consumer Protection: A Critical Issues Research Paper (Nov. 25, 1969) (on file with author).

28. The Michigan Consumers Council was constituted by statute (MICH. COMP. LAWS ANN. § 445.821 (West 2002)) and worked to protect consumers from harmful products, false advertising, and deceptive sales practices. MICHIGAN CONSUMERS COUNCIL, SUMMARY OF MICHIGAN CONSUMER PROTECTION LEGISLATION, ii (1987). It served as a clearinghouse for consumer information and advised the governor and legislature on consumer issues and the attorney general of trade practices requiring investigation. *Id.* The Council had been criticized by some consumer groups as having been unduly influenced by the views of some its members' constituencies: the Chamber of Commerce, industry lobbyists, and the Michigan Department of Commerce. Trudy Lieberman, *Consumer Advocates Fault State Panel's Record*, THE DETROIT FREE PRESS, Oct. 1, 1973.

29. MICH. COMP. LAWS ANN. § 445.903 (West 2002). One of the legislative precursors of the MCPA, House Bill number 4001, introduced January 10, 1973, carried a blanket prohibition, without elaboration, of "unfair, unconscionable, or deceptive acts or practices" in section 3. Mich. H.B. 4001, Regular Sess. (1973).

30. MICH. COMP. LAWS ANN. § 445.902(d) (West 2002).

31. MICH. COMP. LAWS ANN. §§ 445.905-.907 (West 2002).

32. MICH. COMP. LAWS ANN. §§ 445.905, .910, .915 (West 2002).

"carry out a transaction in accordance with" consumers "reasonable expectations," and avoidance of unconscionable contract terms.[33] Private actions by consumers (under Section 11) were encouraged by provision for recovery of the lesser of actual damages or a sum of $250.00 for each violation as well as award of attorney's fees.[34]

Finally, and importantly to the topic of this paper, the MCPA deputized several executive regulatory agencies (including the commissioner of insurance) to investigate their licensees in the same manner as the Attorney General would investigate other merchants.

III. THE MCPA'S STATUTORY EXEMPTIONS TO ITS COVERAGE

The Consumer Protection Act was borne from a protracted legislative process between 1973-76.[35] Governor William G. Milliken had voiced support for a strong consumer protection law in his 1975 State of the State address.[36] Later that year, competing bills passed both the House and Senate and a compromise was forged by a Conference Committee of their delegates.[37] The legislators thoroughly considered the MCPA's relationship to administrative regulation of businesses and any exemptions to its coverage.[38] As will be seen, the Supreme Court's ruling in *Globe Life* rejected the legislature's judgment and essentially rewrote the statute to preclude virtually all consumer lawsuits against regulated businesses.[39]

A. Legislative History of the Exemptions

Introduced in early 1975 as Senate Bill No. 1 ("S.B. 1"), the proposed MCPA carried an exemption which excluded from its coverage "transactions or actions specifically authorized" by state or federal law, the Section 4(1)(a) exemption.[40] In addition to a limited exemption for publishers of advertisements based upon deceptive claims made by merchants in ads, S.B. 1 provided that the law would not apply at all to

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33. MICH. COMP. LAWS ANN. § 445.910.

34. MICH. COMP. LAWS ANN. § 445.911 (West 2002).

35. The Attorney General and the State of Michigan Consumer's Council worked to enact the MCPA. They both actively supported H.B. 4001 in 1973 and earlier versions. Earlier versions of the Act were passed in one form or another by the House of Representatives in 1973 and again in 1974, but failed in the State Senate. Annual Report, Michigan Consumers Council, 6 (1973); Memorandum to the Executive Office from Frank J. Kelley, Attorney General, July 11, 1973 (on file with author).

36. 6 Michigan Report 14, Gongwer News Service, Jan. 9, 1975.

37. Mich. S.B. 1, Regular Sess. (1975); Mich. H.B. 4433, Regular Sess. (1975).

38. *See id*.

39. *See generally Globe Life Ins. Co.*, 597 N.W.2d at 28.

40. Mich. S.B. 1, Regular Sess. (1975). S.B. 1 also provided that the burden of proving any one of the three exemptions under the act would be upon the person claiming the exemption. *Id.*

conduct subject to the UTPA, the existing law prohibiting deceptive practices by insurance companies.[41] Since the UTPA created no private right of action for insureds,[42] this provision would have preserved the status quo.

In May 1975, the Senate approved amendments to S.B. 1 from its Committee of the Whole.[43] Among significant changes to the bill, it struck the word "specifically" from the Section 4(1)(a) exemption, so that any "authorized transaction or action" whatsoever would be immune from the reach of the Act.[44] It also expanded the number of industries altogether exempt from the coverage of the consumer protection act.[45] In addition to insurance companies, S.B. 1 would not apply to banks, savings and loans associations, and credit unions.[46] These additional exemptions were attributed to pressure from lobbyists and caused consumer advocates to bemoan that the proposed act had been significantly weakened.[47]

Meanwhile, an alternative approach to comprehensive consumer protection had been introduced early in 1975 as House Bill 4433.[48] While its prohibitions and enforcement provisions were in many ways nearly identical to S.B. 1, it contained only two exemptions.[49] Section 4 of H.B. 4433 contained similar exemptions for acts "specifically authorized" by law and qualified protection for publishers of advertisements, but carried no exemption for unfair practices by insurers.[50]

The Department of Commerce (which oversaw the Commissioner of Insurance) gave Governor Milliken its analysis of H.B. 4433, pointing out its significant difference from S.B. 1: "H.B. 4433 does not exclude the insurance industry from regulation under the act."[51]

The Department of Commerce went on to express its reservations over assigning new investigative responsibility to the Attorney General, arguing that office lacked the in-house expertise to effectively police

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41. Section 4 of Mich. S.B. 1 provided in the pertinent part:

This act does not apply to:

> (C) An unfair method of competition or unfair or deceptive act or practice in the business of insurance which is subject to chapter 20 of Act No. 218 of the Public Acts of 1956, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

Id. at 6, lines 19-22 (on file with author).

42. *See Dasen*, 197 N.W.2d at 835.

43. 1 Journal of the Senate 1055 (Mich. 1975).

44. *Id*.

45. *Id*.

46. 1 Journal of the Senate 1055-56 (Mich. 1975).

47. Trudy Lieberman, *Senate Finally Takes up Consumer Protection Bill*, DETROIT FREE PRESS, May 27, 1975, at 1-B.

48. Mich. H.B. 4433, Regular Sess. (1975).

49. *Id.*

50. *Id.*

51. Memorandum to Governor Milliken from Director Richard K. Helmbrecht, Michigan Department of Commerce, May 19, 1975 (on file with author).

regulated industries.[52] It suggested instead that other executive agencies be enlisted to assist in enforcing the new law.[53] Specifically, the Department proposed that the Insurance Commission have concurrent authority to investigate insurance practices which might be claimed to be unfair under the new consumer law.[54]

House Bill 4433 was referred to the House Committee on Consumers.[55] That Committee received similar suggestions from the Department of Commerce, chiefly on the lines of responsibility for enforcement of existing regulatory authority. The Department's Director had asked that its bureaus (including the Commissioner of Insurance) "share in the enforcement" of the new law, noting that the Department was "in favor of including all industries under the act as long as jurisdictional lines in the enforcement of regulatory statutes are clearly drawn."[56] Since these agencies already administered similar consumer statutes, the Department of Commerce urged it would be most efficient to authorize these agencies - rather than the Attorney General - to investigate violations of the new consumer law by companies they regulated.[57]

In addressing the exemption for "specifically authorized" acts contained in the proposed House Substitute S.B. 1, the Director wrote:

> Section 4(1)(a) appears, however, to have generated considerable confusion regarding what conduct is or is not covered by the bill as well as the responsibilities of the [regulatory] Bureaus and the Attorney General for enforcement. I do not believe it is the purpose of this section to exempt industries entirely, as some have suggested, or to alter jurisdictional lines. The section, as I interpret it, is intended merely to preserve existing regulatory powers already granted by the legislature.[58]

The Committee on Consumers thus approved a House Substitute for S.B. 1 which carried the exemption for acts "specifically authorized" by law, and incorporated many of the suggestions for additional agency

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52. *Id.*

53. *Id.*

54. *Id*. Among other suggestions, the letter proposed addition of a new section to provide concurrent authority to investigate unfair practices under the Insurance Code of 1956: "The Insurance Commission shall have authority to conduct investigations in the same manner as the Attorney General for violations of the provisions of this Act or a rule, with respect to persons subject to Chapter 20 of Act. No. 218 of the Public Acts of 1956, as amended." *Id*.

55. 1 Journal of the House 431 (Mich. 1975).

56. Letter from Richard K. Helmbrecht, Director of the Michigan Department of Commerce, to Representative Lynn Jondahl, Consumers Committee Chair (Nov. 4, 1975) (on file with author).

57. *Id.*

58. *Id*.

investigative authority.[59] As amended, the House Substitute gave executive agencies authority to investigate violations of unfair practices under the bill; the agencies would be required to forward their findings to the Attorney General.[60] Among other changes, the Substitute would have given authority to the Commissioner of Insurance to investigate unlawful trade practices under the Act and required a full report of any such investigation to the Attorney General.[61] Significantly, it would have also empowered the Attorney General to define additional unfair trade practices by administrative rule.[62]

After extended debate on several further amendments from the floor, the House adopted the Committee on Consumer's Substitute for S. B. 1.[63] The Senate, having already approved its own bill (S.B. 1),[64] voted not to agree to the House Substitute and the competing bills were sent to a Conference Committee.[65]

After deliberations, the Conference Committee reached agreement that did not include a wholesale exemption of the insurance industry from the measure, but did retain the exemption for "[a] transaction or conduct specifically authorized" by law.[66] An important part of the compromise denied the Attorney General power to define additional unfair practices by rule.[67] The Committee also incorporated the idea that the Attorney General's investigative authority ought not overlap with that of agencies regulating insurance, banking, and the other industries cited by the Department of Commerce.[68] Under a newly-added Section 21 of the bill, the Commissioner of Insurance would be empowered in same way as the Attorney General to investigate insurers believed to have engaged in a method, act, or practice unlawful under the Consumer Protection Act.[69] At the same time, a provision was drafted to proscribe the Attorney General's authority to investigate and prosecute those

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59. *See* House Substitute (H.B. 1) for Mich. S.B. 1 (1975), at 16-17 (on file with author); 4 Journal of the House 3488 (Mich. 1975) (reporting substitute to the full House with recommendation for passage).

60. House Substitute (H.B. 1) for Mich. S.B. 1 (1975), §§ 22-26. (on file with author). Edwin M. Bladen, former Assistant Attorney General who headed its Consumer Protection and Economic Crime Divisions at the time, confirmed the origin of these amendments in his paper. *See* Bladen, *supra* note 13.

61. House Substitute (H.B. 1) for Mich S.B. 1 (1975), § 26 (on file with author).

62. Analysis of Senate Bill 1 (proposed House substitute H-1), First Analysis, Nov. 12, 1975 (on file with author).

63. 4 Journal of the House 3927-36 (Mich. 1975).

64. 2 Journal of the Senate 1071-73 (Mich. 1975).

65. 3 Journal of the Senate 2650 (Mich. 1975) (Sens. Bishop, Cooper, and Guatello as Senate delegates); 4 Journal of the House 3970 (Mich. 1975); 4 Journal of the House 4012 (Mich. 1975) (Reps. Angel, Forbes, and Jondahl as House delegates).

66. Conference Report, § 4(1)(a) *in* 3 Journal of the Senate 2279, 2281 (Mich. 1975).

67. *Id*.

68. Conference Report, §§ 17-21 *in* 3 Journal of the Senate 2279, 2284-85 (Mich. 1975).

69. Conference Report, § 21 *in* 3 Journal of the Senate 2279, 2285 (Mich. 1975).

industries - but expressly preserving consumers' rights to sue insurers, as well as banks and other regulated businesses such as Blue Cross and Blue Shield.[70]

Under this latter compromise, practices which were unfair, unconscionable, or deceptive under the MCPA - and which were also made unlawful by another statute (e.g., unfair insurance and banking practices) - could not be the subject of any action whatsoever by the Attorney General.[71] Instead, that regulatory agency's administrative procedures would be the only means of government enforcement.[72] If, on the other hand, the practice alleged to be unlawful under the MCPA was not prohibited by another statute, the regulatory agency possessed the authority to investigate such conduct, but was obliged to refer the results to the Attorney General for possible civil prosecution.[73]

In either event, civil actions by individual consumers were not affected by this exemption. The words used in the compromise measure were curiously cryptic in eliminating the Attorney General's role, but explicit in preserving a consumer's private right of action.[74]

The Conference Committee reported back its resolution of these differences and incorporating the above changes to S.B. 1 in November, 1975.[75] In final form, Section 4 provided that the act would not apply:

- To a "transaction or conduct specifically authorized" under laws administered by federal or state regulators ("the Section 4(1)(a) exemption");

- to publishers and other media for claims based on content of advertisements unless the publisher knew or should have know of the ad's false, misleading or deceptive nature; and

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70. Conference Report, § 4(2)(a)-(h) *in* 3 Journal of the Senate 2279, 2281 (Mich. 1975). In addition, the Conference Committee's bill did not give the Attorney General the power to define additional unfair practices by rule. *Id*.

71. *See id*.

72. *Id*.

73. Analysis of Mich. S.B. 1, Regular Sess. (1976) *in* House Legislative Analysis Section 2 (on file with author).

74. Section 4(2)(a) of the Conference Report provided:

Except for the purposes of an action filed by a person under section 11, this act shall not apply to an unfair, unconscionable, or deceptive method, act, or practice which is made unlawful by: "(a) Chapter 20 of Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws, MCL 445.904; MSA 19.418(4)." 3 Journal of the Senate 2279, 2281 (Mich. 1975) (Conference Report). The compromise measure also included the proviso that the burden of proving an exemption was upon the person claiming the exemption. *Id*.

75. *See supra* notes 66-70.

- except for purposes of private actions under Section 11, to unfair practices already unlawful under a variety of statutes, four of which pertained to insurance, including the UTPA provisions of the Insurance Code ("the Section 4(2)(a) exemption").[76]

The first and third of these - the Section 4(1)(a) and 4(2)(a) exemptions - were not dependent upon each other.[77] Instead, they were complementary to the extent that a business transaction or conduct might be either specifically authorized *or* prohibited by existing law.[78]

If a state or federal law *specifically authorized* a certain practice - such as an auto repair shop charging more than its written estimate if it had obtained the customer's oral consent thereto[79] - the Section 4(1)(a) exemption would not allow a consumer (or the government) to claim that the shop's conduct was unfair or deceptive under the MCPA.[80] The proviso gave merchants safe harbor in a transaction or conduct whose very terms were prescribed by statute or approved by regulators.[81]

By contrast, if one of the specified statutes already *prohibited* the business practice - such as an insurer using confusing or misleading language in its application form - then the Section 4(2)(a) exemption denied new governmental enforcement authority.[82] However, such unfair practices - already illegal under the UTPA – would now be actionable by consumers. The Section 4(2)(a) exemption was thus a qualified one precluding the Attorney General's from enforcing the new Act. As noted above, this second exemption plainly disclaimed any limitation on suits by consumers.[83]

Despite the Attorney General's reduced role, the Conference Committee made it clear that the new Act applied with full force to insurers.[84] If the conduct or transaction was neither specifically

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76. MICH. COMP. LAWS ANN. §§ 500.2001-.2093 (West 2002).

77. *See id*.

78. *Id*. Indeed, the Director of the Department of Commerce correspondence to the Committee on Consumers had suggested that the two exemptions be incorporated into one. He proposed the following language for Section 4: "(1) This act shall not apply to: (a) a transaction or conduct specifically authorized OR PROHIBITED under laws administered by a regulatory board or officer acting under statutory authority of this state or the United. States." Letter from Richard K. Helmbrecht, Director of the Michigan Department of Commerce, to Representative Lynn Jondahl, Consumers Committee Chair (November 4, 1975) (emphasis added) (on file with author).

79. Motor Vehicle Service and Repair Act, P.A. 1974, No. 300, § 32 (current version at MICH. COMP. LAWS ANN. § 257.1332 (West 2002)).

80. *See* MICH. COMP. LAWS ANN. § 500.2001 (West 2002).

81. *Id*.

82. MICH. COMP. LAWS ANN. §§ 500.2001-2093 (West 2002) ("the Section 4(2)(a) exemption").

83. *Id*.

84. *See* Analysis of Mich. S.B. 1, Regular Sess. (1975), House Legislative Analysis Section (on file with author).

authorized under Section 4(1)(a) - nor prohibited by one of the several statutes cited in Section 4(2)(a) - then five regulatory agencies would have investigatory authority to determine whether businesses under their charge had engaged in unfair practices under the new Act. The Insurance Commissioner's role was plainly spelled out in Section 21 of the Committee's report: any insurer subject to regulation under the Insurance Code could be investigated for violating the new MCPA.[85] The Commissioner was given the same authority as the Attorney General had under Section 7, except that any subpoena to an insurer needed to be secured through the Attorney General.[86] This shared investigatory power was to promote more efficient policing of newly-illegal business practices by state regulators who knew the industry.[87]

In summary, the legislators who passed the Consumer Protection Act: (1) fully expressed and intended that the insurance industry would be subject to the act and that the Department of Commerce would play an important role - along with the private consumers and the Attorney General - in enforcing its provision against insurers; and (2) used the word "specifically" in the Section 4(2)(a) exemption - after due deliberation - to confer a limited immunity from the Act for transactions and conduct whose terms or aspects were prescribed by another statute or approved by a regulatory authority.

No action was taken on the proposed legislation until late 1976. The Conference Report was passed overwhelmingly by both the House and the Senate in their lame-duck sessions and was signed by Governor Milliken on December 15, 1976 as Public Act No. 331.[88]

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85. *Id*.

86. Section 21 of the Report read:

> (1) The commissioner of insurance may investigate, in the manner set forth in section 7, a person subject to Act No. 218 of the Public Acts of 1956, as amended, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, who the commissioner believes has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful under this act.
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> (2) When the commissioner requires the use of the subpoena power provided in this act, an application shall be made to the attorney general, who shall proceed to procure a subpoena on behalf of the commissioner in accordance with section 7.
>
> (3) Upon conclusion of an investigation, the commissioner shall provide a full report to the attorney general.

Id.

87. Analysis of Mich. S.B. 1, Regular Sess. (1975), House Legislative Analysis Section, 3 (on file with author) (Second analysis, Dec. 7, 1976) (arguments for bill include promise of "swift action against violators" by regulatory agencies and the Attorney General).

88. The vote for passage in the Senate was 29-3, 3 Journal of the Senate 2311 (Mich. 1976); the vote in the House was 70-14, 3 Journal of the House 3352-53 (Mich. 1976); *Senate Vote Bans Consumer Fraud*, DETROIT FREE PRESS, Dec. 1, 1976, at 3A.

B. Judicial Construction of the MCPA Exemptions

An analysis of the decision in the *Globe Life* requires a review of the Michigan Supreme Court's 1982 precedent which it tacitly overruled (the unanimous decision in *Diamond Mortgage)*, as well as a Michigan Court of Appeals decision in 1985 (*Kekel*).

1. Attorney General v. Diamond Mortgage Co.

In *Attorney General v. Diamond Mortgage Co.*, the State sued a mortgage broker in *quo warranto* and under the MCPA for usurious and deceptive practices. [89] The loans in question added brokerage or finance fees to the principal, which the state claimed were usurious.[90] It also alleged that the mortgage documents were confusing to consumers and inconsistent in several respects, including Diamond Mortgage's true role in the transaction as broker or lender and the annual percentage rate of the loan.[91] All told, the complaint cited eleven specific instances of unfair trade practices under Section 3(1) of the MCPA.[92] As relief, the complaint sought forfeiture of the corporation's business privileges, reformation of the loan documents, and civil penalties.[93]

The trial judge dismissed the Attorney General's complaint on grounds that it was not actionable due to the Section 4(1)(a) exemption.[94] Reasoning that Diamond Mortgage's activities as a broker were "under the auspices of the Michigan Department of Licensing and Regulation," the trial court found it was not subject to the MCPA and dismissed the complaint for failure to state a claim upon which relief could be granted.[95] The Court of Appeals affirmed the dismissal on grounds that the State had to exhaust recourse to the Department of Licensing and Regulation before seeking relief in the circuit court.[96] The Supreme Court granted leave to appeal.[97]

In their briefs to the Michigan Supreme Court, the parties made short work of arguing the issue - Diamond Mortgage's points on the topic ran just over two pages - and neither side's brief cited any authority beyond the language of the statute. The Attorney General argued that the lower court's construction of the Section 4(1)(a) exemption would work a

89. *Diamond Mortgage Co.*, 327 N.W.2d at 805.
90. *Id.* at 807.
91. *Id.*
92. Brief of Appellant at 10a-11a, *Diamond Mortgage Co.*, 327 N.W.2d 805 (No. 33639).
93. *Diamond Mortgage Co.*, 327 N.W.2d at 807.
94. *Id.* at 808.
95. *Id.* at 810-11.
96. Att'y Gen. v. Diamond Mortgage Corp., 301 N.W.2d 523, 525 (Mich. Ct. App. 1980).
97. *Diamond Mortgage Co.*, 327 N.W.2d at 805.

"cruel hoax" on consumers if they could sue an unlicensed optician for deception, but not a licensed optometrist:

> It is common knowledge that many occupations and business have been brought under licensing statutes to reduce the occurrence of incompetent and unethical conduct. However, those statutes rarely provide any basis for the licensing authority to require that relief be given to injured consumers. It makes no sense to exempt occupations or businesses from the [MCPA] merely because they are conducted under an authorizing statute or regulation.[98]

The Attorney General also argued for a fair reading of the word "specifically" in the Section 4(1)(a) exemption:

> The legislature's use of the language "*specifically"* authorized in describing the scope of the exemption is indicative of an intent to exempt "a" transaction or conduct which has been given particular legislative or lawful administrative approval rather than an attempt to exempt *any* "transaction or conduct" so long as the perpetrator is engaged in a business which is authorized under laws administered by a regulatory board or officer [acting under state or federal law].[99]

Diamond Mortgage argued that the circuit judge had correctly construed the statute.[100] Since Diamond was a licensed as a real estate broker, it was subject to the authority of the Department of Licensing and Regulation.[101] Since the acts of a licensed broker by the Real Estate Brokers Act surely include negotiating a mortgage, Diamond urged that the exception applied, "as Diamond's activities were specifically authorized under laws administered by a state regulatory agency, its activities were exempt from the [MCPA]."[102]

Justice Mary Coleman wrote for a unanimous Supreme Court in rejecting Diamond Mortgage's arguments. Her opinion on the scope and meaning of the Section 4(1)(a) exemption relied upon the plain language of the Act.[103] While Diamond Mortgage's broker's license generally authorized it to engage in the activities of a real estate broker, the Court held that it did not "specifically authorize" the usurious conduct that plaintiff alleged as violation of the MCPA, "nor transactions that result from that conduct":

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98. Brief of Appellant at 22, *Diamond Mortgage Co.*, 327 N.W.2d 805 (No. 33639).
99. *Id.* at 23 (emphasis added).
100. *Diamond Mortgage Co.*, 327 N.W. 2d. at 810.
101. *Id.* at 807.
102. Brief of Appellee at 24, *Diamond Mortgage Co.*, 327 N.W.2d 805 (No. 33639).
103. *Diamond Mortgage Co.*, 327 N.W. 2d. at 811.

> 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." For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.[104]

The Michigan Supreme Court reversed the dismissal of the Attorney General's complaint.[105]

2. Kekel v. Allstate Insurance Co.

In *Kekel v. Allstate Insurance Co.*, plaintiffs raised a claim under the MCPA in their action under a no-fault auto insurance contract. [106] Although the opinion in the case does not reveal the nature of the alleged unfair trade practice, the complaint was dismissed for failure to state a claim.[107] The Court of Appeals' *per curiam* opinion framed the issue as the relationship between the Section 4(1)(a) exemption and that contained in Section 4(2)(a).[108] As noted previously, the latter provision contains a partial exemption for unfair practices in the insurance context: the Attorney General and County Prosecutors are not authorized to sue for alleged violation several statutes, including the UTPA.

The Court of Appeals in *Kekel* first reviewed the *Diamond Mortgage* case and declared it distinguishable.[109] It said that, unlike mortgage brokers, Allstate was subject to all of the provisions of the Insurance Code, including the UTPA.[110] The panel further posited that the Insurance Commissioner administered an "extensive statutory and regulatory scheme" that the conduct in question was "subject to."[111] The *Kekel* opinion did not explain whether or how the insurer's conduct in question was "specifically authorized" under Section 4(1)(a). Instead, the

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104. *Id.* at 811.
105. *Id.* at 814.
106. Kekel v. Allstate Ins. Co., 375 N.W.2d 455 (Mich. Ct. App. 1985), *leave denied*, 424 Mich. 878 (Mich. 1986) (Three Supreme Court Justices expressed desire to grant reconsideration and would have granted leave to appeal).
107. *Id.* at 460.
108. *Id.* at 458-60.
109. *Id.* at 458.
110. *Id.*
111. *Id.* at 458-59.

Court simply cited the defendant's amenability to regulation as a proxy for express authorization.[112]

In passing on the meaning of the Section 4(2)(a) exemption, the *Kekel* panel overlooked or ignored the plain language of the first words of that section: "[e]xcept for the purposes of an action filed by a person under section 11."[113] The reference to section 11 in the Section 4(2)(a) exemption is to MCL 445.911, the provision authorizing private actions.

The plain language of the Section 4(2)(a) exemption could only mean that actions by consumers under MCL 445.911 were unaffected in any way. Yet, the panel wrote that:

> The actions complained of by the plaintiffs could arguably fit factually into a number of the itemized acts or practices which are made unlawful. There can be no argument, however, that the acts complained of by the plaintiffs are covered by the provisions of §2043 [of the UTPA]. Thus, defendant's conduct as described by plaintiffs would be subject to the Insurance Code of 1956 meeting the criteria of the exemption set out in §§ 4(2)(a) of the Michigan Consumer Protection Act.[114]

The *Kekel* panel's *per curiam* opinion failed to address the exemption's limited language in any way while pronouncing that the plaintiffs' claims - as unfair practices under the UTPA - were precluded by the Section 4(2)(a) exemption! The Court's nonsensical construction of Section 4(2)(a) has spawned criticism and confusion.[115]

3. Smith v. Globe Life Insurance Co.

a. The Consumer's Claim in Globe Life

In December 1992, Robert A. Smith, then 47 years old, was employed full-time as a carpenter with the Grand Rapids Public Schools.[116] Using an old truck as trade-in, he bought a 1993 Ford pickup from Jack Keller Ford, financing the balance of the purchase price through Ford Motor Credit Corporation.[117] As a part of the financing, he

112. *Diamond Mortgage Co.*, 375 N.W. 2d at 458.
113. MICH. COMP. LAWS ANN. § 445.904 (West 2002)
114. *Diamond Mortgage Co.*, 375 N.W.2d at 459-60.
115. *See* Robertson v. State Farm Fire and Casualty Co., 890 F. Supp. 671, 676 (E.D. Mich. 1995); Lawson v. American Security Ins. Co., No. 88-CV-10280-BC, 1989 U.S. Dist. LEXIS 18981, at *14 (Mar. 29, 1989) (citing and adopting criticism of Judge Ralph B. Guy in Bridges v. Fire Ins. Co. of Quaker City, No. 84-3179, (E.D. Mich. 1985)).
116. Brief of Appellee at 4, *Globe Life Ins. Co.*, 597 N.W.2d 28 (No. 110065).
117. *Id*.

was offered credit life and disability insurance on the $25,000 loan.[118] Less than two months later, Mr. Smith died from a sudden heart attack.[119]

Upon his death, his daughter found a certificate of disability and life insurance from Globe Life Insurance Company, which named Ford Motor Credit as the first beneficiary and his estate as the second.[120] The insurer denied her claim for the death benefit on grounds that her father had misrepresented his health in applying for the insurance.[121]

Debra Smith filed a lawsuit claiming breach of contract and violation of the MCPA. The factual issues on the contract claim centered on whether her father had completed a written application for the insurance in question, whether he had falsely denied any history of heart problems or diabetes in such application, and whether that application was a part of the contract for insurance.[122] As the thrust of her MCPA claim, Smith contended that Globe Life's certificate was misleading and unfair by falsely representing to her father that the insurance was available to him if he was "fully capable of being actively at work for wages or profit at least 30 hours per week."[123] Her complaint cited five different provisions of the MCPA that were violated by Globe Life's denial of coverage based upon underwriting criteria that were not disclosed by either the insurance application or certificate.[124]

On the insurer's motion for summary disposition, the trial court dismissed Smith's complaint in its entirety. On the MCPA issue, the circuit judge questioned the *Kekel* decision but felt constrained to follow it.[125]

b. The Court of Appeals Decision

The Michigan Court of Appeals decided the appeal from the dismissal. Although former Supreme Court Justice Thomas G. Kavanagh had been assigned to the panel, he did not participate in the decision. The

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 5.
122. Brief of Appellee at 6-7, *Globe Life Ins. Co.*, 597 N.W.2d 28 (No. 110065).
123. *Id.* at 5.
124. Complaint, Count II ¶¶ 22-26, Michigan Supreme Court Records and Briefs, Vol. 5-7 (Jan. Term 1997).
125. Brief of Appellant at 29. *Globe Life Ins. Co.*, 597 N.W.2d 28 (No. 110065). The Circuit Court characterized the constraint of precedent as follows: "It is not necessary in this Court for the Court to be impressed by the high quality of an appellate decision, as long as the Court can figure of what the bottom line is. And it appears to me that [*Kekel*] is a decision of questionable quality, but of unquestionable import." *Id.* at 30. The trial judge further invited appeal of the matter for plaintiff's counsel to pursue "clarification, if not purification of Michigan law" in the matter. *Id.*

two remaining judges affirmed the dismissal of the contract claim, but reversed as to the MCPA.[126]

Judge Jane Markey's opinion rejected Globe Life's argument that Smith's MCPA claim was barred under either exemption.[127] Disagreeing with the *Kekel* Court, Judge Markey prefaced her analysis by emphasizing the plain meaning of the words "specifically authorized" in Section 4(1)(a).[128] She posited that the primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent, that the Legislature is "presumed to have intended the meaning it plainly expressed," that if the "plain and ordinary meaning" of the statute's language is found to be clear, then judicial construction is not needed or allowed, and that courts are required to enforce a clear and unambiguous statute as written.[129] The panel concluded that *Diamond Mortgage* controlled and further, that *Kekel* had misapplied the Section 4(2)(a) against consumers.[130]

The court of appeals' opinion explained that its construction of the exemptions allowed the MCPA and the UTPA to be squared with each other.[131] In particular, it reasoned that the UTPA expressly provides that its administrative remedies were not in any way exclusive or preemptive of other state law.[132] Accordingly, the panel found the acknowledgment of consumer claims in the Section 4(2)(a) exemption allowed a construction of the MCPA that was both obvious and harmonious with the UTPA.[133]

c. The Supreme Court Ruling

By leave granted, Globe Life pursued review in the Michigan Supreme Court. Like its application for leave to appeal, Globe Life's brief to the court on the MCPA claim argued that *Diamond Mortgage* was distinguishable since Globe Life's policies and applications for insurance were mandated to be filed with the Insurance Commissioner.[134] It relied upon Section 613 of the Credit Insurance Act, which authorizes the Commissioner to prohibit the use of any such form by notice issued within 30 days of its filing if it contains any terms that are "unjust, unfair, inequitable, misleading, deceptive, or encourage

126. Smith v. Globe Life Ins. Co., 565 N.W.2d 877 (Mich. Ct. App. 1997).
127. *Id.* at 884.
128. *Id.* at 885.
129. *Id.* at 882-85 (citing Michigan authorities).
130. *Id.* at 884-85.
131. *Id*. at 887.
132. *Globe Life Ins. Co.*, 565 N.W. 2d. at 885 (referencing MICH. COMP. LAWS ANN. § 500.2049 (West 2002): "No order of the commissioner under this uniform trade practices act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state").
133. *Id.* at 887.
134. Brief of Appellant at 14-15, *Globe Life Ins. Co.*, 597 N.W.2d 28 (No. 110065).

misrepresentation" of the policy.[135] Globe Life argued that the fact that its operations were subject to that administrative scrutiny rendered it exempt from the MCPA under the Section 4(1)(a) exemption:

> It is inescapable that [the Credit Insurance Act] specifically authorizes the issuance of certificates of credit insurance, authorizes the Insurance Commissioner to approve such proposed forms, sets forth the criteria for determining whether the proposed forms meet statutory muster, and delineates a statutory procedure for regulating such forms. It is impossible to imagine a more perfect example of a "transaction or conduct specifically authorized under laws administered by a regulatory...officer acting under statutory authority within the meaning of MCL 445.904(1)(a).[136]

Globe Life also argued that the Legislature's failure to amend the MCPA in response to the *Kekel* decision was evidence of its acquiescence in the soundness of that panel's construction of the Section 4(1)(a) exemption.[137] Globe Life's position was seconded by the Life Insurance Association of Michigan as amicus curiae.[138]

At oral argument, Smith's counsel emphasized that Globe Life's general authorization to sell insurance could not be taken as a "specific" authorization for the conduct challenged and further, that there was "no claim or proof that the Insurance Commissioner" had "authorized the use of this application with this certificate."[139] Justices Young and Taylor spent much time questioning counsel on an issue they hadn't briefed: the relationship between the two Section 4 exemptions. Their questions

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135. *Id.* at 15. MCL section 550.613 provides:

> The commissioner within 30 days after the filing of all policies, certificates of insurance, notices of proposed insurance, applications for insurance, binders, endorsements and riders, in addition to other requirements of law, may disapprove any such form if the benefits provided therein are not reasonable in relation to the premium charge or if it contains provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

MICH. COMP. LAWS ANN. § 550.613 (West 2002)

136. *Id.*

137. *Id.* at 16.

138. Brief for Life Insurance Association of Michigan as Amicus Curiae Supporting Appellant, *Globe Life Ins. Co.,* 597 N.W.2d 28, (No. 110065). The court rejected as untimely a motion filed two weeks after the January 21, 1999 oral arguments by the Attorney General for leave to file an Amicus Curiae brief. (Telephone call to office of the Clerk of the Michigan Supreme Court, July 12, 2006).

139. Transcript of Oral Argument at 20, 24, *Globe Insurance Co.*, 597 N.W. 2d. 28 (January 21, 1999), (No. 110065) [hereinafter Transcript of Oral Argument] (copy on file with court and author).

seemed to reveal everyone's uncertainty, if not utter confusion, on that relationship.[140]

The Court issued its ruling in the case in July 1999, with Justice Young writing for a 5-member majority.[141] The majority opinion reconstructed the Court's ruling in *Diamond Mortgage*. It began by quoting the *Diamond Mortgage* Court's reasoning - that a broker's license did not carry specific authorization for the conduct plaintiff alleged violated the MCPA "nor transactions that result from that conduct" - and its holding that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.[142] Following these premises, Justice Young posited that "In short, *Diamond Mortgage* instructs that the focus is on whether the transaction, not the alleged misconduct, is "specifically authorized."[143]

The Court then distinguished *Diamond Mortgage* saying that Globe Life's actions as an insurer were subject to statutory regulation.[144] Since Globe Life's sale of credit life insurance was "specifically authorized" under the Credit Insurance Act, all aspects of the transaction were exempt under Section 4(1)(a) exemption.[145] In trying to explain how this exemption could fairly be read to preclude all claims based upon any aspect of the insurance transaction, the Court emphasized that the exemption was plainly intended to include "conduct the legality of which is in dispute:"

> Consistent with [the rulings in *Diamond Mortgage* and *Kekel*], we conclude here that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. 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

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140. *Id.* at 8-14 (questioning of Globe Life's counsel), and at 19-24 (argument by and questioning of Smith's counsel).

141. *Globe Life Ins. Co.*, 597 N.W. 2d. at 28. Justice Young assumed the bench of the Michigan Supreme Court in early January 1999, the same month as the oral arguments in Globe Life. He had previously sat on the Michigan Court of Appeals, worked in private practice, and served as General Counsel of AAA Michigan from 1992-95. See the Court's website biography, *available at* http://courts.michigan.gov/supremecourt/aboutcourt/biography.htm#young (last visited Jan. 8, 2008).

142. *Globe Life Ins. Co.*, 597 N.W.2d at 37 (citing *Diamond Mortgage*, 327 N.W.2d. at 811).

143. *Id.* at 37.

144. *Id.* at 38.

145. *Id*.

> prohibited. Therefore, we conclude that §4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[146]

The court thus announced it would reverse on this issue. It then proceeded to agree with the Court of Appeals that the *Kekel* Court had misconstrued the Section 4(2)(a) exception.[147] Citing that section as well as Section 11 of the MCPA authorizing private actions for damages and other relief, the court declared that the second exemption limited the first:

> Giving effect to both §4(1) and §4(2), we conclude that private actions are permitted against an insurer pursuant to §11 of the MCPA regardless of whether the insurer's activities are "specifically authorized." Although §4(1)(a) generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, §4(2) provides an exception to that exemption by permitting private actions pursuant to §11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code.[148]

The Court thus concluded that neither exemption barred plaintiffs' MCPA claims based upon misconduct made unlawful under the UTPA.[149]

Justices Kelly and Cavanagh filed opinions concurring with the result of allowing Plaintiff to prevail on her MCPA claim, but otherwise dissenting. Addressing the MCPA claim, Justice Cavanagh wrote that *Diamond Mortgage* required Globe Life to establish that its use of the allegedly inconsistent application and certificate for this single transaction had been specifically authorized.[150] He pointed out that Globe Life had not argued that the forms at issue had been submitted and that, even assuming that they had been, an acquiescence by the Commissioner under MCL 550.613 would be of questionable significance as a specific authorization.[151] Finally, he wrote that the majority offered no analysis for its reading the Section 4(2)(a) exemption as an exception to that found in Section 4(1)(a).[152]

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146. *Id.*
147. *Id.* at 38-39.
148. *Globe Life Ins. Co.*, 597 N.W.2d at 39.
149. *Id.*
150. *Id.* at 44-45.
151. *Id.*
152. *Id.* at 43-46.

C. Critique of the Globe Life Ruling

The *Globe Life* ruling was flawed in two key respects from the outset. First, the Court failed to acknowledge that it was resolving a perceived conflict in the MCPA without the parties having raised or briefed the issue. If it had asked for their input, it may have learned of the history behind the exemptions which belies its tortuous reading. Secondly, the Court violated the fundamental rule of statutory interpretation to give effect to the legislature's language. The opinion did not recite or apply the rules governing that judicial role. It did not remind its author or the reader that the "cardinal principle of statutory construction is that courts must give effect to legislative intent," that "courts necessarily must first examine the text of the statute," and that, if "the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted."[153] The result was a poorly reasoned opinion that has proven "difficult" to understand and disastrous for Michigan consumers. [154]

1. Distorting Diamond Mortgage and the Section 4(1)(a) Exemption

The court in *Globe Life* essentially recast the holding in *Diamond Mortgage* and rewrote the Section 4(1)(a) exemption to equate statutory regulation of a transaction or conduct with its being specifically authorized.[155] In the same way as in *Diamond Mortgage*, Globe Life's authorization to sell credit life insurance generally authorized it to engage in the business, but did not "specifically authorize" the allegedly unfair conduct alleged by plaintiffs to violate the MCPA, "nor transactions that result from that conduct."[156] The contrary rule of *Globe Life* - that the authority to sell insurance affirmatively sanctioned all conduct taken to effect the sale - failed to give effect to each word in the Section 4(1)(a) exemption and Section 4(3) - which together require

153. *See* Burton v. Reed City Hosp. Corp., 691 N.W.2d 424 (Mich. 2005) ("The cardinal principle of statutory construction is that courts must give effect to legislative intent") (citing Morales v Auto-Owners Ins. Co., 672 N.W.2d 849, 851 (Mich. 2003)); Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003) (requiring language of statute be examined first for intent and to be applied it if clear) (citing Helder v. Sruba, 611 N.W.2d 309 (Mich. 2000). *See also In re* MCI Telecommunications, 596 N.W.2d 164 (Mich. 1999).

154. Mark G. Cooper, *Annual Survey of Michigan Law: Insurance*, 47 WAYNE L. REV. 601, 652 (2001) (referring to *Globe Life* as a "difficult opinion.")

155. Since 1999, the Michigan Supreme Court has attracted much attention by its rejection of precedent favorable to personal injury plaintiffs and criminal defendants. *See* Sarah Delaney, *Stare Decisis v. The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998-2002*, 66 ALBANY L. REV. 871 (2003). *See also* Todd Berg, *Overruling Precedent and the Michigan Supreme Court*, MICHIGAN LAWYERS' WEEKLY, Nov. 6, 2006.

156. *Globe Life Ins. Co.*, 597 N.W.2d at 37.

defendants to prove that the transaction or conduct in question was "specifically" authorized. These two provisions suggest a much narrower meaning of "transaction" than the Court drew.

The *Globe Life* court's mischief began with its reformulation of the reasoning in *Diamond Mortgage*. By stating that "*Diamond Mortgage* instructs that the focus is on whether the transaction" was specifically authorized, the Court misrepresented the thrust of its prior ruling and ignored the obvious purpose of the MCPA to outlaw particular unfair practices.[157] By concluding that all aspects of a regulated firm's generally licensed transactions were insulated, it rendered the word "specifically" meaningless.

The court's disregard of the holding of *Diamond Mortgage* is apparent from a comparison of the holdings of the two decisions:

> *Diamond Mortgage:*
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> 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 [MCPA], nor transactions resulting from that conduct . . . . 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 law . . . .' For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.[158]
>
> *Globe Life:*
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> In short, *Diamond* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.' Thus, the defendant in *Diamond* . . . was not exempt from the MCPA because the transaction at issue, mortgage writing, was not 'specifically authorized' under the defendant's real estate broker's license . . . .[159]
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> . . . .
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> Contrary to the 'common-sense reading' of [Section 4(1)(a)] by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is

157. *Id.*
158. *Diamond Mortgage Co.*, 327 N.W.2d at 811.
159. *Globe Life Ins. Co.*, 597 N.W. 2d at 37.

> 'specifically authorized.' Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.[160]

The first paragraph of the *Globe Life* excerpt is a distortion of the rationale of the unanimous ruling in *Diamond Mortgage*. The holding of *Diamond Mortgage* was that Defendant's licensure was not specific authorization for any particular conduct or transaction.[161] The concluding passage of *Diamond Mortgage* cited above clearly reveals that the court read the Section 4(1)(a) exemption to require more than a general business license to insulate unfair dealings from the MCPA and that it required that the particular conduct or transaction claimed to be unfair to be specifically authorized. Any fair reading of *Diamond Mortgage* reveals that the Court rejected the Defendant's argument that licensure insulated it from claims that it had employed deceptive practices in its business.

The *Globe Life* Court's simplistic approach to the statutory language was also somewhat deceptive. By emphasizing that the exemption necessarily covered "conduct the legality of which is in dispute," the majority employed a straw-man argument.[162] There was no question that the Section 4(1)(a) exemption could operate to insulate particular transactions or conduct which might be questioned as unfair under the MCPA. *Diamond Mortgage* had made plain that though no statute or regulatory agency specifically authorizes misrepresentation or false promises, the exemption would apply where plaintiffs sought to characterize any "specifically authorized" form of representation or promise as illegal under the Act.[163] Under Section 4(1)(a), a specific authorization (e.g, prescribing or approving the language of a warranty) provides a safe harbor against the "transaction or conduct" being alleged to constituted an unfair "method, act or practice" under the MCPA.[164]

What about the alleged confusing nature of the insurance application and certificate Mr. Smith received from *Globe Life*? Conceivably, the forms might have confused him even *if* their use had been approved by state regulators. It is plain that in such a case their use would have been specifically authorized by the Commissioner of Insurance and that the Section 4(1)(a) exemption would bar the MCPA claim. However, neither of the parties' briefs had made an issue of this "questioned legality" of Globe Life's conduct. Although plaintiff argued that the application and certificate were confusing and stated inconsistent qualifications for insurance, Globe Life had not offered to demonstrate that the

160. *Id.* at 38.
161. *Diamond Mortgage Co.*, 327 N.W.2d at 811.
162. *Globe Life Ins. Co.*, 597 N.W. 2d at 38.
163. *Diamond Mortgage Co.*, 327 N.W.2d at 811.
164. *Id.* at 807.

questionable legality of the forms had been reviewed or approved in any way - much less "specifically authorized" - by any agency regulator.[165]

Indeed, Globe Life's argument was that the Credit Insurance Act simply (1) *required* the forms to be filed; (2) that it authorized their challenge and rejection by the Commissioner of Insurance within 30 days; and (3) that it implicitly conferred approval of the form if no such actions were taken within that time.[166] Nowhere did Globe Life document that the challenged application had in fact been filed and tacitly approved.[167] Instead, the argument that the Commissioner of Insurance had the power to reject certificates and forms of insurance which it was obliged to file was accepted without any proof that it had done so. Contrary to the suggestion in the majority opinion, Globe Life had not argued in the lower courts or on appeal that it had done so - only that it was required to do so. The court's claim that "[Globe Life] assert[ed] that its application and the certificate of insurance were submitted to and implicitly approved by the State Commissioner of Insurance"[168] is simply not supported by the trial court record, Globe Life's application for leave to appeal, or its brief on the merits.[169] In short, the Court cited the Commissioner's statutory authority to exercise control over Globe Life's forms as grounds for finding transactions employing them being "specifically authorized."[170]

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165. *Globe Life Ins. Co.*, 597 N.W. 2d at 44-45.

166. Brief of Appellant at 14, *Globe Life Ins. Co.* 597 N.W. 2d. 28 (No. 110065).

167. My 2006 search for such records proved unsuccessful in documenting these facts. I undertook a Freedom of Information Act investigation of the records of the Office of Financial and Insurance Services. A request for all credit insurance act disapprovals under MCL section 500.613 since the 1958 Credit Insurance Act revealed that records are only maintained for the past ten years. A review of such records at OFIS in the Ottawa Building in Lansing on July 10, 2006 revealed no records identifying Globe Life Insurance Company as an applicant for approval of any forms or rates for credit life insurance between 1996 and 2006.

168. *Globe Life Ins. Co.*, 597 N.W.2d at 36-37.

169. *See id.* at 44-45 (Cavanagh, J., concurring in part and dissenting in part) (noting no such argument by Globe Life). Copies of Globe Life's application for leave and brief on appeal are on file with the author.

170. A finding of the Insurance Commissioner's tacit approval of any such form requires a failure to take action on it within 30 days of its submission. MICH. COMP. LAWS ANN. § 550.613 (West 2002). The Insurance Code of 1956 prescribes the 30-day approval period for forms submitted by insurers. MICH. COMP. LAWS ANN. § 500.2236 (West 2007).

My review of hundreds of OFIS files from 1996-2006 revealed letters explaining disapprovals but that agency "approvals" took many forms but not written letters of express approval. Many files reflected they were "approved" by a rubber stamp to that effect upon the insurer's submission. Other insurer submissions bore a similar "approved" stamp, with the word "deemed" in handwriting above it, indicating that the OFIS had not rejected the form within 30 days of its submission. Still other files contained an Insurance Bureau Analyst's internal worksheet bearing a handwritten "A," denoting approval.

In any event, the statutory approval-by-default approach could only be found by evidence of Globe Life's having filed the form. This requirement for *de jure* approval

Justice Robert A. Young, the author of the opinion, had signaled his approach to the issue at oral arguments six months earlier. At that time, he characterized the Section 4(1)(a) exemption in "shorthand" as "a global exemption . . . for a regulated industry."[171] His majority opinion grounded the majority's ruling, not in the fact that the use of the challenged forms had been approved, but in a general authorization to sell credit life insurance.[172] By suggesting that a transaction's amenability to regulation gave specific authorization to all its aspects of its conduct, the *Globe Life* majority failed to give the legislature's words the benefit of their plain meaning. In addition, the opinion misapprehended altogether the holding in *Diamond Mortgage* that a license to transact business was not specific authority for all challenged conduct and transactions.

The import of the Section 4(1)(a) exemption is that action which is authorized by state statute or a regulatory officer or agency acting pursuant thereto cannot be challenged as violating the MCPA.[173] The straightforward interpretation of the words "specifically authorized" is that they exempt a transaction or conduct whose terms or aspects are expressly prescribed or required by a statute or an administrative ruling. For example, credit life insurers whose rates are set by the Insurance Bureau ought not have those same rates challenged as exorbitant. Although the list of unfair practices in Section 3(1) of the MCPA would support a consumer's challenge to such prices and rates in this fashion, in this case the insurer's rate is exempt because it has been specifically authorized by the state regulator.[174] Similarly, a tenant ought not be able to challenge a landlord's taking of a security deposit in an amount equal to one and one-half month's rent as excessive or otherwise unfair; here, too, the legislature has specifically authorized that transaction or conduct as a lawful practice by statute regulating the relationship.[175]

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was somehow lost on the court despite MCPA Section 4(3), which imposed the burden of proving an exemption on Globe Life. There simply was no basis in the record for the court to find as a matter of fact that the use of the application form in question had been "specifically authorized."

171. Transcript of Oral Argument, *supra* note 139.

172. *Globe Life Ins. Co.*, 597 N.W.2d at 38-39, n.12.

173. CONSUMER PROTECTION DIVISION, OFFICE OF THE ATTORNEY GENERAL, A HANDBOOK ON THE CONSUMER PROTECTION LAW IN MICHIGAN 53 (1978) ("The drafter's intent was to exempt those specific statutorily authorized transactions which the legislature has already permitted"). The passage went on to illustrate that a wage assignment conforming to statutory guidelines would be immune from challenge under the MCPA. *See* Gary Victor, *The Liability of Professionals, Insurance Companies and other Regulated Industries Under the Michigan Consumer Protection Act*, 77 MICH. B.J. 69, 71 (1998) ("[Section 4(1)(a)] is a narrow exemption indeed").

174. Tracy Dobson, *Credit Insurance: The Hidden Insurance*, 65 MICH. B.J. 167 (1986).

175. Landlord and Tenant Relationships Act, § 2, 1972 Mich. Pub. Acts 348 (codified at MICH. COMP. LAWS ANN. § 554.602 (West 2007)).

As a further illustration, the Attorney General's brief in *Diamond Mortgage* gave the example of a wage assignment of up to 10% of a debtor's wages also being insulated from challenge by virtue of the Section 4(1)(a) exemption since it is specifically authorized by section 17 of the Small Loans Act.[176]

In its pursuit to hold the entire transaction exempt from the MCPA, the Court in *Globe Life* ignored the fact that the Act's primary object, revealed in its preamble and throughout its provisions, was to prohibit and penalize "certain methods, acts, and practices" in doing business with consumers.[177] The entire thrust of the Act was to allow consumers to challenge routine practices, such as boilerplate applications and forms, as deceptive and inviting consumer confusion.[178] The meaning of the words "transaction or conduct" should have been resolved in light of the language in the rest of the MCPA.

The Court's broad construction of "transaction" disregarded the use of the same word eleven different times in Section 3(1),the section immediately preceding the exemptions, in identifying the circumstances of dealings with consumers featuring "unfair, unconscionable, or deceptive methods, acts or practices."[179] The MCPA's original twenty-nine types of unfair or deceptive trade practices repeatedly use the word "transaction" in referring to questionable aspects of the parties' relationship and conduct toward one another.[180] In each such preceding

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176. Brief of Appellant at 23 n.4, *Diamond Mortgage*, 327 N.W.2d 805 (citing the Small Loans Act, MICH. COMP. LAWS ANN. § 493.1-.26 (West 2005); in particular MICH. COMP. LAWS ANN. § 493.17).

177. 1976 Mich. Pub. Acts 331, §§ 3(1), 6-11, 17-21. The preamble reads: "AN ACT to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties." *Id.*

178. Dix v. American Bankers Life Assurance Co. of Florida, 415 N.W.2d 206, 209 (Mich. 1987) ("The Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices"). *Dix* involved claims of systematic misrepresentations of the terms of annuity policies sold to thousands of Michigan school employees.

179. MICH. COMP. LAWS ANN. § 445.903(1) (West 2002).

180. *Id*. The original MCPA provided in pertinent part:

> §3(1)(m) ("Causing a probability of confusion or of misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a *transaction.*")
>
> §3(1)(n)("Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a *transaction*.")
>
> §3(1)(o) ("Causing a probability of confusion or of misunderstanding as to the terms or conditions of credit if credit is extended in a *transaction*.")
>
> §3(1)(q)("Representing or implying that the subject of a consumer *transaction* will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.")

use of the word, the legislature identified particularly unfair aspects of business conduct without reference to any particular business setting. The MCPA's preamble first words, "AN ACT to prohibit certain methods, acts, and practices in trade or commerce," made plain that prohibiting the listed unfair practices was its primary object.[181]

Two prominent examples are found in paragraphs (n) and (o) of Section 3(1) of the MCPA: they prohibit "methods, acts, or practices" causing a probability of confusion as to legal rights of a "*party to a transaction*" or the terms or conditions of extensions of credit "*extended in a transaction.*"[182] These provisions would clearly seem to support a challenge to confusing and misleading language in forms. Yet an insurer should not be subjected to suit under the MCPA if the form in question had been prescribed by statute or specifically approved by regulators. However, the fact that the general transaction - here, the sale of insurance - was legally authorized, i.e., licensed or permitted, is surely an irrelevant consideration.

In short, Section 3(1) of the MCPA set out to prohibit particularized unfair dealings in commercial transactions with consumers. The 29 unfair practices identified discrete acts or omissions in inducing and carrying out trade.[183] In the exemption that immediately followed in Section 4(1)(a), the legislature used the term "transaction or conduct" to

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§3(1)(t) ("Entering into a consumer *transaction* in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.")
§3(1)(u)("Failing, in a consumer *transaction* that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment . . . .")
§3(1)(w)("Representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a *transaction*, if the benefit is contingent on an event to occur subsequent to the consummation of the *transaction*.")
§3(1)(x)("Taking advantage of the consumer's inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the *transaction* who knows or reasonably should know of the consumer's inability.")
§3(1)(y)("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.
§3(1)(bb)("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.")
§3(1)(cc)("Failing to reveal facts that are material to the *transaction* in light of representations of fact made in a positive manner.")

Id. (emphasis added).

181. *Id.*

182. MICH. COMP. LAWS ANN. § 445.903(1)(n)-(o) (West 2002) (emphasis added).

183. 1976 Mich. Pub. Acts 331, § 3(1).

refer not to the "general" business setting of the dispute, but to the particular communicative business activity involving "unfair, unconscionable, or deceptive" practices toward consumers.[184]

Any question on the meaning of "transaction or conduct" in Section 4(1)(a) is aided by rules of statutory interpretation. An obvious first reference for the meaning of "transaction" was its use in the phrase "transaction or conduct."[185] Long-standing rules of reason hold that a word's meaning is drawn from its immediate context. The legal doctrine is that of *noscitur a sociis*, literally, "it is known from its associates."[186] A more alliterative formulation is that "words of feather flock together."[187] In short, the meaning of a word is known from its accompanying words. "When two or more words in a statute are grouped together, and ordinarily have a similar meaning but are not equally comprehensive, the general word will be limited and qualified by the special word."[188]

Under the doctrine of *noscitur a sociis*, the word "transaction" cannot plausibly be read in isolation and construed as requiring nothing more than a simple license for some line of business activity. When coupled with the words "specifically authorized" in Section 4(1)(a), the words "transaction or conduct" ask whether the particulars of the parties' agreement or performance in dealing with each other are affirmatively authorized or prescribed by law.

Indeed, this sort of common sense reading of the MCPA was precisely that followed by the Michigan Court of Appeals one month after the *Globe Life* opinion was published.

In *Zine v. Chrysler Corporation*,[189] the Court of Appeals examined the meaning of the word "transaction" in Section 3(1). The case involved two putative class action plaintiffs who claimed that Chrysler's furnishing of booklets describing lemon laws from other states (where state laws require sellers to disclose such statutes) misled them into thinking Michigan had no such statutory protection. When its motion for summary disposition was denied, Chrysler argued on interlocutory

184. MICH. COMP. LAWS ANN. § 445.904(1)(a) (West 2002).

185. *Id*.

186. Yaldo v. North Pointe Ins. Co., 578 N.W.2d 274, 281 (Mich. 1998) (Taylor, J., dissenting) (citing Black's Law Dictionary and State ex rel Wayne County Prosecutor v. Diversified Theatrical Corp., 240 N.W.2d 460, 463 (Mich. 1976)).

187. Dalesandro v. Long's Drug Stores, 383 F. Supp. 2d 1244, 1249 (D.Haw. 2005) (citing State v. Merino, 915 P.2d 672, 691 (D. Hawaii 1996)) ("The canon of construction denominated *noscitur a socii* . . . may be freely translated as 'words of a feather flock together,' that is, the meaning of a word is to be judged by the company it keeps.")

188. Griffith v. State Farm Mut. Auto. Ins. Co., 697 N.W.2d 895, 902, n.11 (Mich. 2005) (quoting SUTHERLAND STATUTORY CONSTRUCTION § 47.16, 265-267 (Thomson West 6th ed. 2000)).

189. 600 N.W.2d 384 (Mich. Ct. App. 1999).

appeal that the word "transaction" as used in subsections 3(1)(n) and (cc) could not include conduct after the sale of the vehicles.[190]

Judge William Whitbeck's opinion for the *Zine* court noted that the word "transaction" was not defined in the MCPA. He resorted to Black's[191] and standard dictionaries[192] for its meaning: "a 'transaction' is the business conducted between the parties."[193] This definition's focus on the parties' actual dealings is wholly consistent with the dominant usage of the word at the time of the adoption of the MCPA.[194]

The *Zine* court thus examined the transaction in its particulars of allegedly unfair conduct under Section 3(1). It held that a "failure to reveal facts material to the transaction" in light of a seller's affirmative representations of fact[195] ought to be analyzed by considering what representations had been made to the buyer prior to the closing of the sale. Accordingly, a buyer who was not given allegedly misleading information about other states' lemon laws until after the sale had no viable claim under this quoted provision.[196] On the other hand, the court ruled that representations that might cause confusion of a consumer's legal rights as "party to a transaction"[197] ought reasonably be understood to "refer to acts that occur before *and after* the transaction had been concluded."[198]

The *Zine* court was surely true to the MCPA's overall design by finding the meaning of the word "transaction" in the details of the business between the parties. On the other hand, the *Globe Life* ruling is plausible only if the Legislature intended to use the term "transaction" in the Section 4(1)(a) exemption in a broad, wholly generic sense, totally divorced from the context of any alleged unfair conduct. Yet rules of

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190. *Id.* at 396.

191. *Id.* at 396-97. The Court quoted BLACK'S LAW DICTIONARY'S 5th Edition, which carried the same definition of the transaction as its 4th Edition had in 1968, the year before adoption of the MCPA:

> Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered.

Id.

192. The Court quoted the first two senses of the word from RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2d ed. 1997): "1. the act or process of transacting; the fact of being transacted. 2. something that is transacted, esp. a business agreement." *Id*.

193. *Zine*, 600 N.W.2d at 396.

194. *Id*. at 397. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (2d. 1966) similarly defined "transaction" business senses as: "1. a transacting or being transacted. 2. that which is transacted or completed; specifically, a business deal."

195. *Id*. at 396. (citing MICH. COMP. LAWS ANN. § 445.903(1)(cc) (West 2002)).

196. *Id.* at 397.

197. MICH. COMP. LAWS ANN. § 445.903(n) (West 2002).

198. *Zine*, 600 N.W.2d at 397 (emphasis added).

statutory construction wisely presume, and logic strongly suggests, that they did not do so.

Words appearing in different parts of a statute are presumed to be used in the same sense throughout.[199] This black letter rule of construction is recognized as more likely to lead to a harmonious reading of the statute as a whole. Even if one could read the word "transaction" itself to admit of a broader construction, rules of judicial construction prohibit doing so where it would violate the general meaning and purpose of the statute.[200] In a statute whose design is to identify in detail and proscribe 29 distinct types of unfair and deceptive trade practices, it defies logic and common sense to suggest that the drafters intended the words "transaction or conduct" in the Section 4(1)(a) exemption to disregard the specifics of the dealings involved.[201] The plain meaning of the exemption in its context is to focus on the merchant's transaction with and conduct toward the consumer. The exemption would insulate the defendant only if the allegedly unfair "transaction or conduct" had been specifically authorized.

The *Globe Life* court's obligation was to give effect to each word of the statute in its grammatical context;[202] it utterly failed to do so.

A contextual construction of the word "transaction" was also called for under the MCPA's limitations provision. Both Sections 10 and 11 place time limits on the bringing of any suit by using the following language:

> An action ... shall not be brought ... more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a *transaction involving the method, act, or practice* which is the subject of the action, whichever period of time ends at a later date.[203]

This language makes apparent the drafters' consistent approach in targeting unfair business practices in the marketplace. The Section 4(1)(a) exemption fairly applies only if a challenged transaction or

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199. City of Grand Rapids v. Crocker, 189 N.W. 221, 224 (Mich. 1922).

200. Renee v. Oxford Twp., 146 N.W.2d 819, 821 (Mich. 1966), *aff'd*, 155 N.W.2d 852 (Mich. 1968).

201. Bladen, *supra* note 13, at 13 (stating that the *Globe Life* majority's ruling on Section 4(1)(a) exemption was "clearly erroneous and totally illogical"); Gary Victor, *The Michigan Consumer Protection Act: What's Left After Smith v. Globe*?, 82 MICH. B.J. 22, 25 (2003) (stating that the *Globe Life* majority "legislated" its meaning of scope of Section 4(1)(a) exemption).

202. Sun Valley Foods Co. v. Ward, 596 N.W.2d 119, 123 (Mich. 1999).

203. MICH. COMP. LAWS. ANN. § 445.910(5) (West 2002) (action by Attorney General); MICH. COMP. LAWS. ANN. § 445.911(7) (West 2002) (action by consumer) (emphasis added).

conduct - the allegedly "unfair, unconscionable, or deceptive method, act or practice" under Section 3(1) - was specifically authorized by law.[204]

Finally, the *Globe Life* majority did not even bother to address the Court of Appeals' premise that, as a remedial statute, the MCPA was to be liberally construed in furtherance of its objective.[205]

The errors of the *Globe Life* ruling are seen in sharp relief when compared to the readings of consumer protection acts by other state supreme courts. Similar statutes have been read as they are written - favorably to consumers and to be liberally construed.[206] Other states' courts have been more faithful to the language of their legislatures allowing exemption for acts "required or specifically authorized,"[207] or simply "permitted" by law.[208]

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204. Indeed, this approach is also taken by another provision in the Insurance Code which prescribes an exemption from the antitrust statutes. MCL section 500.122 provides that "[t]ransactions or conduct authorized, prohibited, or permitted" under the Insurance Code are not subject to the antitrust enforcement. MICH. COMP. LAWS. ANN. § 500.122 (West 2002). However, it also provides that exemption requires that the particular "activity" must gave been authorized, prohibited or permitted. *Id.* MCL section 500.122 limits the reach of the antitrust reform act as follows:

> Transactions or conduct authorized, prohibited, or permitted under a regulatory scheme under this code shall not be subject to the Michigan antitrust reform act, Act No. 274 of the Public Acts of 1984, being sections 445.771 to 445.788 of the Michigan Compiled Laws. The fact that a transaction or conduct concerns the business of insurance shall not exempt it from the Michigan antitrust reform act unless the activity has been authorized, prohibited, or permitted under a regulatory scheme under this code.

Id.

205. *Globe Life Ins. Co.*, 565 N.W.2d at 885 (citing Price v. Long Realty, Inc., 502 N.W.2d 337 (Mich. Ct. App. 1993)). *See* Dudewicz v Norris-Schmid, Inc, 503 N.W.2d 645, 649 (Mich. 1993) ("remedial statutes . . . are to be liberally construed in favor of the persons intended to be benefitted.").

206. Contrasting the case to annotations of "mainstream" state court precedents, one prominent consumer law practice manual classifies the *Globe Life* decision with courts that "confuse" the significance of regulation under such exemptions. JONATHON SHELDON & CAROLYN CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §2.3.3.3.2 (6th ed. 2004).

207. *See* Tennessee's CPA, TENN. CODE ANN. § 47-18-111 (West 2007) (exempting "[a]cts or transactions *required or specifically authorized* under" federal or state law); *Skinner v. Steele*, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987). In *Skinner*, the Tennessee Court of Appeals rejected the insurer's claim to the exemption on account of its being regulated in the sale of insurance, noting:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. *It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency.*

Skinner, 730 S.W.2d at 337 (emphasis added).

The *Skinner* opinion was discussed in the Attorney General's proposed amicus brief which was rejected by the *Globe Life* court as untimely. *See supra* note 138. *See also* Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1988); 815 ILL. COMP. STAT. ANN. 505/10b(1) (West. Supp. 2005) ("specifically authorized"); Price v. Phillip Morris, Inc.,

Many state consumer statutes have a statutory exemption grounded in the fact that the industry or transaction is simply "permitted" or regulated in some way.[209] Where (as in the MCPA) the statute provides that the party claiming the exemption bears the burden of demonstrating its applicability, even these courts have rejected arguments that a general regulatory scheme confers a blanket exception.[210]

The Globe Life ruling is notable for its lack of reasoning and the absence of any examination of the origins of the Section 4(1)(a) exemption. The legislative history shows that an overwhelming majority of the Michigan House of Representatives and Senate voted for that version of the MCPA which did not carry a wholesale exclusion of the insurance industry. Moreover, there is simply no authority in the statute or any of its legislative history for the Court's view that business regulation serves to "specifically" authorize all of a licensee's conduct.[211]

Globe Life's expansive reading also rendered functionally meaningless the Legislature's grant of investigatory power to the Commissioner of Insurance. Under Section 21 of the MCPA, the Commissioner may investigate insurers who may have violated the Act.

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848 N.E.2d 1 (Ill. 2005) (holding claim under analogous Illinois consumer protection act against tobacco company barred under similar exemption because sale of "lower tar" cigarettes specifically authorized by Federal Trade Commission consent decree).

208. Construing such "permitted" language in its Deceptive Trade Practices Act, the South Carolina Supreme Court found that a used car dealer was not exempt from a claim based upon its failure to reveal the fact of a vehicle's prior ownership general, even though the dealer's general activity was permitted. Ward v. Dick Dyer & Associates, 403 S.E.2d 310 (S.C. 1991), citing Carr v. United Van Lines Inc., 345 S.E.2d 734 (S.C. Ct. Ap. 1986) (involving a claim under the Trade Practices Act based upon confusing language of tariff fails where its terms were prescribed by Interstate Commerce Commission; the provision was thus an "action . . . or transaction . . . permitted" under similar exemption).

209. *See* CONN. GEN. STAT. ANN. § 42-110c(a) (West 2007) ("otherwise permitted"); MASS. GEN. LAWS ANN. ch. 93A, § 3 (West 2006) ("otherwise permitted"); TEX. BUS. & COM. CODE ANN. § 17.49(b) (Vernon 2002) ("An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.")

210. *See* Bierig v. Everett Square Plaza Assoc., 611 N.E.2d 720, 727 n.14 (Mass. App. Ct. 1993) (proving exemption for acts "permitted" by law under Massachusetts Deceptive Trade Practices Act requires "a defendant [to] show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive.")

211. Prior to *Globe Life*, the Michigan Court of Appeals had recognized a "learned professions" exemption to the MCPA in holding that a patient's malpractice claim against a physician could not be augmented with a consumer claim under the Act. Nelson v. Ho, 564 N.W.2d 482 (Mich. Ct. App. 1997). The *Nelson* court ruled that a physician's medical care and services were not "trade or commerce" under the MCPA, though claims based upon business or entrepreneurial aspects of their practice were. *See* Gary Victor, *The Liability of Professionals, Insurance Companies and Other Regulated Industries under the Michigan Consumer Protection Act*, 77 MICH. B.J. 69, 69-70 (1998) The *Globe Life* opinion did not discuss *Nelson v. Ho*, nor did Justice Young's opinion address how his approach to specific authorization would relate to other professions.

Recall that the history made clear that the regulators who were charged with enforcing the UTPA against insurers lobbied for and received new power to cite those same insurers for violations of the MCPA. The court's transformation of the Section 4(1)(a) exemption into a "global"[212] exemption for regulated businesses is patently inconsistent with Section 21. Why would the statute's drafters deputize agency investigations of misconduct under the new law if all of an authorized insurers' dealings with consumers were "specifically authorized"? The same absurd result obtains under *Globe Life* with Sections 16 through 20 of the MCPA, which conferred similar agency authority to the cemetery commission, the Public Service Commission, the director of the Department of Commerce, and the commission of the Financial Institutions Bureau.[213]

In sum, the ruling reveals the majority's lack of appreciation or respect for the MCPA's innovative approach to consumer protection.

2. An Untenable Accommodation of the Section 4(2)(a) Exemption

The court's expansive view of the first exemption led it to a makeshift attempt at squaring it with the second. In the process, the court failed to defer to the legislature's judgment and mocked the language of its compromise. Having concluded that Globe Life was immune under the Section 4(1)(a) exemption, the court compounded its error by exploring whether Smith's claim was nevertheless allowable under the Section 4(2)(a) exemption.[214] In doing so, it furnished no plausible explanation for such an awkward construction of the statute.

The court somehow found that Globe Life's conduct was expressly authorized under the Section 4(1)(a) exemption, but nevertheless actionable under the Section 4(2)(a) exemption if plaintiff proved it was prohibited by the Insurance Code! Such a construction is plainly at odds with the structure of the statute to immunize specifically authorized acts (Section 4(1)(a)), while at the same time preserving MCPA liability to private plaintiffs for acts of insurers that are already illegal under the UTPA (Section 4(2)(a)). As Justice Cavanagh noted, it defies reason to read the second exemption as creating an exception to the first.[215]

As set forth earlier, the legislative history shows the MCPA's drafters seriously considered the view of consumers and industry alike in their deliberations. The resulting structure of the two exemptions was the product of a painstaking compromise that the Court failed to uphold. The crux of the compromise was that (1) insurers would indeed be subject to

212. *See* Justice Young's characterization of Section 4(1)(a) at oral argument as a "global" exemption. Transcript of Oral Argument, *supra* note 139.

213. *See* MICH. COMP. LAWS ANN. §§ 445.917-.920 (West 2002).

214. *Globe Life Ins. Co.*, 597 N.W.2d at 38-39.

215. *Id*. at 44. *See Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

the MCPA, (2) their violation of Section 3(1) unfair practices would be investigated by the Insurance Commissioner, and (3) consumers could now sue for acts that were already prohibited by the UTPA or newly-illegal under the MCPA. Altogether ignored by the court's majority was the significance of Section 21, which had been first suggested by the Department of Commerce: it unquestionably acknowledged that an insurer's routine business practices were within the MCPA. "A statute is a compromise and must be enforced as such, and thus with due recognition of the various interests that gained recognition in the legislative process."[216] In *Globe Life*, our Supreme Court failed Michigan consumers in this regard.

Under *Globe Life's* confusing construction, Michigan law provides the very same conduct or transaction can be both authorized and prohibited, lawful and unlawful - indeed "sanctioned" in the two opposite senses of that word. The legislature surely did not intend such double talk.

D. The Fallout of Globe Life on Michigan Consumers

The court's *Globe Life* decision produced a double-whammy of legislation and case law against Michigan consumers. As an aftershock to the decision, the Court's clumsy construction of the Section 4(2)(a) exemption favoring consumers like Smith was quickly overturned by the Michigan Legislature. In the year following the ruling, the insurance industry successfully lobbied to expressly exempt its members from some MCPA actions. The bill crafted a new exemption to the Act's coverage as Section 4(3); the Act would "not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by [the UTPA.]"[217] While an analysis of the new Section 4(3) exemption measure said it clarified the "confusion" created by the *Globe Life* opinion, its clear import was to bar suits over insurance practices which violated the UTPA, thus relegating consumers to administrative complaint remedies in a way totally inconsistent with the MCPA's drafters.[218]

The Section 4(3) exemption was enacted as one of many measures promoted by business interests during the tenure of Governor John Engler to deny or dismantle consumer protection for insureds.[219] For example, Michigan consumers have virtually no protection against

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216. Stephan v. Goldinger, 325 F.3d 874, 877 (7th Cir. 2003).

217. *See* Trade and Commerce—Prohibition of Methods, Acts and Practices, Pub. Act No. 432 (2000) (codified at MICH. COMP. LAWS ANN. § 445.904(3) (West 2002)).

218. Two Michigan House Legislative Analyses were prepared H.B. 5332: As introduced, dated February 11, 2000, and as enrolled, January 18, 2001. The only complete analysis of the measure rationale was the second, dated after passage of the Act.

219. David Zeman, *Penalties few for insurers that don't pay - Bills that shield them sail through Lansing*, DETROIT FREE PRESS, Dec. 28, 2001, at A8.

abusive practices by insurance companies in claims processing.[220] Consumer advocates argue that the only true recourse - policing of the industry by the Office of Financial and Insurance Services - is seriously deficient.[221] Michigan is one of only a few states which did not authorize the commissioner of insurance to monitor rates for premiums and to order refunds of excessive charges. Moreover, after the *Globe Life* decision, even if such rates are based on impermissible factors, there is clearly no right for consumers to sue their insurers for such relief.[222] Is it any coincidence that there is wide disparity in premiums and that insurers appear to be enjoying record profits?[223]

Yet the legacy of *Globe Life* reaches far beyond the setting of consumer insurance. In its wake, consumer claims against all sorts of regulated businesses have been dismissed under the Court's ruling on the scope of the Section 4(1)(a) exemption. A survey of Michigan state and federal court decisions reveals that deceptive trade practices ranging from swindles in casinos games to bogus and padded charges in mortgage closing documents have been summarily dismissed without trials on grounds that a licensing agency had some regulatory power over the business.

For example, in *Kraft v. Detroit Entertainment, LLC,*[224] Plaintiff brought claims under the MCPA against the three Detroit casinos alleging that certain slot machines were deceptive in misrepresenting the chances of winning a large payoff. The case was dismissed and the Michigan Court of Appeals affirmed, reasoning that under *Globe Life*, defendants were exempt because the operation of the slot machines had been approved by the Michigan Gaming Control Board (MGCB). In explaining the upshot of the *Globe Life* rule, the Court of Appeals reiterated and applied our Supreme Court's incongruous notion that business conduct could be both permitted and prohibited:

> Whether the specific misconduct alleged - defendants' misrepresentation of the chances of winning a large payoff on the "bonus wheel" - is illegal or prohibited by the MGCB is irrelevant to the determination whether the transaction or conduct was specifically authorized by the MGCB.[225]

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220. David Zeman, *The Claims Game - When Insurers Just Won't Pay; Lowballed, Accused Policyholders Lose*, DETROIT FREE PRESS, Dec. 27, 2001, at A1.

221. David Zeman, *State Acts Rarely in Gripes About Insurance - Critics say Little is Done About Supervising Industry*, DETROIT FREE PRESS, Dec. 28, 2001, at A1.

222. *See generally* McLiechey v. Bristol West Ins. Co., 474 F.3d 897 (6th Cir. 2007).

223. Charlie Cain, *Report: Michigan Auto Insurers pile up Profits, Surpluses*, THE DETROIT NEWS, June 8, 2007, at B1 (citing Jay Angoff, An Analysis of the Profitability and Performance of the Michigan Auto Insurance Market, *available at* http://www.cpan.us/PDF-documents/JAReportMay302007.pdf (last visited Jan. 8, 2008).

224. 683 N.W.2d 200 (Mich. Ct. App. 2004).

225. *Id.* at 205.

Likewise, in *Newton v. Bank West, FSB*,[226] the Plaintiff obtained a residential real estate loan from the defendant bank. She claimed the bank violated the MCPA by charging a document preparation fee that exceeded the costs necessary to prepare them.[227] The trial court's dismissal of the claim under the Section 4(1)(a) exemption was affirmed by the Michigan Court of Appeals. The Court of Appeals concluded that since the state saving bank was specifically authorized to make residential mortgage loans under laws administered by regulatory boards or federal statutes, the challenged aspect of its conduct in doing so was not covered by the Act.[228]

Similarly, in *Burton v. William Beaumont Hospital*,[229] uninsured patients who claimed the defendants issued grossly excessive billings violated the MCPA saw their claim dismissed without a trial. The patients' class action under Section 11 included claims that the hospital's billings for emergency care were grossly excessive. The federal court dismissed the claims under *Globe Life* since the "general transaction" of billing patients was specifically authorized.[230] While the *Burton* court cited the Michigan Public Health Code's administrative approach to regulating relations between health providers and patients, it found no specific authority for unconscionably high billings. It referenced instead that, under the statute, "[a] patient . . . is entitled to receive and examine an explanation of his or her bill regardless of the source of payment and to receive, upon request, information relating to financial assistance available through the facility."[231]

While the *Burton* court also pointed out that the statute authorized the patient to complain to the state agency,[232] it is not at all clear that the state has the power to order hospitals to reduce or adjust excessive bills.[233] Federal and state law are otherwise very unhelpful in protecting consumers against charges by medical providers. The Secretary of Health and Human Services recently withdrew a proposed rule which would

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226. 686 N.W.2d 491 (Mich. Ct. App. 2004).
227. *Id.*
228. *Id.*
229. 373 F. Supp. 2d 707 (E.D. Mich. 2005).
230. *Id.* at 721.
231. *Id.* (citing MICH. COMP. LAWS ANN. § 333.20201(2)(i) (West 2001)).
232. *Id.* at 720-22.
233. The rules of the Department of Consumer and Industry Services, Bureau of Health Service subject physicians to licensing sanctions including removal and suspension, but apparently do not authorize relief to patients against unfair billings. *See* MICH. COMP. LAWS ANN. § 333.16121(4) (West 2001); MICH. ADMIN. CODE, r. 338.900-.951 (rescinded Aug. 16, 2007); and MICH. ADMIN. CODE r. 338.1601-.1637. This conclusion was confirmed as the understanding of Complaint and Allegations staff of the Bureau of Health Professions in a telephone call to their Lansing offices on July 6, 2007.

define "excessive charges" that could be a basis for excluding the provider from the Medicare reimbursement program.[234]

Finally, a case from January of this year reveals the utter voiding of consumer protection in Michigan worked by *Globe Life*. In *Woods v. William & Sons Plumbing & Heating, Inc*.,[235] a *pro se* plaintiff prevailed at trial in her contract and MCPA claims against a plumbing firm and its two principals.[236] After recounting that the case, first filed in 1995, was tried nearly a decade later and that plaintiff's verdict was offset by case evaluation sanctions, the Court of Appeals set aside the verdict. The unreported opinion underscores the significance - under *Globe Life* - of the defendants being licensed plumbers: "[b]ecause the defendants Williams and Thomas conducted the plumbing renovation, installation, and repair project, however irresponsibly or inadequately, pursuant to their licensure and subject to the authority of the state plumbing board, the MCPA does not apply."[237]

All of these cases thus perpetuate the *Globe Life* legacy: a profound disrespect for both the legislature and consumers. The idea that elected representatives who had wrestled so long and hard to reach common ground between the interests of consumers and regulators would pass a consumer protection measure that did not cover the regular activity of licensed businesses is an affront of the first order.

In *Liss v. Lewiston-Richards, Inc*.,[238] the Michigan Supreme Court reaffirmed its approach to exempting residential home builders from the MCPA under the Section 4(1)(a) exemption. The plaintiffs claimed that the defendant failed to complete their home construction in a timely and workmanlike manner. They also claimed the defendants made misrepresentations in performing the construction contract. Affirming a dismissal of the claims, Justice Young for a 5-member majority wrote that the claims were barred. In interpreting the words "specifically authorized," the *Liss* Court concluded that - under *Globe Life* - the Section 4(1)(a) exemption requires only "a general transaction that is 'explicitly sanctioned.'"[239] Using this approach, the *Liss* majority concluded that since a licensed home builder is specifically authorized to build homes, the general transaction of doing so was authorized and homeowners have no claims against them under the MCPA.[240]

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234. *See* Notice of Withdrawal of Proposed Rulemaking, Department of Health and Human Services Office of Inspector General, 72 Fed. Reg. 33430 (proposed June 18, 2007).

235. No. 256394, 2007 WL 162237 at *1 (Mich. Ct. App. Jan. 23, 2007), *leave denied*, 735 N.W.2d 240 (Mich. 2007).
2007)

236. *Id.*

237. *Id.* at 8.

238. 732 N.W.2d 514 (Mich. 2007).

239. *Id.* at 519-20 (Kelly, J., dissenting).

240. *Id.* at 521.

Justice Kelly's dissent in *Liss* urged that *Globe Life* and *Diamond Mortgage* were in conflict and detailed her views why *Globe Life* was wrongly decided. In addition to many other arguments against finding the builder exempt, she found that there was no express statutory authority for licensed builders to build homes.[241]

Globe Life has judicially transformed Section 4(1)(a)'s exemption into an amorphous, global exemption for virtually all regulated business activity. The ruling shields the very unfair practices that the MCPA targeted. By its ruling in *Liss*, the Court has also overruled a Court of Appeals opinion that had held the MCPA applicable to a contractor doing home renovations.[242]

How long before the Michigan Supreme Court rules that all home repair contractors are beyond the reach of the MCPA because their activities are subject to a license?[243]

IV. CONCLUSION: THE LEGISLATURE MUST ACT TO REINSTATE THE LAW PRIOR TO *GLOBE LIFE*

A major impetus for the U.S. consumer movement in the 1970's was the widespread belief among law enforcement and legislatures that administrative regulation was not adequately protecting consumers. Statutes such as the MCPA thus broadly defined "trade or commerce" and proscribed in detail unfair business practices. Critically, it included attorneys fees provisions to encourage and enlist the private bar to complement enforcement by the Attorney General and state regulators. The value of Michigan's groundbreaking consumer protection statute has been seriously undermined by our Supreme Court ruling in *Globe Life*. The Legislature should act to restore balance and coherence to the law.

Two concrete proposals to reverse the ruling in *Globe Life* have been put forth. Gary Victor, an expert MCPA practitioner, has suggested that the Section 4(1)(a) exemption be stricken altogether.[244] A bill introduced in the Michigan House of Representatives last year would rephrase the exemption to apply only to "method, act, or practice that is expressly

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241. *Id.* at 522-29.

242. *Id.* at 521. *See* Hartmann & Eichhorn Building Co. v. Dailey, 732 N.W.2d 108 (Mich. 2007), *vacating* 701 N.W.2d 749 (Mich. Ct. App. 2005); Kimberly A. Breitmeyer, *Residential Builders now Liable under the Michigan Consumer Protection Act*, 85 MICH. B.J. 28 (2006).

243. The problem of overpriced and unreliable home repairs is a chronic one and complaints to a licensing agency rarely bring satisfaction to consumers. *See* George Hunter & Joel Kurth, *State fails to stop shoddy contractors - Homeowners are hammered by weak sanctions against poor work*, THE DETROIT NEWS, Aug. 12, 2001, at A1.

244. Gary M. Victor, *How to Fix the Consumer Protection Act and the Damage Done by Smith v. Globe*, STATE BAR OF MICHIGAN CONSUMER LAW SECTION, *available at* http://www.michbar.org/consumer/pdfs/aug07.pdf (last visited Jan. 8, 2008).

permitted by a statute, rule, or regulation."[245] While either measure would be an improvement, the latter may prove a more certain approach to the problem of *Globe Life*.

The House Bill would replace the words "transaction or conduct" in the Section 4(1)(a) exemption with "method, act, or practice" in an attempt at complete agreement with the wording of the MCPA's preamble and Section 3(1)'s list of unfair, deceptive and unconscionable business dealings.

H.B. 4217 would restore some coherence to the MCPA by restoring a common-sense reading to the exemption to end the parade of regulated industries availing themselves of the excesses of the Michigan Supreme Court's antithetical "*Globe*-alization" of the MCPA.

245. Mich. H.B. 4217, Regular Sess. (2007), *available at* http://legislature.mi.gov/doc.aspx?2007-HB-4217 (last visited Jan. 8, 2008).