State Bar of Michigan

NEWSLETTER

Consumer Law

V. 29, No. 1 State Bar of Michigan Consumer Law Section September 2026

Contents

From the Chair....1

Annual Meeting....2

Consumer Advocates Start Your Engines
Attorney General v Eli Lilly Resurrects the MCPA....3

From the Chair

As I reflect on my term as Chair of the Consumer Law Section for 2026, I am reminded that effective leadership requires both vision and adaptability. Throughout this year, my primary focus has been monitoring the *Attorney General v Eli Lilly* litigation and its potential impact on the Michigan Consumer Protection Act.

As many of you know, the MCPA has faced significant challenges since the Michigan Supreme Court's decisions in *Smith v Globe Life Ins Co* and *Liss v Lewiston-Richards, Inc,* which effectively exempted most businesses from MCPA coverage. The Attorney General's lawsuit against *Eli Lilly*, filed in January 2022, represented a critical opportunity to address these limitations. The case centered on whether the MCPA applies to conduct related to insulin pricing, despite FDA regulation of insulin sales.

Now that the Michigan Supreme Court has ruled in favor of the Attorney General, I believe we stand at a pivotal moment for consumer law practitioners in Michigan. This decision opens doors that have been closed for too long, making consumer law claims not only viable but profitable for attorneys committed to protecting Michigan consumers.

My term as Chair has also been a learning experience in understanding what it means to lead a section of the State Bar. I have endeavored to be accessible to our members, answering questions and fostering dialogue about the evolving landscape of consumer law in our state. As we move forward, I encourage all members to stay engaged and to recognize the renewed opportunities this development presents for our practice.

In September at our annual meeting, we will be presenting the Frank J. Kelley Distinguished Public Service Award to Michigan State Senator Mary Cavanaugh. Additional information regarding what Senator Cavanaugh's background can found by reviewing this newsletter.

Further details about the Eli Lilly litigation and its implications can be found by reviewing the update article in this newsletter.

Council 2025-2026

Chairperson
Cameron Bell, Troy

Chairperson-Elect
Libby Benton, Ypsilanti

Secretary
Michael Nelson, Grand Rapids

Treasurer
Terry Adler. Grand Blanc

Council Members
Term Ending 2026
Paul Matouka, Troy
Valerie Moran, Oxford
Frances Murphy, St. Clair Shores

Term Ending 2027
Todd Ryan, Ann Arbor
Dani Liblang, Birmingham
Ian Lyngklip, Oak Park

Term Ending 2028
Donna Malloneis, Midland
Alyson Oliver, Troy
Gary Victor, Ypsilanti
Adam Taub, Southfield

Immediate Past Chair
Andrew Campbell, Ypsilanti

Legislative Liaison
Lorray Brown, Ypsilanti

Newsletter Editor
Gary M. Victor
gmvictor@hotmail.com

Annual Meeting

The Annual Meeting of the Consumer Law Section of the Michigan Bar will be held virtually on Thursday, September 17 at 9:30 am. The information on how to access the meeting will be provided to section members before the meeting, The first portion of the meeting will be devoted to Section business including election of officers and council members. The Slate proposed by the Council is provided below. After Section business is completed, the Frank J. Kelly Consumer Advocacy Award will be presented to this year's recipient, State Senator Mary Cavanaugh. See bio. After that presentation, additional speakers may be available and any questions from Section members can be addressed.

Slate

The Consumer Law Council had proposed the following individuals for election for the 2026-2027 year:

Officers

Chair—Libby Benton, Ypsilanti
Chait Elect—Todd Ryan, Ann Arbor
Treasurer—Terry J. Adler, Grand Blanc
Secretary—Paul Matouka, Troy

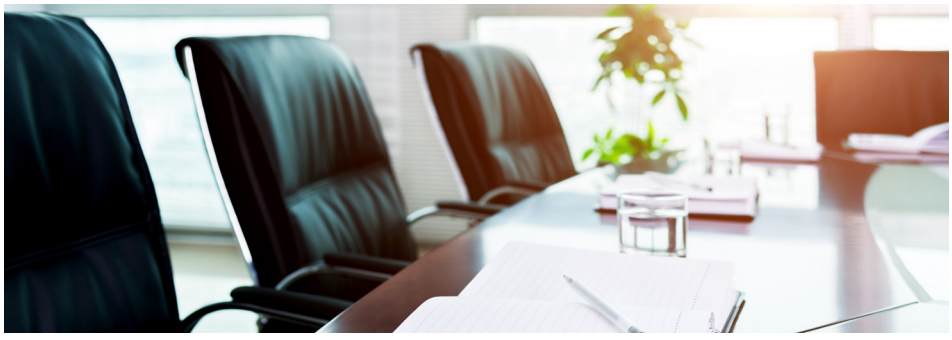
Council Members

Available Council positions will be announced at the meeting

This Year's Frank J. Kelly Consumer Advocacy Award Recipent

The Frank J. Kelly Award is awarded each year to someone who has contributed to the best interest of Michigan consumers. This year's recipient is Senator Mary Cavanaugh.

Senator Mary Cavanagh is serving her first term in the Michigan Senate, representing the Sixth Senate District, which includes the communities of Northwest Detroit, Redford, Livonia, Farmington, and Farmington Hills. With over 20 years of civic engagement and public servant experience, Senator Cavanagh understands how to build vital relationships with communities while bringing about positive change. Prior to serving in the Michigan Senate, Cavanagh was elected to the House of Representatives in 2020, where she served



the communities of Redford Township and Northwest Detroit and was a vocal champion for small businesses, frontliners, and our most vulnerable populations. She has also worked as an AmeriCorps member, serving in Detroit Public Schools fighting the school to prison pipeline, as a direct care worker for those with behavioral and intellectual challenges, and as a director for a company dedicated to preserving home ownership and community revitalization. In the senate, Senator Cavanagh is committed to supporting policies and budgets that focus on attainable housing, accessible & affordable healthcare, small business and community development supports, consumer protection, and workforce development initiatives.

Senator Cavanagh currently serves on nine committees, including as the chair of three – the Committee on Finance, Insurance, and Consumer Protection, Subcommittee on the Department of Labor and Economic Opportunity, and Subcommittee on the Department of Licensing and Regulatory Affairs & the Department of Insurance and Financial Services. In addition, Cavanagh serves as Vice Chair to the Senate Committee on Community & Economic Development

Consumer Advocates Start Your Engines *Attorney General v Eli Lilly* Resurrects the MCPA

By Gary M. Victor

Introduction

It's about time. After a wait of more than a quarter century the Michigan Supreme Court in *Attorney General v Eli Lilly and Co* (*Eli Lilly*)[1] has brought the Michigan Consumer Protection Act (MCPA)[2]back to life. Many of the readers of this article have waited a long time for something, anything, whether by legislative action[3] or a Supreme Court decision, to cure the damage to the MCPA caused by *Smith v Globe Life Ins Co (Smith),*[4] and *Liss v Lewiston-Richards, Inc (Liss).*[5] Other readers cannot remember a time when the MCPA was viable cause of action. The hero in this story, *Eli Lilly,* is a messy case involving complex issues of standing, the availability of declaratory relief and stare decicis,[6] This article will not burden the reader with a discussion of these issues, but will concentrate on how the Court went about overruling *Smith* and *Liss*.[7] First, however, the history of how we got here will be discussed with enough of the factual context of *Eli Lilly* to understand the setup before the Court.

The History

When the Michigan Consumer Protection Act (MCPA) became effective in1977, "it was one of the most powerful consumer protection statutes in the United States."[8] As written, the MCPA was the broadest consumer protection statute in Michigan with only a few narrow exceptions.[9] The MCPA gave the Attorney General (AG) significant power to investigate and prosecute "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce"[10] and broadly defined "trade or commerce.[11] To clarify what would constitute a violation of the act, the MCPA listed thirty or so specific acts or failures that would establish unfair, unconscionable or deceptive practices.[12]

More importantly for consumer advocates, the MCPA created a private right of action authorizing consumers to recover a minimum amount of damages together with reasonable attorney fees.[13] This private right included claims for declaratory judgments and injunctions[14] as well as specifically providing for class actions.[15] By including this private right of action, the Legislature clearly intended to motivate attorneys to become private attorneys general thereby assisting in the enforcement of the act.[16] And it did. During the more than two decades that the act was operating as intended, in addition to cases brought by the AG,[17] many MCPA cases were brought by consumers represented by private attorneys.[18]

This golden age of the MCPA came to screeching halt in 1999 with the Michigan Supreme Court's decision in *Smith.* The *Smith* Court found the MCPA's single vulnerability and exploited it in order to eviscerate the act. That venerability is the act's exemption section, MCL § 904(1)(a), which exempts from coverage of the act:

> 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,

Without conducting any reasoned statutory analysis or reviewing the clear legislative intention of the MCPA to broadly protect consumers, the *Smith* Court drove a truck through this narrow exception with this conclusion:

> 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 prohibited.[19]

As the "general transactions" of most businesses are authorized by one law or another, under *Smith's* interpretation it appeared that whole areas of business activity were now exempt from MCPA coverage even if the specific conduct alleged would constitute a violation of the act, no matter how awful the conduct might be. Consumer advocates were devastated by *Smith* and wondered what was left of the MCPA.[20] Consumer attorneys and scholars wrote articles about how to cure the damage done to the MCPA by *Smith.*[21]

If there was any doubt about how dramatically *Smith* had ruined the MCPA, in 2007 along came *Liss*.[22] *Liss* followed, and if anything, exacerbated the effect of *Smith*'s holding.[23] Again, without any reasoned statutory analysis, *Liss* changed the words "specifically authorized" in MCL § 445.904(1)(a) to mean "explicitly sanctioned"[24] making it clear that all regulated businesses were exempt from the MCPA. After *Smith* and *Liss*, it was abundantly clear to consumer advocates that there was very little left of the MCPA. Those attorneys who understood this problem might nibble around the edges taking the chance they might be kicked out on summary disposition. Many other people were confused as to the state of the law including legislators who enacted new sections of the MCPA that under *Smith* and *Liss* were nullities,[25] Consumer advocates tried to lobby the legislature to change the law, and in the absence of legislative action, hoped that the right case would come along for a more liberal court to make things right.[26] Whether the best case or not, *Eli Lilly* was the right case at the right time. We can now take a look at the facts.

The Relevant Facts of *Eli Lilly*

At issue are two insulin products sold by Eli Lilly with the same chemical composition. One was sold in Michigan at a higher price under the brand name and the second was sold in other countries at a lower price as a generic drug. The AG believed this practice to be a violation of the MCPA. The AG filed and was granted a petition in the circuit court for the issuance of civil investigative subpoenas. At the same time the AG filed an action or a declaratory judgment arguing that *Smith* and *Liss* were wrongly decided and that question should be ruled on before the subpoenas were served. Eventually, both parties stipulated to refrain from further action until the AG's declaratory judgment action was decided. In essence, the AG had set up a test case to see if the Supreme Court would reverse *Smith* and *Liss*, and the parties recognized that would save time and expense to see what the Supreme Court would do with the AG's declaratory judgment action rather than litigating their way up there. Both parties moved for summary disposition.[27]

The circuit court, as expected, granted Eli Lilly's motion on the basis of *Smith* and *Liss* and the Court of Appeals affirmed on the same grounds. The Supreme Court granted leave instructing the parties to address several issues including: . . ."(3) whether this Court's decisions in [*Smith* and *Liss*] correctly interpreted MCL 445.904(1)(a)"[28] We can now discuss how the Court went about reversing *Smith* and *Liss*.

The Court's Analysis Reversing *Smith* and *Liss*

Legal analysis is very beautiful when done well. Even when the Court believes its prior decisions were clearly erroneous, to reverse them competently it must do a sufficient legal analysis to stand the test of time. It is not enough to say the prior decisions were wrongly decided; the Court must support its position every step of the way.

The *Eli Lily* Court did a yeoman's job at this task. The Court supported its analysis with appropriate legal authority throughout. The focus here, however, is more on the logic of its arguments.

In short, the job of a court in determining the meaning of words in a statute is to discern the intention of the legislature in including those words to accomplish the objective of the statute itself. For anyone who has taken time to read the MCPA, it is obvious that *Smith*, and later *Liss*, were wrongly decided. Their interpretations of MCL § 445.904(1)(a) just do not make sense. No reasonable legislature would take the time to write a broad consumer protection statute and include therein a short exemption provision that all but destroys the purpose of the statute in the first place.[29] The objective of the *Eli Lilly* Court was to show this obvious truth through careful, unimpeachable legal reasoning. The Court succeeded in accomplishing that objective.

The *Eli Lilly* Court starts its challenge to *Smith* and *Liss,* as one would expect, with the wording of the statute noting that if the language is clear and unambiguous, judicial construction is not permitted.[30] The Court than finds the language of MCL § 445.904(1)(a) unambiguous.[31] Noting that the section refers to "a transaction" singularly, the court states:

> Based on the plain language of the statute, MCL 445.904(1)(a) was intended to be a narrow exemption, forbidding plaintiffs from bringing MCPA claims involving transactions or conduct that defendants are specifically authorized by law to do.[32]

Given the unambiguous statutory wording of MCL § 445.904(1)(a), it was the obligation of the *Smith* and *Liss* Courts to interpret those words by giving them their plain and ordinary meaning without adding to them or subtracting from them. This they failed to do. The *Eli Lilly* Court next demonstrates how *Smith* and *Liss* violated this primary principle of statutory analysis in two ways. First, by inserting a new word—"general"—into the statute; and second, by essentially taking the words "specifical authorized" out by changing the focus of those words.[33] After examining insertion of the word "general" into MCL § 445,904(1) by *Smith* and *Liss* the *Eli Lilly* Court states:

> Therefore, by inserting the word "general" into the statutory language, *Smith* and *Liss* broadened the MCL 445.904(1)(a) exemption in a manner that was contrary to legislative intent. This exceeded the judiciary's duty to interpret statutory law as written, not make it.[34]

Next the Court turns to the improper manipulation of "specifically authorized" by the *Smith* and *Liss* Courts. Under the wording of MCL § 445.904(1)(a) the focus of "specifically authorized" is on a specific transaction or a type of conduct by the actor—the defendant. *Smith* shifts the focus to the "general transaction" defendant is involved in, for example, building houses—a totally different point of reference. *Liss* exacerbated *Smith's* error "by focusing its analysis on the licensure of or overall regulatory burden on the actor, rather than the actions of that actor."[35]

The logic of *Eli Lilly* on the statutory wording is irrefutable. The clear purpose of the MCPA as a whole is to protect consumers. *Smith* and *Liss,* by adding the word "general" to MCL § 445.904(1)(a) and changing the focus the section from the defendant's conduct to whether the defendant is regulated in some way or another, penned an interpretation which all but destroyed the statutory goal of protecting consumers. *Eli Lilly* makes it clear that such a misinterpretation of MCL § 445.904(1)(a) cannot stand and requires reversal.

Eli Lilly goes on to examine how the misinterpretation of MCL § 445.904(1)(a) by *Smith* and *Liss* relates to other parts of the MCPA. An interpretation of a part of a statute which makes that part inconsistent with, or makes a nullity of, another part the same statute must be incorrect. The *Eli Lilly* Court finds *Smith* and *Liss* are faulty here as well.

After discussing the myriad types of industries that were given MCPA immunity by *Smith* and Liss,[36] the Court turns to the incongruity issue. The Court first points out that at least one type of prohibited conduct under MCL § 445.903(1) is a nullity under the interpretation of *Smith* and *Liss*. That subsection, MCL § 445.903(1)(dd)(ii), prohibits holding containers that violate the environmental protection act. Since this conduct applies to people already regulated under the environmental protection act, their general transactions are subject to regulation and they would be exempt from the MCPA under *Smith* and *Liss*.[37] The Court rounds out this area of argument showing that the interpretation of *Smith* and *Liss* is inconsistent with a number of other MCPA provisions. The MCPA provides for investigations of several heavily regulated industries Including banking, public utilities, cemeteries, securities and insurance.[38] The Court points out the incongruity here by stating:

> If the Legislature had intended the mere existence of some other licensing or regulatory scheme to completely foreclose an MCPA action, it would not have directly enrolled the enforcers of those regulatory schemes in facilitating the MCPA. Neither *Smith* nor *Liss* addressed this incongruence.[39]

Summary And Conclusion

During the twenty plus years between its enactment in 1977 and 1999 with the holding in *Smith*, the MCPA was the premier consumer protection statute in Michigan as it was intended to be. *Smith* and later *Liss* changed all that by interpreting a MCPA exemption, MCL § 445,904(1)(a), so broadly that it virtually ate up the rest of the act. With those two cases, Michigan consumers were pretty much left in the dark waiting, hoping, for a case like *Eli Lilly* to come along and breathe life back into the MCPA. This article has examined how *Eli Lilly* went about putting the world back on its axis. Here, the AG set up a test case to see if this Supreme Court was willing to take a swing at it. And, fortunately for Michigan consumers and consumer advocates, the *Eli Lilly* Court pretty much hit it out of the park.

Those of us that have examined the MCPA, knew from the get go that *Smith's* interpretation of MCL § 445.904(1)(a) was ridiculous. No reasonable legislature would do something so stupid as writing a broad consumer protection statute and contain therein a small exemption provision which would all but destroy the purpose of the statute. Nevertheless, in order to reverse two of its prior cases, the *Eli Lilly* Court had to undertake a careful, pervasive legal analysis to show why *Smith* and *Liss* were incorrectly decided.

The *Eli Lilly* Court first went to the exemption section, found the words unambiguous and that their ordinary meaning was to create a narrow exception to the MCPA. The Court showed how the *Smith* and *Liss,* in their interpretation of the section, had added and/or subtracted words from the section violating the general rules of statutory construction. On that basis alone, the *Eli Lilly* Court showed that *Smith* and *Liss* had created a broad exemption to the MCPA contrary to the clear purpose of the MCPA—protecting consumers—thus requiring reversal. To further support its reversal, Court showed that under the *Smith* and *Liss* interpretation some subsections of the MCPA would end up nullities and that the Legislature's inclusion of several other sections would make no sense under those cases.

All of us committed to protecting consumers have waited for a case like *Eli Lilly* to come along for a long, long time. We would have been happy with any decision that reversed *Smith* and *Liss*. Fortunately, the *Eli Lilly* opinion is well reasoned and extensively supported. Hopefully, it will be very difficult for a future Supreme Court to find a way of corrupting the MCPA as *Smith* and *Liss* did, but this being courts anything is possible. In the meantime, consumers and consumer advocates are entitled to rejoice in the MCPA's resurrection.

Endnotes

1 ____ Mich ____ (2026), July 31, 2006

2 MCL § 445.901, *et seq.* 445.903(1)

3 See Victor, *Can the Legislature Cure the Damage to the Michigan Consumer Protection Act Caused by Smith v Globe,* 8 Consumer Law Newsletter 3 (No. 1, April 2003).

4 460 Mich 446 (1999). See Victor, *The Michigan Consumer Protection Act: What's Left After Smith v Globe*, 82 Mich Bar Journal 22 (No 9, September 2003).

5 478 Mich 203 (2007). See Victor, *Liss v Lewiston-Richards, Inc.—The Supreme Court Puts What Might be the Final Nail in the Coffin of the Michigan Consumer Protection Act*, 11 Consumer Law Newsletter 1 (No. 1, August 2007).

6 *Eli Lilly*, is a four to three decision with the three dissenters taking no position on reversing *Smith* and *Liss*, but instead basing their opinion primarily on standing.

7 *Eli Lilly*, Slip Opinion at 19-27.

8 *Id*. Slip Opinion at 3 citing Victor, *The Liability of Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act*, 77 Mich B J 69, 69 (1998).

9 MCL § 445.904.

10 MCL § 445.903(1). The AG's powers are outlined in the MCPA in sections MCL §§ 445.905 through MCL 445.910 and are extended to several other investigation authorities such as prosecuting attorneys (MCL § 445.915) and the Commissioner of Financial Institutions (MCL § 445.917).

11 MCL § 445.902(1)(g).

12 MCL § 445.903(1). Today the section lists many more.

13 MCL § 445.911(2).

14 MCL § 445.911(1).

15 MCL § 445.911(3). Now MCL § 445.011(4).

16 See. Victor, *The Michigan Consumer as a Private Attorney General*, 4 COLLEAGUE 13 (December, 1991).

17 See, eg, *Attorney General v Diamond Mtg Co*, 414 Mich 603 (1982).

18 *See, eg, Dix v American Bankers Life Assurance Co of Florida*, 419 Mich 410 (1987) (annuities); *Forton v Laszar*, 239 Mich App 711 (2000) (residential builder); *Price v Long Reality Inc*, 199 Mich App 461 (1993) (real estate broker); *Noggles v Battle Creek Wrecking Co*,153 Mich App 363 (1986) (wrecking company); *McRaild v Shepard Lincoln Mercury*, 141 Mich App 406 (1985) (car dealer); and, *Smolen v Dahlman Apts Ltd*, 127 Mich App 108 (1983) (residential security deposits),

19 *Smith, supra* fn 4 at 465.

20 See Victor, *The Michigan Consumer Protection Act—What is Left After Smith v Globe*, 82 Mich BJ 22 (No 9, September 2003); *See also*, Victor, *A Tiny Michigan Consumer Protection Act Victory—A Type of Case that Survives Smith,* 17 Consumer Law Newsletter, 1-6, (No.2, June 2014).

21 See, Scott, Note, *Exempting the Protection Out of Michigan's Consumer Protection Act—A call for Retuning Consumer Protection to the Act*, 84 U Det Mercy L Rev 237 (2007); Maveal, The Michigan Consumer Protection Act Gutted by Supreme Court "Globe-alization", 53 Wayne L Rev (2006); Victor, *How to Fix the Michigan Consumer Protection Act to Correct the Damage Caused by Smith v Globe,* 9 Consumer Law Newsletter 7 (No. 2, September 2004); Victor, *Can the Legislature Cure the Damage to the Michigan Consumer Protection Act Caused by Smith v Globe,* 8 Consumer Law Newsletter 3 (No. 1, April 2003).

22 478 Mich 203 (2007). See Victor, *Liss v Lewiston-Richards, Inc.—The Supreme Court Puts What Might be the Final Nail in the Coffin of the Michigan Consumer Protection Act*, 11 Consumer Law Newsletter 1 (No. 1, August 2007).

23 E*li Lilly.* Slip Opinion at 21.

24 *Liss*, *supra* fn 5 at 213.

25 See Victor and Lyngklip, *The Michigan Consumer Protection Act is Virtually Dead—Yet the Legislature, Executive Branch and Many Attorneys Don't seem to know it*, 91 Mich BJ 25 (No 8, August 2012).

26 It is reasonably arguable that these three cases, *Smith*, *Liss* and *Eli Lilly* are more about the political composition of the Court than reasoned legal analysis; but that is a discussion for another time.

27 *Eli Lilly.* Slip Opinion at 7-9.

28 *Id* at 10.

29 *Smith's* interpretation of MCL § 445.904(1)(a) shows more than sloppy legal reasoning, it is evidence of intentionality—an intention to hinder the ability of the MCPA to protect consumers; the very purpose of the act.

30 *Eli Lilly*, Slip Opinion at 19-20.

31 *Id* at 20.

32 *Id.* This exception is indeed very narrow. Over the nearly fifty years since the enactment of the MCPA, legal writers have found less than a half-dozen examples where his exception might apply. One is where the Motor Vehicle Service and Repair Act, MCL 2571301 *et seq.* authorizes a repair facility to charge the lesser of $50 or 10% over a written estimate without getting the vehicle owner's consent. MCL 257.1332(1). An attempt to claim that this conduct constitutes a violation of the MCPA would fail under this exception.

33 *Id* at 20-21,

34 *Id* at 21. Apparently, the Court had enough confidence in its "wording" analysis that it left the entire "remedial statute" analysis to a footnote. See *Eli Lilly*, Slip Opinion fn 10 at p 20.

35 *Id* at 23.

36 *Id* at 24-35.

37 *Id* at 25-26, Another subsection is MCL § 445.901(1)(gg) which applies to home or telephone solicitations whose practitioners are already regulated under the home solicitation and sales act. See Victor and Lyngklip, supra fn 24.

38 *Id* at 24-25.

39 *Id* at 26.



SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

First Class
Presorted
U.S. Postage PAID
Lansing, MI
Permit # 191