State Bar of Michigan

NEWSLETTER

Consumer Law

V. 10, No. 1 State Bar of Michigan Consumer Law Section August 2006

Annual Meeting to Address Collection Suits

Issues and problems in consumer collection suits in the Michigan District Courts will be highlighted by three diverse speakers at the State Bar Consumer Section's Annual Meeting, Thursday, September 14, at the State Bar Annual Meeting in Ypsilanti. Front and center will be the new realities of assignment and collection of consumer debt, creating minefields for consumers, lawyers, and judges alike.

The past 15 years have seen an explosion of consumer debt, and dramatic changes in who holds it and who collects it. Gone are the days when local businesses maintained revolving accounts in-house, and when accounts defaulted, suits were typically filed in the name of the original creditor. Now, most consumer credit is handled through national entities, using credit cards of various types and installment agreements that pass quickly to national players.

By the time a debt is subject to a collection suit, it may have gone through the hands of several assignee collectors, bundled and sold several times. The end assignee, considered a collection agency by federal law but not necessarily under Michigan licensing statutes, likely acquired the defaulted debt with hundreds or thousands of other delinquent accounts.

The assignee often heads to court with only sketchy information about the account, and difficulty getting the details. Defendants, when they respond, come to court unrepresented in most cases, and often have few records of their own. Some maintain the accounts are not theirs, but have difficulty proving it. Meanwhile, identity theft complaints to the FTC have increased sevenfold in recent years. It's hard for judges, and sometimes consumers themselves, to know if the debt sued on or particular charges are really those of the consumer. Efforts to pursue some cases without good information or documentation have given rise to Fair Debt Collection Practices Act claims against plaintiffs and their collection lawyers.

The 46th District Court in Southfield last year proposed new local court rules to increase the information and documentation required on filing consumer collection cases and garnishments. Is that the way forward, to promote fairness and accuracy in these cases?

Three views will be presented at this year's Consumer Section Annual Meeting program. Hon. Stephen Cooper, 46th District Court Chief Judge; Michael Buckles, a veteran collection attorney active in the Michigan Creditors Bar Association; and Adam Taub, consumer practitioner at Lyngklip & Taub Consumer Law Group, will address issues and problems in district court consumer collection cases.

Consumer Law Section 2006 Annual Meeting

Thursday, September 14
At the State Bar Annual Meeting, Eagle Crest Marriott, Ypsilanti

2:00 p.m. Business Meeting, followed by program

Presentation of Frank J. Kelley Consumer Advocacy Award To Henry Erb, Target 8 Investigative Reporter, WOOD-TV Grand Rapids

Program: *Consumer Debt Collection Issues in Michigan District Courts*

Speakers: Hon. Stephen Cooper, 46th District Court
Michael H.R. Buckles, Buckles and Buckles PC
Adam G. Taub, Lyngklip & Taub Consumer Law Group

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From the Chair

Consumer Law Section Priority: Fix the MCPA

By Josh Ard, Chairperson

As members of the section should know, this is a challenging time to be a consumer lawyer in Michigan. As a result, the council is faced more with the challenge of restoring and maintaining consumer rights rather than trying to expand them. Michigan's Consumer Protection Act is barely in existence today. The act, codified at MCL §§ 445.901 et seq. offers valuable protection to Michigan consumers from "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce" MCL § 445.903(1). One of its most effective attributes is that complainants do not have to show all of the elements of fraud, such as a deliberate misrepresentation about a current state of affairs, which they justifiably relied on to their detriment. In many instances, all that needs to be shown is that the method, act, or practice "caus[es] a probability of confusion or of misunderstanding." Moreover, persons who are sharp enough not to be fooled by an unfair, unconscionable, or deceptive method, act, or practice can act as a private attorney general to protect their more gullible fellow consumers from future harm. This valuable tool that protects our most vulnerable consumers is teetering on the edge of total ineffectiveness due to a series of court interpretations, especially *Smith v Globe Life Insurance Company.*

The current status of the Consumer Protection Act is not well known either to the general public or to the legislature. In the current session of the legislation, 20 bills have been introduced amending the act, generally by adding protections. In the previous session, 23 bills were introduced, of which five became enacted, mostly designed to combat identity theft. As long as the *Globe* exemption is honored, laws and bills adding new violations sections to the MCPA may be totally ineffectual, since most businesses involved will argue they are exempt under *Smith* because they are regulated and legally authorized to engage in the business they are in.. The council has attempted to address this problem in two ways. First, we are preparing an amicus brief in *Hartman & Eichhorn v Dailey* to encourage the Michigan Supreme Court to limit the application of the exemption.. The idea that *Smith* would lead to the exemption being applied broadly to many entire industries, such as residential building contractors, was a claim made by the dissent, which the majority downplayed. Unless the court corrects recent results, the dissent will have been proven correct after all. Second, the council is attempting to educate the legislature about the true state of consumer protection in hopes of getting the exemption fixed. A major impediment is the vocal opposition of the Michigan Chamber of Commerce to any meaningful consumer protection act at all. This is based on a fallacious ideology that the market itself will correct any abusive treatment of consumers.

Our state supreme court has further limited consumer rights and remedies. A striking example of this is *Rory v Continental Ins. Co*, in which the court essentially held that there is no consumer law affecting contracts and that contracts involving consumers should be analyzed virtually identically to the way contracts involving sophisticated businesses are.

There is much to be done about educating our profession, the courts, the legislature, and the general public. One start is a consumer law theme issue of the *Michigan Bar Journal*, which will appear this fall. We encourage our members to help promote effective consumer law by working with the media and other local organizations. The general public will not be happy to realize that we have fewer protections as consumers than citizens of virtually any other state. Until the problem is better known, it will not be solved.

State Bar Launches Practice Management Resource Center

By Thomas W. Cranmer

[Ed note: The president of the State Bar of Michigan has requested that we include this letter in our newsletter. We are pleased to comply. Especially given the state of consumer law in Michigan today, it is important for Michigan residents that consumer law attorneys are able to remain in business in these trying economic times. Increasing the efficiency of the office is one way to help.]

As president of the State Bar of Michigan, I am proud to introduce a new membership benefit: the Practice Management Resource Center (PMRC). This new program will assist members in effectively and efficiently managing the business component of practicing law. It is designed to help attorneys manage everything from outfitting an office with the latest software that integrates time accounting, billing, and account management, to effectively marketing one's practice.

The PMRC is accessible through the State Bar's website at *http://www.michbar.org/pmrc/content.cfm.*

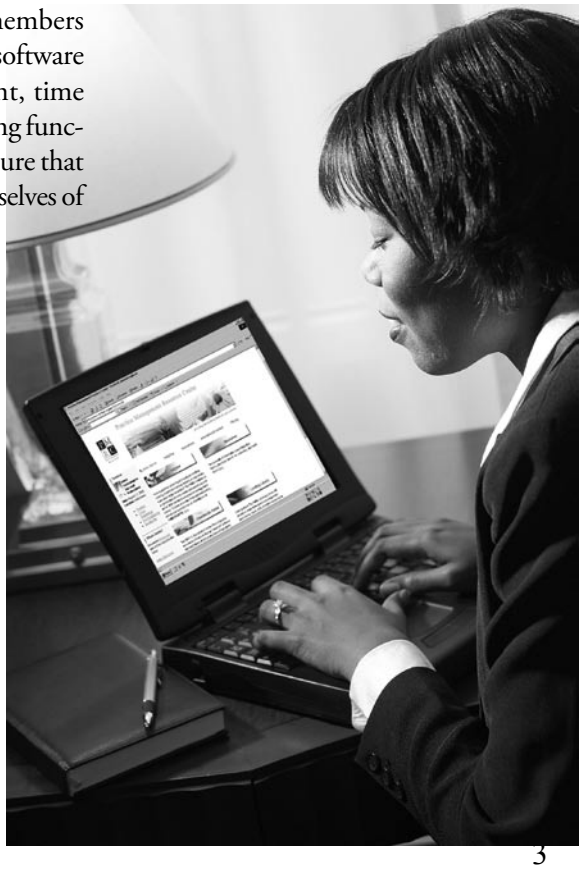
The PMRC contains different sections of information. The Resources section provides electronic access to articles, features, and forms on a variety of topics, such as business development, financial management, and calendaring and docket control. The Legal Software Directory contains links to dozens of vendors offering software applications to assist members in the day-to-day management of a law practice. And in the near future, a lending library will be available for members to search law practice management publications, tapes, CDs, and other resources. Those resources can then be requested online or at the State Bar of Michigan building in Lansing.

The PMRC also includes a Helpline, which is accessible by phone at 1.800.341.9715 or via e-mail at *pmrcHelpline@mail.michbar.org*. The PMRC Helpline is a confidential, informal service designed to quickly assist SBM members with practice management issues. Those accessing the Helpline can get practical guidance, suggestions, referrals, and information about a variety of practice management topics from a practice-management advisor.

In addition to the website, the PMRC has an onsite Educational Center located in the State Bar of Michigan's headquarters at 306 Townsend in Lansing. The Educational Center offers programs on a variety of topics, including "hands-on" software demonstrations on an informal, individual basis. For example, members and their staff can test-drive legal software in areas such as case management, time accounting, billing, and calendaring functions. We have made efforts to ensure that members statewide can avail themselves of this new service by taking the programs on the road in both Grand Rapids and Marquette. Bar associations interested in scheduling a program in their area should contact the PMRC Helpline.

The State Bar strives to be responsive to its members' needs. The PMRC was established in direct response to lawyers asking for help in keeping up with changes in technology, streamlining the way they practice, and enhancing the service they provide their clients. Many members in larger firm settings are simply trying to keep abreast of what tools are available. Others have undertaken career moves as a result of market changes or quality of life choices, placing many in the position of beginning solo and small firms midway through their legal careers. The PMRC is designed with both sets of needs in mind, providing practical guidance and useful resources.

I invite you to visit our website, and call or send an e-mail to let us know what you think.



Out of the Frying Pan: Foreclosure Rescue Scams Threaten Vulnerable Homeowners

By Fred Miller

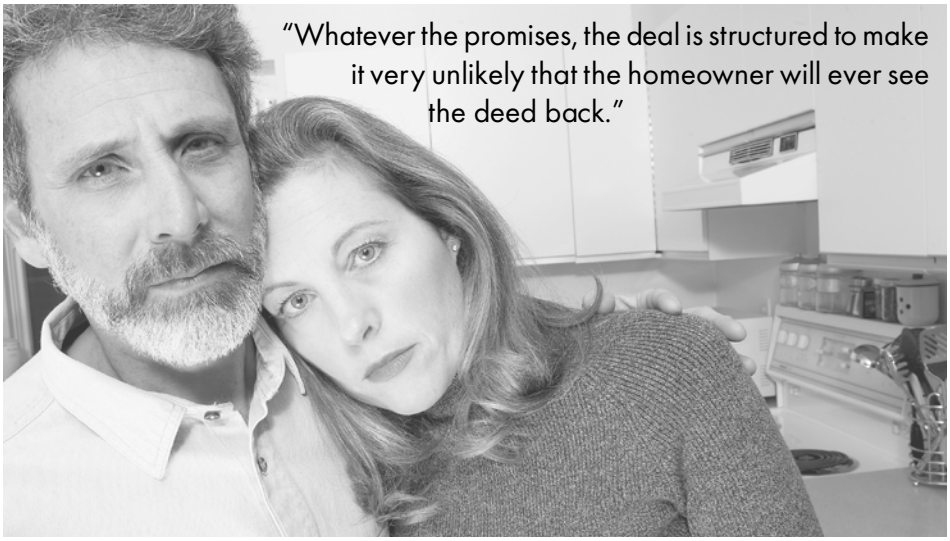
With growing frequency, residents in Michigan and many other states who face foreclosure are losing their homes, their equity, and their opportunity to redeem or sell, not to the financing mortgage holder but to third parties who have promised to help them keep their homes. The varied and ubiquitous schemes to accomplish this end are collectively called "foreclosure rescue scams."

Some overdue attention has been focused on this national phenomenon by a report released last year by the National Consumer Law Center. NCLC surveyed consumer and legal services lawyers and came up with examples from 18 states, including Michigan. In addition, teaching others to use the same techniques is a growing industry, weaving a web of similar scams that grows as the number of delinquent mortgages mushrooms.

NCLC identifies three types of foreclosure rescue scams. The first promises professional assistance in dealing with the mortgage delinquency, but provides little or no real help, while siphoning off the resources that might have been used to make real arrangements directly with the lender to save the house.

The other two versions result in deeds to the individual or company promising assistance, to a "trust" controlled by the scammer, or to an investor arranged by the scammer. The homeowner may or may not be told or understand that the documents signed give title to someone else. The homeowner is often told that the arrangements are a new loan that will save the house from foreclosure. If the scammer doesn't hide the fact that a quit claim deed is signed, there is a promise that the property will be deeded back in a short time, after some payments are made. There may be a lease with an option to buy signed, or these promises may only be oral.

Whatever the promises, the deal is structured to make it very unlikely that the homeowner will ever get the deed back. "Rent" payments are higher than the mortgage that the homeowner had trouble paying to begin with. Often the property that is mortgaged is conveyed by the scammer or the "investor" at the same time the deed is conveyed, for much more than the payoff of the original mortgage, with huge fees going to the scammer and sometimes an associated mortgage broker. The homeowner is confronted with the need to buy the house back for much more than the first mortgage balance, after a foreclosure has destroyed any remaining credit-worthiness.



"Whatever the promises, the deal is structured to make it very unlikely that the homeowner will ever see the deed back."

In some cases, the original mortgage is never paid off at all. One version of the scam now propagated by a Jackson man with a splashy website has the ownership of the house transferred to a trust, with the homeowners the ostensible beneficiaries but the perpetrator named as the trustee controlling the property. NCLC reports on seminars touting the approach to real estate "investing." Less up-front cash is needed, nor a new mortgage. The trust arrangement is said to circumvent the due-on-sale clause in the homeowner's mortgage. The trust can sell the property when the homeowners default on large rental payments, and the documents setting up the trust give a large portion of the equity to the scammer.

In all these schemes, the homeowner ends up in an eviction proceeding. The homeowner's lawyer, should there be one, has to convince the court that this is not really a landlord-tenant case, and instead contest the entire transaction.

Fortunately, there is useful Michigan case law. A series of cases hold that, where the parties contemplated payback of the amount tendered and return of the title to the property, the money was a loan

and the conveyance a constructive mortgage, even though titled a deed. Another recent, unreported case strongly supports the need for district courts to either address the equitable issues or remove the case to circuit court when serious questions of equitable ownership are raised.

Seen as a loan, the payback amounts are usually so high that the real interest rate far exceeds usury standards. If the new deed-holder-lender does enough of these transactions (five in the previous year), the true figures of the loan to the homeowner have to be disclosed under the federal Truth in Lending Act, but they never are.

Still, the homeowners, given their financial status, rarely do have lawyers. And even when a court agrees that the transaction is not what it appears to be and the homeowner is not stuck with the words on paper, the homeowner still is confronted in most cases with a mortgage company, the lender to the scam artist or "investor," which claims to be a good-faith lender without knowledge.

NCLC reports on efforts by attorneys general and state legislatures to attack this problem. The Colorado attorney general's office shut down one foreclosure "rescue" operator, securing a $1.1 million judgment involving transfer of title to over 100 Denver-area homes. NCLC reports, however, that the same people apparently have set up shop in Texas.

Attorneys general, and occasionally prosecutors, in other states are taking similar measures. In Michigan, the AG's office filed a cease and desist notice against one operation, Specialty Funding, and associated companies and individuals. Specialty Funding advertised as a "home saver" and "foreclosure specialist." The AG's office alleges that consumers were told documents were needed to help obtain refinancing, and not told they were signing over title or giving power of attorney to sell the house. Specialty Funding has not responded and may have quietly disappeared.

Several states have passed statutes that directly address foreclosure purchase arrangements, and some are now regulating foreclosure consultants. The statutes in Minnesota, California, and Maryland are among the most comprehensive, requiring notices, limiting contract terms, and providing for cancellation periods on entering into consultant or property purchase/repurchase agreements. So far, there is no action in Michigan to regulate or outlaw the booming business of grabbing the equity of distressed homeowners.

Litigating Foreclosure Rescue Scams I: Attacking the Equity-Stripping Deed

By Michael Nelson

[Ed. note: As this issue goes to press, the Western District federal court has just issued an opinion addressing several of the issues outlined below in the foreclosure rescue context. Moore v Cycon Enterprises*, Case No. 1:04-CV-800, Opinion of August 16, 2006. This case is being litigated for the plaintiffs by Section member Phillip Rogers, with assistance of Michael Nelson.]*

The key to litigating a foreclosure rescue scam in which a deed is given to the scammer or the scammer's "investor" is to treat the transaction as a loan, which is what the parties intended. Michigan courts recognize the doctrine of **equitable mortgage**. A deed, absolute on its face, will be declared a mortgage, where the parties intend that it serve as security for loan, especially where the transaction involves fraud or overreaching, as by a creditor over a financially distressed debtor.[1] Recognizing the transaction as a loan leads to a number of useful legal theories.

Usury. Using the amount paid out by the lender (to the homeowner and to existing mortgagees) as the amount financed and the amount that would have to be repaid by the homeowner to retain the home as the payments, the interest rate can be calculated. It will inevitably be more than the legal rate permitted under state law. As a result, the lender is barred from the recovery of any interest or other fees and court costs, and the homeowner is entitled to recover her attorney fees and costs.[2]

Truth in Lending. Since the transaction is, in reality, disguised credit, it is subject to the Truth In Lending Act,[3] including the rescission rights at §1635,[4] to the same extent as if the equitable mortgage were a direct security interest.[5] Because the required notice of the right to rescind was not given, the homeowner has an extended right to rescind the transaction for up to three years. When the borrower rescinds, the lender is required to cancel its security interest and refund any money paid. Courts have equitable authority to require that the borrower repay the amount actually paid to the borrower or the borrower's benefit, but this amount does not include any interest, fees or other costs. TILA allows the prevailing consumer to recover attorney fees, and provides federal jurisdiction. Because the annual percentage rate will inevitably exceed the interest rate trigger under the Home Ownership and Equity Protection Act,[6] the loan will be subject to HOEPA.

Michigan Credit Services Protection Act. [7] The Michigan statute covers any "person who, in return for consideration, attempts to provide or perform . . . advice or assistance regarding the foreclosure of a real estate mortgage."[8] It is a violation of the statute to make a false or misleading representation in the offer or sale of the service or to engage in any fraudulent or deceptive act.[9] The act provides a private cause of action for actual damages, attorney fees, and punitive damages,[10] a rarity in Michigan.

If the solicitation and signing were done at the person's home, the **Michigan Home Solicitation Sales Act**[11] may provide another ground to rescind the transaction. Mortgage rescue scams involve a number of blatant violations of the **Michigan Consumer Protection Act,**[12] if the scammers are not exempt. The **Mortgage Brokers, Lenders and Servicers Act**[13] provides a private cause of action for fraud, deceit, or deception in connection with the making of or offer to make a residential mortgage loan.

Michigan law provides ample ammunition to pursue the persons who participated in the mortgage rescue scam, undo the transaction, and recover the stolen equity, at least if it remains in the hands of one of the participants. Recovering the equity becomes more difficult, but not necessarily impossible, when the property has been mortgaged and the mortgagee may not have been involved in the scam. While a detailed discussion of the mortgagee's liability is beyond the scope of this article, theories of **civil conspiracy,**[14] an **aider and abettor**[15] or **joint venture**[16] may defeat the claim that the mortgagee is a holder in due course and subject it to liability on the other claims. The right to rescind under TILA continues against even an innocent assignee.[17] In the case of a HOEPA loan, a subsequent assignee of the mortgage is liable not only for rescission claims but also for all other claims unless the assignee can prove that it could not determine, through the exercise of due diligence, based on all the mortgage documents, that this was a HOEPA loan.[18]

Legislation is needed to outlaw equity theft through foreclosure rescue scams, but, in the meantime, civil lawsuits will have to do the enforcement.

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Litigating Foreclosure Rescue Scams II: Suing the "Foreclosure Consultant/Mediator"

By Lorray S.C. Brown, Consumer Law Attorney, Michigan Poverty Law Program

The foreclosure rescue scams commonly involve two types of practices: 1) foreclosure rescue consultants/mediators and 2) foreclosure rescue/equity stripping. This section of the foreclosure rescue article focuses on the consultants/mediators scammers.

The typical scenario in these foreclosure rescue schemes involves an individual or company who approaches a financially distressed homeowner, threatened with foreclosure. The individual/company offers to "save" the homeowner's home for a fee (sometimes ranging from $700 - $1200). The individual/company offers to be the homeowner's exclusive representative with the mortgagee to negotiate a payment plan, a new loan deal with the mortgagee, or to find a company to refinance the mortgage to prevent the imminent foreclosure. The individual/company accepts the fee from the homeowner and does very little (if anything) to prevent the foreclosure. The homeowner is then left to scramble at the last minute to prevent the foreclosure. At that point, the homeowner has no other option but to file an unwanted bankruptcy. In some cases, it is too late, and the homeowner loses the home. In many cases, the homeowner on his/her own could easily have negotiated a payment plan with the mortgagee and prevented the foreclosure and the unwanted bankruptcy.

In litigating these cases, advocates can raise the following legal claims (in addition to the Michigan Consumer Protection Act[1]): 1) the Michigan Credit Services Protection Act[2] and 2) the Federal Credit Repair Organization Act.[3]

Credit Services Protection Act

The Michigan Credit Services Protection Act (MCSPA) prohibits a credit services organization from charging or receiving "from a buyer of services money or other valuable consideration before completing performance of *all* services the credit services organization has agreed to perform for the buyer."[4] MCSPA also prohibits the credit services organization from making false or misleading representations about its services and engaging in fraudulent or deceptive practices.[5]

The most important aspect of MCSPA is that the credit services organizations are not allowed to charge up-front fees. All services must be completed before any fee can be collected. Many foreclosure rescue consultants/mediators charge up-front fees. In fact, the design of the scam is to "collect the money and run."

These foreclosure rescue consultants/mediators should fall within the definition of "credit services organizations" under the MCSPA. The MCSPA defines a credit services organization as a person who "in return for consideration" provides services "as an intermediate between a debtor and a creditor on behalf of the debtor regarding credit that was extended prior to any agreement to have the credit services organization serve as an intermediate."[6]

Advocates, however, should make sure that these foreclosure rescue consultants/mediators are not 501c(3) nonprofits. The MCSPA exempts nonprofit corporations that are exempt from taxation under section 501(c)(3) of the IRS Code.[7] Some foreclosure rescue consultants/mediators advertise that they are nonprofits, but they may not be 501c(3) nonprofits.

Credit Repair Organization Act

The Federal Credit Repair Organization Act (CROA) similarly applies to credit repair organizations that provide advice or assistance to any consumer with regard to *any* activity or service that improves a consumer's credit record.[8] Most foreclosure rescue consultants/mediators should fall within this statutory definition.

CROA prohibits the credit repair organizations from making misleading representations about services and engaging in fraud or deception.[9] Significantly, it also prohibits these organizations from accepting any payment from consumers before fully completing all services.[10] CROA also does not apply to tax-exempt 501(c)(3) non-profit organizations.[11]

Endnotes

1 MCL 445.901 et seq.
2 MCL 445.1822 et seq.
3 15 USC 1679 et seq.
4 MCL 445.1823(b) (emphasis added).
5 MCL 445.1823(d), (e).
6 MCL 445.1822(b)(vi).
7 MCL 445.1822(c)(ix).
8 15 USC 1679a(3).
9 15 USC 1679b(a)(3), (4).
10 15 USC 1679b(b)
11 15 USC 1679a(3)(B)(i).

State Bar Consumer Law Section 2006 Election Notice

The State Bar Consumer Law Section will hold its 2006 Officer and Council Members Election on **Thursday, September 14, 2006, at 2:00 pm**, at the State Bar Annual Meeting at the Ypsilanti Marriott at Eagle Crest.

Nominees for Officers:
Chairperson: Lorray S.C. Brown
Chair-elect: Lawrence J. Lacey
Treasurer: Terry J. Adler
Secretary: Dani K. Liblang

Nominees for open Council seats, expiring 2009:
Gary Victor
Lauren C. Roberts Thomas
Julie A. Petrik

Nominations will also be accepted from the floor.

Litigating Foreclosure Rescue Scams
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Endnotes

1. *Fred L. Alpert Industries v Oakland Metal Stamping Co.,* 379 Mich. 272, 278-79; 150 N.W.2d 765 (1967), G*rant v Van Reken*, 71 Mich. App. 121; 246 N.W.2d. 348 (1976).
2. MCL 438.32.
3. 15 U.S.C. 1601 *et seq.*
4. 15 U.S.C. 1635.
5. *James v Ragin*, 432 F. Supp. 887 (W.D.N.C., 1977), *Long v Storms*, 622 P.2d. 731 (Or. Ct. App. 1981).
6. 12 CFR _ 226.32(a)(1)(i).
7. MCL 445.1821 et seq.
8. MCL 445.1822(b).
9. MCL 445.1823.
10. MCL 445.1824.
11. 445.111 at seq.
12. MCL 445.901 *et seq.*
13. MCL 445.1651 *et seq.*
14. *Temborius v Slatkin,* 157 Mich App 587, 599-600; 403 NW2d 821 (1986).
15. *Aetna Casualty and Surety Co v Leahy Construction Co,* 219 F.3d 519 (CA 6, 2000).
16. *Reed & Noyce v Municipal Contractors, Inc,* 106 Mich App 113, 117; 308 NW2d 445 (1981).
17. 15 USC § 1641(c)
18. 15 USC § 1641(d)(1).

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