Consumer Law

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State Bar of Michigan Consumer Law Section

Keynote Speaker Patricia Sturdevant Addresses Section's Annual Meeting

By Carolyn Bernstein

National Association of Consumer Advocates (NACA) General Counsel, Patricia Sturdevant, spoke to the Consumer Law Section at the Annual State Bar Meeting in Grand Rapids in September. NACA is a nonprofit

Gary M. Victor (left), second recipient of the annual Frank J. Kelley Consumer Law Award, presented by the Consumer Law Section at its annual meeting, received congratulations from Clarence Constantakis, Section treasurer. Mr. Victor, a professor at Eastern Michigan University, is a pioneer in litigation under the Michigan Consumer Protection Act.

association of attorneys and consumer advocates dedicated to addressing abusive and fraudulent consumer practices through networking and trading of ideas and information. Sturdevant's topic, "Improving Your Practice," was warmly received.

Sturdevant started out as a single practitioner in a store front office in California handling routine consumer defense cases. Her big break came on a case involving Avco's sale of insurance to consumers for their financed purchases of goods. Each time Sturdevant's client purchased a good, she bought more insurance—theft insurance, fire insurance, burglary insurance. When the client's goods were stolen, however, the insurance company denied her theft claim. Upon a close inspection of the policies, Sturdevant determined that the policies' benefits were entirely illusory; none of the policies would *ever* pay out because of their exclusions and limitations.

Sturdevant brought a UDAP* claim and exposed the unconscionable difference between Avco's income on the sales of insurance verses the amount paid on claims. Though she could not get the judge to approve a class action, she was able to pursue injunctive relief forcing Avco to stop its sale of deceptive insurance. The eventual award to be split among all affected consumers? Two million dollars.

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From the Chair

Section Initiates ListServ

By Ian Lyngklip
Section Chairperson

The Consumer Law Section is continuing its efforts to facilitate communication among the state's consumer advocates. In an effort to do this, the Section Council adopted a proposal launching an Internet listserv which will be administered through the State Bar's Internet server.

What It Is

The listserv is an automated distribution center for e-mail messages that can be posted to all subscribers to the list. The purpose of the listserve is to act as a computerized bulletin board—or e-mail chat—for the members of the Consumer Law Section. An e-mail message posted to the list will be sent to all the members of the listserv, who will then have an opportunity to comment and respond to that message. The Section Council envisions that the list will facilitate discussions in the following areas:

1. the substantive law of consumer protection in Michigan,
2. case preparation, management, and strategy,
3. projects of the Consumer Law Section,
4. section notices and business.

How to Join & Leave the List

There is no fee for joining and all members of the Section who have provided the State Bar with an e-mail address will initially be subscribed to the list. All section members are invited to join and participate. If you are a member of the section and you have not received an e-mail notice from the listserv, you can join by sending an e-mail address to *ianlaw@pipeline.com* and ask to join the section's e-mail listserv. If you have begun receiving messages and do not want to be a member, simply post a response to the list asking to unsubscribe.

How to Post a Message or Response

If you have a question about consumer law in the state or the section's current projects, just send an e-mail message to *consumerlaw@lists.michbar.org*. The message will then be routed to all the members of the list.

The council hopes that this listserv will become a valuable tool that section members can use in everyday practice. The listserve will put you in touch with other lawyers who can provide insight based on their experience and knowledge in this growing area of the law. We hope that this will become one of the section's most valuable benefits and will be frequently used by the members of the section. ■

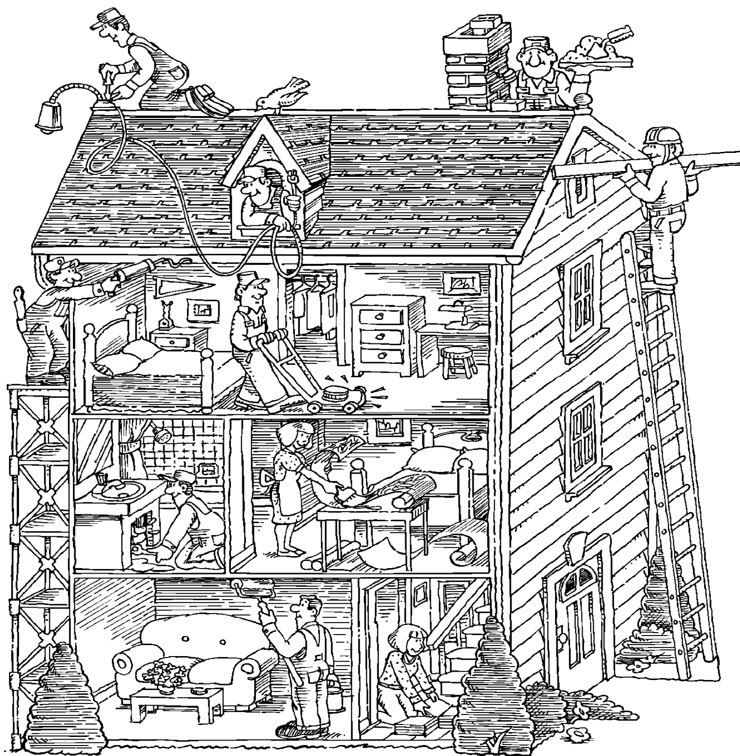
Patricia Sturdevant Addresses Annual Meeting

Continued from page 1

Like past speakers, Sturdevant stressed the importance of screening consumer protection issues carefully and quickly before you accept a case. Not only does this enable you to avoid lost causes, it helps you develop long-term relationships with clients who may appreciate that you aren't wasting their time or creating false expectations.

Don't get bogged down worrying about the minimal damages a client may have sustained, advises Sturdevant. Instead, focus on how much the defendant gained from the illegal behavior. Consider the difference such a focus shift made in another of Sturdevant's cases in which consumers were overcharged $5 in late fees by a bank. Though each consumer lost only $5 for each late payment, the scheme netted the bank over $5 million, making pursuing the case more than worthwhile.

If you are a small practitioner, Sturdevant advises avoiding class actions that are not only expensive for you, but also expose the named plaintiff to court-assessed costs and fees. Instead, she recommends bringing Michigan Consumer Protection Act claims on behalf of individuals that include requests for an order enjoining the offensive business practice plus restitution to *every* consumer affected. This approach enables small practitioners to settle cases without the court approval necessary in class actions and keep costs and liability exposure to a minimum.



Sturdevant discussed some of the more popular scams to be inflicted on consumers lately. Yield-spread premium lending (see related article in this issue) nets huge fees for mortgage brokers. These brokers target elderly and low-income consumers with equity in their homes to cash out credit card debt for home equity loans at higher interest rates than they actually qualify for. The brokers get kickbacks for referrals to higher-rate loans, but the consumers are still charged a fee for getting a low rate.

The ever-present home improvement scams are still rampant, according to Sturdevant. Home improvement companies charge exorbitant prices for shoddy workmanship in low-income communities. They can often be identified through their advertisement of FHA or HUD funds.

Insurance packing of worthless disability or credit life insurance without the consent or knowledge of consumers frequently arises when the insurance company is a wholly owned subsidiary of the finance company. Sturdevant suggests contacting the insurance commission under the Freedom of Information Act for information on the amount of premiums paid in and the amount of claims paid out.

Sturdevant also recommends that true consumer advocates take a more active role in preventing less scrupulous practitioners from taking huge attorney fees awards for worthless settlements in class action consumer cases. One example of this practice, raised by Peter Bagley, is the Art Van class action in which class members were given coupons worth 15% off their next Art Van purchase while plaintiffs' attorneys received $1.6 million in settlement of a claim that netted Art Van $7 million in overcharges. Sturdevant has promulgated class action settlement guidelines for NACA; coupon settlements are almost *never* acceptable. To stop this trend, she recommends filing objections and threatening intervention on behalf of consumers who aren't being fairly represented in class actions.

NACA is a unique resource for consumer practitioners. It publishes a newsletter and offers valuable information to NACA members through its website, ***www.naca.net***. For a membership packet, contact NACA's website or e-mail address at ***nacabos@shore.net***

**A generic term for unfair deceptive acts and practices which refers to the consumer law statutes in the various states.*

THE COURT OF APPEALS PROVIDES GUIDANCE INTERPRETING POTENTIAL VIOLATIONS OF THE MCPA

By Ian B. Lyngklip and Gary M. Victor

During 1999, the Michigan Consumer Protection Act (MCPA)[1] was the subject of considerable attention by the Court of Appeals.[2] As is usually the case with Court of Appeals' opinions, this past year's decisions were a mixed bag. What those of us that work or may work on MCPA cases hope for in appellate opinions is a reasoned analysis of the statute given its legislative intent. In deciding how to proceed as a practitioner, it is the well-reasoned analysis that is most helpful. Unfortunately, many courts simply make conclusionary holdings with little analysis; still others are bold enough to ignore the plain wording of the MCPA to create interpretations made of whole cloth.[3] In terms of the quality of its analysis, Zine v Chrysler Corp[4] *is maybe the most important MCPA decision of 1999.*

In Zine, *the Court had to interpret three MCPA subsections defining unfair and deceptive trade practices.[5] In doing so, it provided guidance on four questions:*

(1) What is the meaning of the word "transaction" in the MCPA?

(2) Can conduct after a transaction is completed lead to MCPA liability under MCL §§445.903(1)(n) or (cc).

(3) Can omissions, as opposed to representations, cause a probability of confusion as to the rights, obligations, or remedies of a party to a transaction?

(4) What does the word "material" mean in the context of the MCPA?

The Court's analysis of these four questions will be discussed below.

The Case

The plaintiffs in *Zine* were purchasers of new motor vehicles. Along with their vehicles, the plaintiffs also received informational brochures describing their rights under the lemon laws of several states. Notably, there was no summary of their rights under Michigan law. The plaintiffs brought action under MCPA. They claimed that the brochure was misleading and confusing to Michigan consumers in violation of §§MCL 445.903(1)(n), (s) and (cc) of the Act. These sections read as follows:

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

The Court rejected the plaintiffs' case almost entirely. Nonetheless, the case represents an important addition to the statute's jurisprudence. The Court took great care in laying out the defects of the claim, and in so doing, also gave a road map to pleading violations under the Act.

What is the Meaning of "Transaction"?

The word "transaction" is contained in many of the thirty plus subsections of §445.903(1) defining unfair and deceptive trade practices.[6] The *Zine* Court looked to both legal and general dictionaries in determining the meaning of the term.[7] The Court concluded that "a 'transaction' is the business conducted between the parties."[8] Applying this definition, the Court held that the "transaction" was "the negotiations that concluded in Zine's agreement to buy the truck."[9] Having defined "transaction" as the sale of the vehicle, the Court next addressed whether post-sale conduct could lead to MCPA liability.

Can Post-Sale Conduct Give Rise to Liability?

Chrysler claimed that its post-sale statements could not give rise to liability under subsections 903(1)(n) and (cc), since these provisions refer to information relevant to the "transaction." Essentially, Chrysler claimed that post-sale conduct is irrelevant to transaction. The Court rejected this blanket immunity and proceeded to analyze these two subsections on their own terms.

Subsection (cc) prohibits omissions material to the transaction in light of representations made positively. The Court interpreted the subsection to refer only to "information withheld during the negotiations and up to the time of the transaction."[10] In this case, the "positive" statements—those con-

tained in the brochure—were made after the transaction. Therefore, the omitted information could not have been material to the sale and did not trigger subsection (cc). For purposes of subsection 445.903(1)(cc), then, post-sale conduct cannot give rise to MCPA liability.

But the Court's analysis of MCL §445.903(1)(n) was quite different. That subsection creates liability for causing a probability of confusion as to the legal rights, obligations, or remedies of a party to a transaction. The Court held that both pre-sale and post-sale conduct could cause such a probability of confusion.[11] So, for purposes of subsection (n), post-sale conduct can give rise to liability under the MCPA. Having found that post-sale conduct could lead to liability under the MCPA, the Court next considered whether that conduct could consist of omissions or had to be affirmative representations.

Can Omissions Cause a Probability of Confusion?

Chrysler also claimed that a mere omission could not cause a probability of confusion within the meaning of subsection (n). It asked the Court to adopt a position requiring an affirmative statement or misrepresentation of rights as a prerequisite to this type of claim. The Court rejected this view. Instead, the Court held that both representations and omissions could cause a probability of confusion as to legal rights, obligations, or remedies of a party to a transaction.[12] Therefore, for purposes of subsection (n), a plaintiff can allege that either or both an omission or an affirmative representation caused the probability of confusion.

What is the Meaning of the Word "Material"?

Perhaps most importantly, the *Zine* Court gave the first clear definition of materiality under the Act. Several subsections of §445.903(1) require a showing materiality. These include two of those relied upon by *Zine's* plaintiff's—subsections (s) and (cc). In considering the issue of materiality, the Court analyzed misrepresentation cases and arrived at the following standard:

> *By analogy, then, a material fact for purposes of the MCPA would likewise be one that is important to the transaction or affects the consumer's decision to enter into the transaction.*[13]

This standard is quite similar to the proposed MCPA standard jury instruction on materiality:

> ***Materiality***
>
> *(A section) (Sections) of the Act which Plaintiff claims (was) (were) violated prohibit(s) (misrepresentation of) (failure to disclose) a material fact.*
>
> *A material fact is one which is important to the transaction, or one which the Defendant knew or should have known would influence the Plaintiff in entering into the transaction. It need not be the sole or a major reason for the transaction.*[14]

Both *Zine* and the instruction allow a plaintiff to meet his burden by showing that the information was "important" to the transaction. *Zine* differs in allowing the plaintiff to show that the information would "affect" the decision to enter into the transaction, while the instruction requires the plaintiff to show that the defendant should have known it would have affected the plaintiff's decision. In this respect, *Zine* may be viewed as more favorable to the consumer in that it appears to rely on the consumer's subjective decision to buy rather than focusing on the seller's knowledge of the consumer's needs.

Conclusion

While the plaintiffs in *Zine* did not prevail on most of their claims, the case provides important and reasoned guidance on four issues regarding the interpretation of the MCPA. The Court interpreted the word "transaction" in the context of the facts of *Zine* to be that period starting with negotiations and ending with the consummation of the sale. The Court held that post-sale conduct can give rise to liability under the Act where that conduct causes a probability of confusion as to the legal rights, obligations, or remedies of the parties. The Court also held that omissions—rather than just affirmative misrepresentations—can cause a probability of confusion under the Act. Finally, and perhaps most importantly, the Court has defined materiality under the MCPA. Under the holding in *Zine*, to be "material," a fact is one that is "important to the transaction or affects the consumer's decision to enter into the transaction."[15] This standard appears to incorporate the subjective analysis of whether the plaintiff would have entered into the contract had the true facts been known.[16] If the answer is "no," then the fact omitted or stated is material.

Endnotes

1. MCL §445.901, *et seq.*
2. *See, e.g., Zine v Chrysler Corp,* 236 Mich App 261 (1999); *Nesbitt, v American Community Mut Ins Co,* 236 Mich App 216 (1999); *Aaronson v Lindsay & Hauer Lintern Ltd,* 235 Mich App 239 (1999); *Head v Phillips Camper Sales & Rental, Inc,* 234 Mich App 94 (1999); and *Jackson County Hog Producers v Consumers Power Co;* 234 Mich App 72 (1999).
3. See *Smith v Globe Life Ins,* 460 Mich 446 (1999).
4. 236 Mich App 261 (1999).
5. MCL §§445.903(1)(n), (s) and (cc).
6. *See, e.g.,* §§445.903(1)(m), (n), (o), (q), (t), (u), (w), (x), (y), (bb), and (cc).
7. 236 Mich App at 279-281.
8. *Id* at 280.
9. *Id.*
10. *Id.*
11. *Id* at 281
12. *Id* at 281-282.
13. *Id* at 283.
14. Proposed MCPA Standard Jury Instruction Defining Materiality.
15. 336 Mich App at 283.
16. *Id.*

JUNK FEES:
What They are and What to do About Them

By John E. Anding and Christopher G. Hastings

What is a Junk Fee?

When you take out a mortgage loan, you expect to pay interest; perhaps you will have to pay an origination fee or a broker fee, too. After all, that's where the bank or broker makes its money. Or is it?

Take a look at the Settlement Statement or Itemization of Amount Financed from your last loan, or your client's. Chances are, you will see a bewildering array of charges—large and small. Generally, these fees fall into three camps. First, you have the classic finance charges: an origination fee the bank takes to make the loan; a discount fee to buy down the interest rate; a broker's fee to compensate the agent who brought you to the lender. The second group of fees are the "third party charges." They may include appraisal fees, recording fees, title insurance, and the title company's fee for closing.

What's left over is probably a "junk fee," and what it is, and what it is for, may be the subject of serious debate. Application fees, processing fees, document preparation fees, closing fees, and underwriting fees are all likely to be junk fees. What they are, in all probability, is no more than additional profit to the bank. Junk fees may provide your client with a much-needed defense to collection or foreclosure, and—just maybe—they can provide you with a potential class action claim that is well-suited for class certification.

Why are Junk Fees Bad?

Junk fees are bad because they are profit masquerading as something else. Though not necessarily illegal *per se*, junk fees are often assessed in a manner that violates state or federal law, or both.

Many states have one or more provisions limiting or forbidding junk fees. For example, the Uniform Consumer Credit Code in §2.501, forbids all junk fees except those associated with add-on insurance. Most states exhibit quite a jumble of finance laws applying to different kinds of lenders, and many of these laws impose limitations on the kinds of junk fees charged. Some states limit some lenders' junk fees to the lender's actual costs incurred in providing the service; some prohibit entire categories of fees; and some limit junk fees to a single "processing fee" capped at a percentage of the loan amount. To add to the chaos, federal law preempts some of these junk fee statutes. (This issue is discussed *infra.*)

On the other hand, federal Truth-in-Lending law limits not the charging of junk fees but the manner in which they are

charged. Most fees that are not third-party fees must be disclosed as part of the finance charge pursuant to Regulation Z, 12 CFR §226.4. Significantly, §226.4(c)(7) allows a number of "real estate related" fees to be excluded from the finance charge only if they are "*bona fide* and reasonable."

An Example: The Document Preparation Fee

Many mortgage lenders charge a fee for "document preparation" of anywhere from \$100-\$400. If you ask a lender what the fee is "for," you may get a variety of answers (or none). But, HUD's definition in *Buying your Home: Settlement Costs and Helpful Information* is the right one: "Document Preparation: this is a separate fee that some lenders or title companies charge to cover their costs of preparation of final legal papers, such as mortgage, deed of trust, note or deed."

Conforming mortgage lenders (lenders who sell their loans to FNMA) are required to use FNMA-approved forms for notes and mortgages (or deeds of trust), and most nonconforming lenders use these forms, too, because they facilitate sale on the nonconforming secondary market. As a practical matter, the "final legal papers" are prepared by clerical staff using inexpensive mortgage software by entering a handful of data into a computer: name, address, loan amount, interest rate, etc. As a result, any document preparation fee that is more than a nominal amount should be disclosed as part of the finance charge (unless the lender has an invoice from a third party for the same amount). Many banks charging hundreds of dollars for document preparation neglect to disclose the document preparation fee as a finance charge, in an ef-

fort to keep the APR as "competitive" as possible. In doing so, they have misled the consumer as to the finance charge and violated Regulation Z.

They may also have violated a state junk fee statute. While your state's statutes may not specifically provide a private right of action, most state UDAP laws are more than broad enough to encompass an illegally charged junk fee.

Preemption of State Junk Fee Statutes

Before you proceed based on a state law junk fee statute, consider that a savvy defendant will probably raise issues of preemption. If your target defendant is a federal savings bank, state laws are almost surely preempted by a regulation of the Office of Thrift Supervision purporting to "occupy the entire field of lending regulations for federal savings associations." 12 CFR §560.2(a). Even if your target is a national bank, mortgage company, or state-regulated bank or thrift, it may argue that the state law provisions are preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 USC §1735f-7a, which purports to preempt in federally related[1] mortgage loans "the provisions of the constitution or laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges ...."

States are permitted to opt out of DIDMCA by adopting a law so providing (12 USC §1735f-7a(b)), so your first line of defense is to see if yours has done so. If not, you may still have a good argument that DIDMCA does not apply: it has been narrowly construed by the courts. The courts have been guided by an Opinion of the Office of the General Counsel, Federal Home Loan Bank Board (1986 FHLBB Lexis 150), which suggests preemption should be limited to those laws establishing a usury ceiling. Other consumer laws are not preempted.

Congress also wished to tailor its preemption of state usury laws to **preserve** limitations on noninterest charges designed to protect borrowers insofar as such preservation does not frustrate the achievement of the overriding goals of the Act.

Opinion, *supra.* Guided by the Board's opinion, several courts have refused to apply DIDMCA preemption to consumer protection claims growing out of junk fee limitations. *E.g.*, *Weatherman v Gary Wheaton Bank*, 676 NE2d 206 (Ill App 1 Dist 1996) [DIDMCA does not preempt state law claim based upon a "mortgage assignment recording fee"]; *Grunbeck v Dime Savings Bank of NY, FSB*, 74 F3d 331 (1st Cir 1996) [DIDMCA does not preempt New Hampshire's Simple Interest Statute].

Many questions concerning the scope of DIDMCA preemption remain to be answered by the courts, but state laws which limit junk fees in a manner that does not relate solely to an overall usury cap appear poised to survive the DIDMCA preemption argument.

Strike Early on Discovery

Your target defendant is likely to try to develop an after-the-fact analysis of "costs" associated with the document preparation fee, in order to justify its size. Early deposition discovery is important to counter these tactics: get the bank's personnel to tell you precisely what is involved in document preparation and what the fee is "for," before a forensic accountant gives them a revisionist history to follow.

You should also take a look at your state's unauthorized practice of law (UPL) statutes. Preparing closing documents for a fee may constitute the unauthorized practice of law in your state. Your target defendant may find that its efforts to escape the fact that document preparation is just filling in blanks on standardized forms, lead it into the equally dark quagmire of unauthorized practice.

Class Action

Claims based on improperly assessed junk fees are ideal for the class action vehicle because all of the individual issues (Was the charge assessed? In what amount? How was it disclosed?) are resolved by looking at one or more standard form documents: a HUD-1 settlement statement; a truth in lending disclosure and itemization. Other issues are common to all class actions, because such standardized documents "must be given a consistent, uniform interpretation." *Sharon Steel Corp. v Chase Manhattan Bank, N.A.*, 691 F2d 1039, 1048 (2d Cir 1992) *cert den*, 460 US 1012 (1993). Among the legion of cases with similar holdings are *Cope v First National Bank of Atlanta*, 97 FRD C83, 694. See also *General Telephone in the Southwest v Falcon*, 457 US 147, 155 (1981).

Conclusion

Junk fee claims require homework, particularly state law claims which require you to navigate the complex waters of federal preemption, but many profit-obsessed lenders overlook the restrictions on this ready revenue source. Moreover, the consumers who sit on your jury are probably already sensitized to the junk fee issue through their personal experience with both loans and depository accounts. They may just be fed up and unwilling to take it any more.

John E. Anding and Christopher G. Hastings are partners in the Grand Rapids law firm of Drew, Cooper & Anding. They share over 30 years of experience preparing and trying complex commercial and consumer law cases.

Endnotes

[1] The easy answer to the question of whether a particular mortgage loan is federally related is "yes." The precise definition of a "federally related" loan is at 12 USC §1735f-7(a)(1)(C). As a practical matter, the only mortgage loan falling outside the definition would be one by a noncommercial lender such as a family member.

The MCPA after *Smith v Globe*

By Frederick L. Miller

Now that consumer practitioners have had a chance to recover from the initial shock of the Supreme Court's bizarre analysis of the Consumer Protection Act[1] in *Smith v Globe*, 460 Mich 446; 597 NW2d 28 (1999), it's time to address the aftermath. How much is left of the MCPA?

Smith tackles the most contentious issue under the MCPA: What transactions and conduct are exempt under Sec. 4?[2] Two subsections are at issue. Sec. 4(1)(a) exempts transactions or conduct "specifically authorized" under laws administered by state or federal regulatory boards or officers. Sec. 4(2) exempts conduct from MCPA liability if the conduct also violates one of five regulatory codes—the Insurance Code, the Banking Code, the Motor Carrier Act, the Public Service Commission Act or the Non-Profit Dental Care Corporation Act. Section 4(2) exemptions, however, do not apply to actions filed by individuals (thus applying only to actions brought by the Attorney General).

Past court decisions have always said the MCPA should be interpreted broadly to accomplish its purpose of consumer protection. Logically, exemption sections should, therefore, be interpreted narrowly.

With this approach in mind, the intent of these exemptions is not hard to fathom. There are many regulations that authorize, and even require, contract language or other actions by businesses that could be construed as violating some provision of the MCPA. Sec. 4(1)(a) precludes suits that target approved activities as MCPA violations. For instance, charging 25% interest on a used car loan to a person with good credit may be "grossly in excess" of market rates, violating Sec. 3(1)(z) of the MCPA. However, usury statutes authorize used car transactions with interest charges up to 25%. The exemption in Sec. 4(1)(a) may, thus, bar a suit charging that the 25% interest rate violated the MCPA, since the transaction was "specifically authorized" by regulatory legislation.

Another example involves the contradictory rules on cancellation of consumer contracts. The same financed home improvement contract may have three notices of cancellation rights authorized by law. Under the Home Improvement Finance Act, one notice will say the consumer has until 5:00 pm the next day to cancel. In addition, in some situations, two separate sets of three-business-day cancellation notices will be required; one under the Home Solicitation Sales Act and another under the federal Truth-In-Lending Act. The expiration dates for the three-day notices may differ from each other. Three contradictory notices will certainly cause a probability of confusion about legal rights and remedies, which the MCPA prohibits under Sec. 3(1)(n). However, giving all three is authorized (and required), and thus not an actionable violation of the MCPA under Sec. 4(1)(a).

> **"The Supreme Court mocks such a 'common-sense' reading of the MCPA exemption provisions"**

Sec. 4(2) is addressed at very different concerns. While (4)(1)(a) protects conduct *authorized* elsewhere in law, (4)(2) keeps the Attorney General from using the Act against conduct *prohibited* under five specific regulatory laws. The goal is to require the Attorney General to work with, say, the Insurance Commissioner on problems that are addressed by the Insurance Code, instead of using the MCPA to go it alone.

The Supreme Court mocks such a "common sense" reading of the MCPA exemption provisions. The Court rejects a narrow reading of Sec. 4(1)(a). In a mind-bending passage, the Court majority says, "[W]e 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 is prohibited." The sale of credit insurance is authorized by the Credit Insurance Act, the Court says, so these credit insurance transactions are exempt.

What do we make of Sec. 4(2) then? If the Sec. 4(1)(a) exemption is so broad, why is this section even there? If all conduct in the sale of insurance, for example, is already exempt under the Court's broad reading of 4(1)(a), why did the legislature exempt some conduct a second time, as to Attorney General actions, under 4(2)? No explanation is offered. Instead, the Court makes a modest and equally illogical leap in the opposite direction from its approach to 4(1)(a). The Court says that, by stating that this additional, and now re-

dundant, exemption section does not apply to actions by individuals, the Legislature intended to allow some individual actions against regulated industries that would otherwise be exempt under 4(1)(a). Sec 4(2) is read to include an unstated exception to the exemptions in 4(1)(a). Go figure.

What are We Left With?

1. Consumers can sue insurance companies under the MCPA, but only if the conduct constituting an MCPA violation is also unlawful under some provision of the Insurance Code. This is the language of Sec. 4(2) that the Court found was an exception to the exemption. Fortunately, there are a number of Code provisions that may be useful. Failure to pay benefits on a timely basis is a violation of MCLA 500.2006 and a failure to provide the promised benefits under Sec. 3(1)(y) of the MCPA. False statements in the sale of insurance are unlawful under MCLA 500.2007 and 500.2018 and are violations of the MCPA.

2. At least some businesses are not sufficiently regulated to be covered by Sec. 4(1)(a) exemptions, but how many and which ones is most uncertain. The Court says that insurance companies are not "like most businesses." 597 NW2d at 38, fn 12. Implicitly, the Court is saying that most businesses are not exempt under 4(1)(a). But it's hard to find a business that is not subject to some sort of regulation or licensing. Where is the line?

The best reading of this odd decision would limit the "general transaction" approach to 4(1)(a) exemption to insurance companies. As the Court notes at the outset of its discussion, all insurance policies, certificates, applications, notices, binders, and riders have to be submitted to and approved by the Commissioner of Insurance. The "general transaction" for insurance sales is more "specifically authorized" than virtually any other kind of consumer transaction. Very few other businesses have, in theory at least, this level of state oversight. Businesses whose transactions are not subject to this level of required regulatory approval can be distinguished from insurance, leaving them outside the bounds of *Smith v Globe.*

Any broader reading of *Smith* will create anomalies. Sec. 3(1)(o) of the MCPA prohibits "Causing a probability of confusion" as to credit, if credit is extended in the transaction. However, virtually all consumer credit transactions are regulated by state and federal laws and regulations. If *Smith* is read broadly, this MCPA section is meaningless.

Read narrowly to apply only to businesses with the level of government approval and oversight given the insurance industry, the Court's decision makes at least some modicum of sense, and will not decimate the MCPA. However, there is much in the Court's analysis that will be used by attorneys for businesses in an attempt to create an exemption broad enough to accommodate every major business in the state. Use of the Act now will involve a fight in almost every case. Ultimately, only a changed Supreme Court or a consumer-friendly Legislature can make the MCPA a reliable protector of Michigan consumers again.

Endnotes

[1] MCL 445.903

[2] MCL 445.904

Help Build the Section Brief Bank with MTLA

The Consumer Law Section will work with the Michigan Trial Lawyers Association (MTLA) to establish a brief bank for consumer law pleadings and briefs.

The State Bar of Michigan does not have brief bank facilities for sections. MTLA has agreed to add consumer law materials submitted by the Consumer Law Section to its established and well-organized brief bank. Section members will be able to access the Section's consumer law materials in MTLA's brief bank, at the reduced prices paid by MTLA members.

Section members are asked to submit complaints, motions, memos and briefs on Consumer Protection Act and other state and federal consumer law issues to:

Clarence R. Constantakis
Brief Bank Chairperson
5605 Kaufman
Dearborn Heights, MI 48125

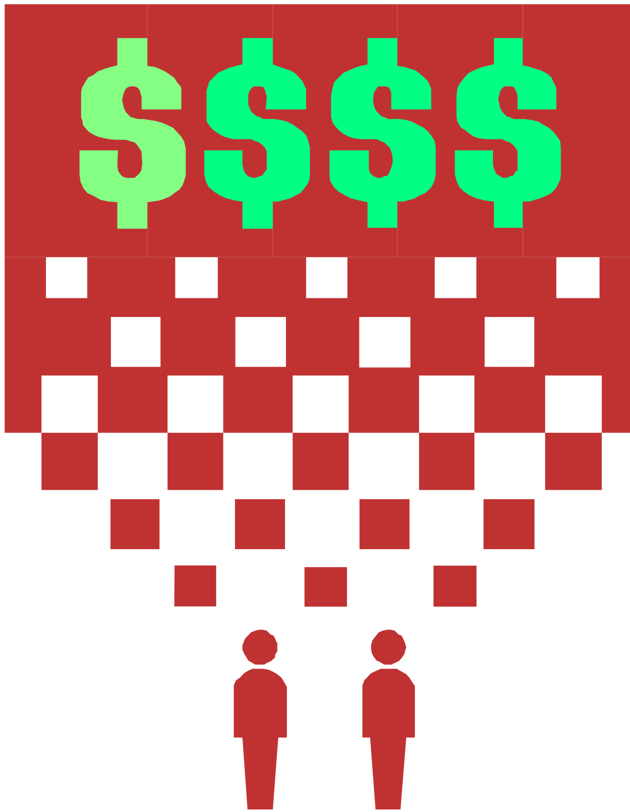
Members will be notified when consumer law materials have been filed and indexed in the MTLA brief bank, and are ready to be used. The Section will also provide members with a list of available topics and information on ordering copies.

Help us out by submitting your briefs and pleadings

The Brief Bank Committee thanks Ian Lyngklip, Carolyn Bernstein, Fred Miller, Dan Andrews, Clarence Constantakis, and Laurin' Roberts Thomas for submitting briefs.

State House Attempting to Legalize Usurious Payday Loans

By Rick Gambor
Michigan Consumer Federation



House Bill 4808, introduced on June 17, 1999, by Rep. Mike Green, would legalize "payday" loans in Michigan—a high-interest lending scheme already in evidence in poor neighborhoods around the state.

In a typical payday loan, a consumer writes a postdated check to the lender—usually dated for the borrower's next payday. The consumer receives immediate cash for the amount of the check, less an 18% "service fee" retained by the lender. When the consumer receives his or her next pay check, the check must be bought back from the lender or rolled over until the next payday—with another 18% fee added on. These fees may seem equivalent to credit card rates until you consider that the entire loan balance is due within one or two weeks. That drives the annual percentage rate for these loans to upwards of 600% in some cases!

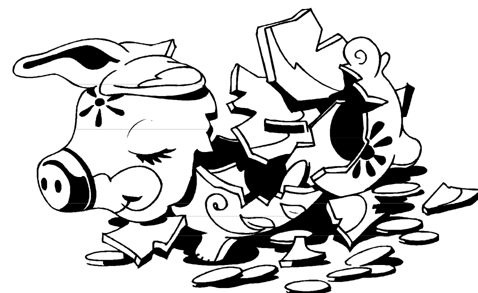
Moreover, if the borrower's check bounces, the lender files a criminal complaint, and, in Michigan, can seek triple the amount of the bounced check as statutory damages in a civil action, plus costs of $250. MCLA 600.2952. What begins as a loan for $200 or $300 can skyrocket into a judgment for over a $1,000 in a few months.

Payday lenders argue that these are not loans and are simply deferred check cashing plans. Additionally, they argue that the service fee is not interest. Consumer advocates and consumer protection officials around the country beg to differ. Consumer protection officials in several states have successfully prosecuted payday lenders for making usurious loans. The Kentucky Supreme Court held in June that deferred check cashing is lending, covered by state usury law. *White v Check Holders, Inc.*, 996 SW2d 496 (Ky 1999).

The upshot is an all-out effort by payday lenders to pass legislation to legalize their practices. Ohio has such a statute, and payday lending has burgeoned since it passed. Michigan House Bill 4808, which is similar to the Ohio law, was introduced at the behest of the industry.

In Michigan, Attorney General Jennifer Granholm has filed a "notice of intended action" against one of the payday lenders operating in Michigan. In addition, she has taken a position in opposition to House Bill 4808. It is also opposed by consumer, labor, and legal aid organizations.

Contact your representative or Rep. Mike Green to voice your views on this legislation. ■



SECTION COUNCIL MEETING AND NEW MEMBER ELECTION NOTICE

The Consumer Law Section Council will meet March 15 at 10:00 am in the Lake Huron room at the state Historical Museum in Lansing. All section members are welcome to attend.

A vacancy in the Council will be filled at this meeting. The Section nominating committee (Ian Lyngklip, Carolyn Bernstein, and Clarence Constantakis) will nominate a member for the seat, and other nominations will be taken from the floor. If you are interested in sitting on the Council, or nominating someone for this position, please drop a note to Clarence Constantakis at 5604 Kaufman, Dearborn Heights 48125, or come to the meeting and make your nomination from the floor.

Also, please notify Mr. Constantakis of plans to attend the meeting so space and lunch can be planned.

The council will vote at its March 15 meeting to take a position on newly-introduced House Bill 5332. HB 5332 would change section 4(2) of the Consumer Protection Act to eliminate any MCPA cause of action against insurance companies remaining after* Smith v Globe *(see article, p.8). It would also curb private MCPA actions against banks, HMOs, Blue Cross, and other businesses. This bill is pending before the House Insurance and Financial Services Committee.

Welcome to Our Home!

www.michbar.org

Be sure to visit our Internet site for the latest Section news and project updates!

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