Consumer Law Newsletter

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State Bar of Michigan Consumer Law Section

Section Annual Meeting Elects Officers, Focuses on Predatory Lending

By Fred Miller

"Subprime mortgage lending is a market that doesn't work," according to Kathleen Keest, assistant Iowa Attorney General, speaking at the annual meeting joint program of the Consumer Law and Elder Law Sections of the State Bar. "Consumers are kept in the dark, then stuck with loans they don't understand and can't afford."

Keest, a nationally-recognized expert on consumer lending, outlined the problems of predatory mortgage loans, and summed up actions that advocates can take to fix them. "Red flags" of problem loans that should be examined closely include: "push marketed" loans that were not sought by the borrower, high cost mortgages with points and fees of 5-10% or higher, single-premium credit insurance where the borrower pays the high loan interest on the insurance premium as well, and a high loan-to-value ratio, with the loan sometimes exceeding the real value of the property.

Prepayment penalty clauses and high loan-to-value ratios keep customers from refinancing high-interest loans, a process called "closing the back door."

Keest outlined the federal and state lending and disclosure laws that can be used to attack predatory lending, and commended new laws enacted in Georgia and North Carolina.

Before Keest's talk, Michigan Assistant AG Stanley "Skip" Pruss was presented with the Section's Frank J. Kelley Consumer Advocacy Award personally by its namesake, former Attorney General Frank Kelley. Kelley praised Pruss, and recounted the origins of the Consumer Protection Division that Pruss now heads. Kelley set up the division "when Ralph Nader was still in school."

New Section officers were also elected at the business meeting. Kathy Fitzgerald, also an assistant AG, is the new Section chairperson. Steve Goren, in private practice, is the chair-elect, with Laurin' Thomas continuing as treasurer and Gary Victor the new secretary.

Legislative Activity in the Lame Duck Session of 2002

By Josh Ard

Well, it could have been worse. The best news is about what did not happen. The Consumer Protection Act was not further weakened. The Item Pricing Act was not gutted. The news is not particularly good when these are the high points. Consumer advocates did have good reason to fear more legislation because industry knew that significantly anti-consumer legislation would have to be passed in 2002, because of incoming Governor Granholm's opposition.

One of the major topics of discussion was predatory lending, as it is throughout the country. Reports of abusive lending have increased and have caught the attention of policy-makers. A leading lobbyist for lenders told me that his clients recognized that a predatory lending bill would pass, so they concentrated their efforts on having a bill passed before Governor Granholm's veto threat could shape the legislation. They succeeded.

House Bill 6121, which became Public Act 660 of 2002, was approved by the governor two days before Christmas. It offers a combination of lumps of coal and a few pleasant stocking stuffers for Michigan consumers.

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From the Chair

Challenges In The Year Ahead

Year 2003 will continue to be a time of challenge for consumer law practitioners, who often are the last line of defense against consumer fraud. With continued economic uncertainty, unemployment, and governmental budget constraints the climate remains ripe for consumer fraud, whether from abusive debt collection efforts, predatory lending practices, or questionable purchase transactions bearing the guise of cost savings. Now more than ever, the need for informed counsel in consumer law disputes is acute.

The Consumer Law Section will continue its efforts to assist the section membership in meeting this need, as well as efforts to encourage appreciation of the importance of consumer law not only to consumers, but to the integrity of the marketplace. Member input and suggestions to further these goals are welcome, as are member contributions to the Consumer Law Section Newsletter. Members who have not already done so are encouraged to sign on to the section listserv by contacting Attorney Josh Ard at *ardw@cooley.edu*.

The Section will also continue its efforts to monitor and report on pending legislation affecting consumer rights. In this regard, two bills that were closely followed by the Section last year failed to pass in the December, 2002 lame duck legislative session; one seeking to legalize payday loans with triple digit finance charges and another that would have eliminated item pricing as presently required by the Pricing and Advertising of Consumer Items Act. It is my hope and anticipation the Section will become more proactive in the legislative process this year, not only by voicing opposition or support to bills of interest, but by outreach to legislative members and bill proposals to address consumer interests not readily available through the courts.

I look forward to serving as the Consumer Law Section chair and, with the Consumer Law Section Council, to meeting the challenges presented in the year ahead.

Kathy Fitzgerald, Section Chair

Can the Legislature Cure the Damage to the Michigan Consumer Protection Act Caused by Smith v Globe?

By Gary M. Victor

Introduction

When the Michigan Consumer Protection Act[1] (MCPA) was passed it became one of the most powerful weapons for protecting Michigan consumers from unfair or deceptive trade practices. The one problem with the act is that it did its intended job too well—at least as far as businesses and their supporters were concerned. As much as the MCPA was a boon to consumers, it was a bane to business. It required businesses to act honestly and fairly or be subject to suit including the payment of reasonable attorneys' fees to a prevailing consumer.[2]

Many of Michigan's consumer protection laws were enacted by the legislature and first interpreted by the courts during a time of liberal majorities. It was only a matter of time for the political pendulum to swing and produce conservative majorities in both the legislature and the Supreme Court. One might expect that judges, whatever their political backgrounds, will reach similar conclusions when interpreting statutes in order to give them the meaning legislature intended. This is often not the case. Judges, like all of us, are human and bring their views of the world to the interpretation process. Were this not so, there certainly wouldn't be the constant bickering about the appointment of federal judges that we see today. Even when acting in the most honorable manner, it is more likely that "liberal" judges will find a more liberal legislative intention; "conservative" judges the reverse.

Sometimes a court's statutory interpretation is so inconsistent with the "common sense" meaning of a statute, it would appear that the court is engaging in legislating rather than interpreting. What the majority of Supreme Court of Michigan did to the MCPA can be argued to be an example of judicial legislating. In Sm*ith v Globe Ins Co*,[3] the Court may have eviscerated the MCPA by its interpretation of the act's exemption section. In *Smith*, the court rendered an interpretation which appears to be totally disconnected to both the plain reading of the act as well as previous interpretations of the legislative intent. Under the *Smith* Court's interpretation, there is now a hole in the act that the proverbial truck can go through it with plenty of room to spare.

This past year a bill was introduced in the Michigan House of Representatives[4] in an attempt to cure *Smith's* damage to the MCPA. It will not be acted on in 2002, and there is a high likelihood given the Republican dominated legislature, that if the bill is reintroduced during the next legislative session it will not pass. The House Bill, however, does provide a model for possible curative legislation in the future and deserves analysis with that goal in mind. This article will examine that MCPA's exemption section as originally written, its intended purposes, significant interpretations prior to *Smith*, the *Smith* Court's interpretation and the House Bill's language to remedy what *Smith* has wrought.

The MCPA Exemption Section and its Intended Meaning

The pertinent parts of the MCPA exemption section [MCL 445.904(1)(a) and (2)] read as follows:

> (1) This act shall not apply to:
>
> (a) A transaction or conduct **specifically authorized** under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.
>
> (2) **Except for the purposes of an action filed by a person under section 11**, this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:
>
> (a) The insurance code[5] . . .
>
> (b) The banking code[6] . . .
>
> (c) [statutes regulating utilities] [7] . . .
>
> (d) The motor carrier act[8] . . .
>
> (e) [statutes regulating non-profit dental corporations].[9] (emphasis added)

After the Court of Appeals decision in *Smith* was published,[10] this author wrote an article containing an extensive analysis of the MCPA exemption section commenting on the Court of Appeals correct interpretation.[11] What follows is an abbreviated version of that analysis.[12] Any examination of the MCPA exemption section must begin with an overview of the act itself.

The MCPA was enacted to prohibit '[u]nfair, unconscionable or deceptive acts or practices in the conduct of trade or commerce."[13] In defining "trade or commerce", the legislature included virtually every kind of business.[14] The MCPA is a remedial statute which must be given a liberal interpretation in order to accomplish its purpose of protecting Michigan citizens from unfair trade practices and many courts have so held.[15] Corre-

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spondingly, as the protections afforded consumers in the act are subject to a liberal interpretation, the exemptions must necessarily be narrowly interpreted.

Given this framework, it is not difficult to understand the legislature's intention in drafting the MCPA exemption section. The key words of the first MCPA exemption subsection, MCL § 445.904(1)(a), are "**specifically authorized.**" The question is why the legislature would want to exempt from MCPA coverage transactions or conduct specifically authorized by law. The answer is simple. In those few instances where conduct by a business is specifically authorized by law yet could come within the meaning of one or more of the MCPA prohibitions, the business in question would be put on the horns of a dilemma—to do what is "specifically authorized" under the law while at the same time risk possible MCPA liability.

For example, under the Motor Vehicle Service and Repair Act[16] (MVSRA) a repair facility may charge "10 percent or $10, whichever is less," over a written estimate without obtaining "the written or oral consent of the customer."[17] Charging any amount above a written estimate without obtaining the consent of the consumer could be argued to be in violation of several subsections of the MCPA.[18] As charging an amount in excess of a written estimate is "specifically authorized" under the MVSRA, motor vehicle repair facilities that make such charges are exempt from suit under the MCPA. Since there are very few laws which would permit conduct that could fall within the meaning of unfair and deceptive trade practices, this is indeed a very narrow, but necessary exemption.

In the other exemption subsection, MCL § 445.904(2), the key words are: "**Except for the purposes of an action filed by a person under section 11**." An action under the MCPA may be brought by a "person,"[19] by the attorney general or by a prosecutor.[20] The MCPA section authorizing actions by persons is section 11.[21] Given these facts, the scope of this exemption under this subsection is, perhaps, even more narrow than the previous one discussed above. First, it only applies to actions brought by the attorney general or prosecuting attorneys; it does not affect individual consumers. Then, it applies only where the alleged conduct constitutes an "unfair, unconscionable, or deceptive method, act, or practice" under the laws listed in the subsection. For example, if conduct by an insurance company constituted an unfair or deceptive practice under the laws regulating insurance, such conduct would be subject to MCPA suits by individual consumers but not by the attorney general or prosecutors.

The purpose here again is clear. The legislature did not want to give concurrent jurisdiction to the attorney general or prosecutors and regulatory agencies. The legislature wanted to avoid potential conflicts between suits by the attorney general or prosecuting attorneys and proceedings brought pursuant to one of the listed regulatory statutes. As to certain acts which may violate the MCPA and at the same time are declared unfair or deceptive under the laws regulating the industries listed in the subsection, the attorney general or prosecuting attorneys must defer to the regulatory remedy. Consumers, on the other hand, are left to pursue their remedies under the MCPA if they so choose.

Principal Cases Interpreting the MCPA Exemption Section

The two principal cases interpreting the MCPA exemption section prior to *Smith* were the Supreme Court's decision in *Attorney General v Diamond Mortgage*[22] and the Court of Appeals decision in *Kekel v Allstate Insurance Co.*[23] *Diamond Mortgage* dealt only with the "specifically authorized" language in MCL § 445.904(1)(a). The case concerned the question of whether real estate brokers are exempt from liability under the MCPA because real estate brokers are subject to regulation under the Michigan Department of Licensing and Regulation. In holding that real estate brokers are subject to liability under the MCPA, the Supreme Court reasoned as follows:

> We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. **While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."**[24] (emphasis added)

Kekel concerned the question of whether an insured could sue his no-fault insurance company under the MCPA. The *Kekel* Court totally ignored the analysis of *Diamond* which focused of whether the transaction or conduct was "specifically authorized" by law.[25] Instead, *Kekel* adopted a new focus by substituting its own words—"subject to regulatory control"—for the words "specifically authorized" used by the legislature.[26] *Kekel* misinterpreted *Diamond*'s holding to be based solely on the fact that the conduct alleged to be in violation of the MCPA in *Diamond* was not subject to regulation under defendant's real estate license.[27] Under the words of the statute and *Diamond's* interpretation there is a very narrow exemption applying only to a "transaction or conduct specifically authorized" by law. Under *Kekel,* there is the very large exemption for all conduct "subject to regulatory control". In the words of one federal judge: "*Kekel* simply can not be reconciled with *Diamond Mortgage* in any principled manner."[28]

In addition to substituting the new words "subject to regulatory control" for "specifically authorized" language in MCL § 445.904(1)(1), the *Kekel* panel completely read the key words—

"Except for the purposes of an action filed by a person under section 11"—out of MCL § 445.904(2). Even though *Kekel* involved a suit by a person against his insurance company, *Kekel* simply deleted the introductory clause allowing consumer suits and stated that the MCPA does not apply at all to acts covered by the insurance code.[29] Clearly, *Kekel* was not an act of judicial interpretation; it was judicial legislation.

The **Court of Appeals** in *Smith*[30] attempted to remedy the confusion created by *Kekel.* Like *Kekel*, *Smith* involved an action by a "person" against his insurance company. The *Smith* panel noted that there was a direct conflict between *Diamond Mortgage* and *Kekel* with regard to the meaning of "specifically authorized" in MCL § 449.904(1)(a). The Court held that *Kekel* had erroneous interpreted this language and that the analysis of the Supreme Court in *Diamond Mortgage* must control.[31] The *Smith* panel also held that *Kekel* was incorrect in its interpretation of MCL § 445.904(2). It held that individual actions were clearly permitted under that subsection.[32] It seemed that all was now well and consumers were to be given the protection offered by the plain language of the MCPA. At least this was the case until the Supreme Court decision came along.

The Supreme Court's Attempt To Eviscerate The MCPA

It was a surprise and a source of trepidation to consumer lawyers when the Supreme Court agreed to hear *Smith*. All agreed that no good could come of it. Many of those concerned, including this author, attempted to conjure up scenarios of what the Court might do. Although the results, at least in part, could have been predicted; even the most convoluted imaginings could not predict the reasoning that eventually flowed from the pens of the Supreme Court majority.

The Court seems to have recognized the absence of even an appearance of judicial integrity in the *Kekel* approach. It was not willing to simply substitute its own words for those of the legislature or fail to read words obviously contained in the act. Instead, the Court chose the course of giving meaning to words which appear to be entirely inconsistent with the clear legislative intent.

With regard to the "specifically authorized" language in MCL § 445.904(1)(a), the Court stated:

> . . .Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that §4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." [33]

With this one stroke, the Supreme Court was able to accomplish what the *Kekel* panel intended—exempting regulated industries from MCPA coverage—without having to change the statutory language. Now regulated businesses could commit unfair and deceptive practices with relative impunity provided the general transaction they were engaged in was "specifically authorized" by law. Of course, the Court did not explain why it rejected the Court of Appeals "common-sense reading" or why its interpretation was inconsistent with the well established remedial legislative intention of protecting Michigan consumers as well as just about every previous reasoned decision on the MCPA.

Having interpreted MCL §445,904(1)(a) to exempt insurance companies from MCPA suits where their general activity was "specifically authorized" by law, the Court was now faced with how to reconcile that interpretation with MCL §445.904(2) which permitted MCPA suits by individual consumers against insurance companies. The Court's analysis on this point can be described as "diabolically creative". The Court appears to have decided to sacrifice the industries listed in MCL §445.904(2)(a)-(e) in order to exempt other regulated industries. Here's how it did it.

> Giving effect to both §4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to §11 of the MCPA regardless of whether the insurer's activities are "specifically authorized." Although §4(1)(a) generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, §4(2) provides an exception to that exemption by permitting private actions pursuant to §11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by §§4(1)(a) and 4(2)(a) are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code.[34]

Under the *Smith* Court's majority interpretation, all industries whose general conduct was "specifically authorized" by law where now exempt from MCPA coverage except those industries listed in MCL § 445.904(2). In other words, the Court held that the legislature enacted the MCPA to protect consumers yet at the same time had exempted all businesses whose general activity was "specifically authorized" by law except those few industries, such as the insurance industry, that are listed in MCL § 445.904(2). Nothing could be more absurd. Why, for example, would the legislature enact such a broad definition of "trade or commerce[35] , if it intended to exempt most industries so engaged?

The insurance industry did not take well to being used as a sacrificial goat. It immediately lobbied the Republican dominated legislature and was given a specific exemption from MCPA

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suits.[36] The banking industry is likely to follow. The stage is now set for corrective legislative action should a Democratic majority ever find its way to the statehouse.

House Bill 6236

The first legislative attempt to cure the damage to the MCPA created by Smith is House Bill 6236 which was introduced by Representative Mark Schauer in July of 2002. Again, the bill will not be acted on this year and will likely be defeated if reintroduced next term. However, it does indicate what actions might be taken in the future as a legislative remedy.

The pertinent part of House Bill 6236 reads as follows:

> Sec. 4. (1) This act applies to any unfair, unconscionable, or deceptive method, act, or practice and creates a cause of action against a company who engages in that method, act, or practice, except for any of the following:
>
> (A) A method, act, or practice that is expressly permitted by a statute, rule, or regulation of this state or the united states. . . .
>
> (C) Except for the purposes of an action filed by a person under section 11, an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by any of the following:
>
> (*i*) The banking code. . .
> (*ii*) 1939 PA 3, MCL 460.1 to 460.10cc
> (*iii*) The motor carrier act. . .
> (iv) The savings bank act. . .
> (*v*) 1925 PA 285, MCL 490.1 to 490.31
>
> (D) An unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code. . .
>
> (2) a person who claims this act does not apply to a method, act, or practice because of an exception to subsection (1) or any other exemption from this act bears the burden of proving that exception or exemption.
>
> (3) as used in this section, "company" means a person engaged in trade or commerce, including, but not limited to, a person whose profession, occupation, conduct, or transactions are regulated by a statute, rule, or regulation of this state or the united states.

Although credit must be given for any attempt to cure the wound in the MCPA created by *Smith*, there is always a potential for additional confusion when a legislative effort is made to correct what is perceived to be a judicial blunder. This effort is no exception. What this bill does is send a message to the Supreme Court something like: "We meant it before and this time we mean it even more". It is an attempt to "box-in" the Supreme Court so it can't "misinterpret" the act similarly a second time. Such legislative efforts, no matter how valiant, often fail because judges are lawyers and masters of words who can give them whatever meaning they wish. Courts can even find exemptions where none exist in the legislative words.[37]

While the original exemption section started with a statement that the act did not apply to certain items, the approach here is to say the act applies to everything except this items listed. The bill seeks to avoid the *Smith* interpretation of "specifically authorized" by substituting "expressly permitted" and then adding subsection (4) which would have the act apply to regulated industries. Basically, it is a reasonable attempt to return the MCPA exemption section to its original purposes. The most significant problem is the introduction of a new word—"company". In the opinion of this author, that new word is neither helpful nor necessary. The word "person" is defined in the act, is used consistently within it and includes anything that could come within the meaning of "company". If the bill were reintroduced, it would make sense to delete "company" and let "person" suffice as long as the words clearly indicate that "person" as used in the section includes regulated industries.

Conclusion

As far as the examination here is concerned, the MCPA exemption section as originally drafted contained two reasonable, narrow exemptions. The first applied where a law specifically made certain conduct legal when that same conduct could be a violation of the act. The second exemption, while still permitting individual consumers to sue under the act, was designed to prevent conflicts between the attorney general or prosecutors and regulatory agencies. The Supreme Court in Sm*ith v Globe Ins Co*,[38] developed a "creative" interpretation of the exemption section that could allow just about any regulated industry to avoid providing consumers with the protections guaranteed by the MCPA.

House Bill 6236 was introduced as a possible fix for the *Smith* debacle. Although a reasonable attempt to cure *Smith's* damage, it contains the potential for additionally confusion especially by adding the new word "company" to the act. In any event and unfortunately, there will be plenty of time to consider the best wording that can be offered to reverse the harm caused by *Smith*. In the meantime, consumer advocates are well advised to be very careful in pursuing MCPA claims against regulated industries. It would be unwise to give this Supreme Court the opportunity to clarify or expand *Smith* so as to increase the damage already done to the act. The pendulum will swing back as it always does. In the absence of a legislative correction, some future Supreme Court may distinguish *Smith* as applicable only to the insurance industry, which now has its own exemption, and return to the proper path established in *Diamond Mortgage*[39]

Endnotes

1 MCL § 445.901, *et seq.*

2 MCL § 445.911(2). Although the act does not provide for attorney fee awards in class actions, such fees are generally available as part of a recovered fund.

3 460 Mich 446 (1999).

4 House Bill 6236.

5 Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

6 The banking code of 1969, Act No. 319 of the Public Acts of 1969, as amended, being sections 487.301 to 487.598 of the Michigan Compiled Laws.

7 Act No. 3 of the Public Acts of 1939, as amended, being sections 460.1 to 460.8 of the Michigan Compiled Laws.

8 The motor carrier act, Act No. 254 of the Public Acts of 1933, as amended, being sections 475.1 to 479.20 of the Michigan Compiled Laws.

9 Act No. 125 of the Public Acts of 1963, being sections 550.351 to 550.373 of the Michigan Compiled Laws.

10 223 Mich App 264 (1997).

11 Victor, Gary M., *The Liability of Professionals, Insurance Companies and Other Regulated Industries Under the Michigan Consumer Protection Act,* 77 Mich B J 69 (1998).

12 The reader is welcome to read the above cited article to see the more in depth analysis.

13 MCL § 445.903(1).

14 MCL § 445.902(c).

15 See, e g, *Dix v American Bankers Life Assurance Co of Florida, 429 Mich.* 410 (1987); *Jordan v Transnational Motors, Inc*, 212 Mich. App. 94 (1995); *Price v Long Realty, Inc,* 199 Mich. App. 461 (1993).

16 MCL § 257.1301, *et seq*.

17 MCL § 2571332(1).

18 *See, eg,* MCL 445.903(1)(s), (bb) and (cc); MSA 19.418(3)(1)(s), (bb) and (cc).

19 MCL § 445.902(b).

20 The attorney general may bring actions for injunctions under MCL 445.905 and class actions under MCL 445.910. MCL 445.915 permits prosecuting attorneys to prosecute actions "in the same manner as the attorney general."

21 MCL § 445.911.

22 414 Mich 603, 327 NW2d 805 (1982).

23 144 Mich App 379, 375 NW2d 455 (1985).

24 414 Micha at 617.

25 In fact, the *Kekel* Court apparently adopted the losing party's argument from *Diamond*. See *Diamond* at 416-417.

26 144 Mich App at 383.

27 Id at 384.

28 *Lawson v American Sec Ins Co*, No. 88-CV-10280-BC (ED Mich, 1989).

29 144 Mich App at 385-387.

30 223 Mich App 264 (1997).

31 *Id* at 281.

32 *Id* at 285-286.

33 460 Mich 446 at 465.

34 *Id* at 467.

35 MCL § 445.902(c).

36 The MCPA was amended to delete MCL §445904(2)(a) which made the reference to the insurance code and added the following new subsection, MCL § 445.904(3):

(3) This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act or practice that is made unlawful by the insurance code. . .

37 See *Nelson v Ho*, 222 Mich App 74 (1997). *Nelson* is also discussed in the author's article cited in endnote 11.

38 460 Mich 446 (1999).

39 414 Mich 603, 327 NW2d 805 (1982).

New Federal Rules Govern High-Rate Mortgage Loans

By Fred Miller

Starting October 1 of last year, new amendments to the Home Ownership and Equity Protection Act (HOEPA) provisions of the Truth-in-Lending Act went into effect, tightening rules for disclosures to consumers in high-interest and high-fee residential mortgage loans. See 15 USC 1602(aa) and 1639 and , and 12 CFR 226.32 and 226.34.

HOEPA's additional disclosure requirements, and prohibitions on some loan terms, apply to loans that meet threshold requirements set by the Act. Some high-rate mortgage lenders have a practice of keeping loans just below HOEPA thresholds to avoid disclosures that might cause consumers to question the value of the loans. In an effort to bring more loans within the HOEPA requirements, the Federal Reserve Board is lowering one of the two thresholds for HOEPA application. First mortgage loans with APR's exceeding the yield on treasury securities with similar maturities by 8% or more are now subject to HOEPA regulation. Previously, the magic number was 10%.

In addition, up-front premiums for various types of credit insurance will now be included in the second alternative threshold, the points-and-fees calculation. Mortgage loans exceeding 8% in points and fees also qualify for HOEPA.

HOEPA transactions require additional disclosures at least three days before consummation. Consumers are to be told they don't have to go through with the loan, that their house could be lost if payments are not made, and the APR and monthly payment must be highlighted for them. The amendments add a statement of the total amount of the loan and credit insurance premiums. These added disclosures are meant to head off bait-and-switch tactics, in which a different loan is substituted at the closing, sometimes a first mortgage loan with a payoff of previous mortgages, when the consumer expected a much smaller loan.

New provisions attempt to address loan-flipping, by limiting refinancing by the same creditor within one year, and evasion of HOEPA by use of open-end credit plans. HOEPA does not apply to open-end loans, such as home equity lines of credit. Some lenders have been known to substitute home equity line of credit agreements at closing on a refinancing of a first mortgage, with little to explain it but the lesser required disclosures.

Legislative Activity . . .

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One major downside of the legislation is that it is largely toothless. There are no private rights of action. Enforcement is left exclusively to the Office of Financial and Insurance Services [OFIS], the Attorney General, and county prosecutors. The legislature heard testimony that criminal enforcement is virtually never used in analogous consumer protection statutes. For example, I have no information about a criminal action ever being taken under the statute regulating automotive repair. Nevertheless, the legislature did not authorize any self-defense by aggrieved homeowners.

A second major downside is that the act preempted local ordinances that might more fully protect homeowners. In essence, this is much more mortgage broker protection than consumer protection.

Third, the consumer protections in the act barely exceed what is already available. The House Legislative Analysis Section, in its analysis of the bill, gives the following as an argument against the bill:

> One model act put forth for discussion by a group advocating on behalf of low-income people would ban practices that are intrinsically linked to predatory lending. For example, this proposed model act would ban balloon payments and negative amortization (where the principal can increase during the loan) connected with "high-cost" home loans, and would specifically prohibit loans made without regard to the customer's ability to repay and without homeownership counseling. (High-cost loans would be defined in the model act as loans bearing interest rates and fees exceeding certain thresholds.) The proposed model would also prohibit "flipping", defined as refinancing an existing home loan when the new loan does not have a reasonable, tangible net benefit to the borrower; prohibit prepayment fees; prevent the financing of credit insurance along with the loan, known as "packing"; restrict late payment fees; and prohibit the acceleration of the indebtedness at the sole discretion of the lender. (Prepared by analyst C. Couch on January 13, 2003).

There are a few prohibitions that benefit consumers. Also, the act requires that borrowers be presented a detailed Borrower's Bill of Rights and a Consumer Caution and Home segment of the industry has come forward and said we support legislation," Mr. Andrews said. The two coalition leaders plan to take a bipartisan approach toward securing legislation. They want to work with Sen. Paul Sarbanes, D-Md., who has taken a very tough line on predatory lending, as well as Rep. Bob Ney, R-Ohio, who is expected to introduce a predatory lending bill in early February that includes consumer protections and a federal pre-emption, which CFAL is seeking.

The message of almost all lenders who go on the record is: "We aren't the bad guys. We need to regulate the bad guys to get the regulators off our backs." Clearly, not everyone is wearing a white hat, a remark for those of you old enough to remember traditional Westerns.

There was other relevant legislative activity. For example, Michigan finally has legislation that authorizes state do not call lists for telemarketers. House Bill 4042, which became Public Act 612 of 2002. The legislation falls short of what is needed. There is no registration, licensing, fees, or bonding required of telemarketers, as is the case in many states. There are too many exemptions of too many people you do not want calling you during your evening meal. It will probably be at the end of the year at least before do not call lists are up and running. Note that the federal government is actively investigating setting up a federal do not call registry that might offer stronger protection against telemarketers. It is also important to note that there is a private right of action for actual damages, or statutory damages of up to $250, plus reasonable attorney fees. Section 1c(3). House Bill 4632 (Public Act 613 of 2002) amends the Consumer Protection Act to include analogous violations and requires reporting of complaints to the relevant Better Business Bureau.

There are a few other bills enacted during the session which the Michigan Legislature's web site classifies as consumer protection measures.

House Bill 6493, which became Public Act 692 of 2002, repeals MCL § 445.1606, which requires the filing of an affidavit of compliance with the federal Home Mortgage Disclosure Act. Such an affidavit need no longer be filed.

House Bill 5363 became Public Act 642 of 2002. In the words of the House Legislative Analysis: "The bill would amend numerous sections of the Michigan Vehicle Code, generally speaking, to treat the leasing of a vehicle in the same manner as the sale of a vehicle." The bill was supported by the Secretary of State's Office, which felt that its jurisdiction over leased vehicles was not sufficiently clear.

Senate Bill 1385 (Public Act 707 of 2002) addressed consumers' rights concerning disability insurance. According to the Senate Fiscal Agency Bill Analysis:

> The bill would amend provisions of the Insurance Code concerning insurers' internal grievance procedures, to do the following:
>
> — Specify that the section requiring insurers and HMOs to establish internal grievance procedures would not apply to a policy or coverage that is exempt from the Patient's Right to Independent Review Act (PRIRA).
>
> — Specify that the section requiring insurers to pay the State's expenses incurred under the internal grievance procedure requirements, would not apply to a policy or coverage exempt from PRIRA.
>
> — Require disability income insurers to establish internal grievance procedures.

Circumventing the Globe: Insight on How Smith v Globe *Has Impacted the MCPA and What Can Be Done About It*

[Ed. Note: Last year, the Consumer Law Section held an essay contest on the implications of the Michigan Supreme Court's ruling* in Smith v Globe Life *on the scope of business exemptions to the Michigan Consumer Protection Act. Katherine Rogers, a third-year student at MSU-DCL College of Law, was the winner. Here is her winning essay.]

By Katherine Rogers

Introduction

In 1999 the Supreme Court of Michigan decided the case of *Smith v Globe Life Insurance Co.*[1], interpreting exceptions to the Michigan Consumer Protection Act ("MCPA")[2] in a manner unprecedented and possibly devastating to the Act itself. The plaintiff in this case brought a cause of action against the defendant credit life insurance company pursuant to the MCPA. However, defendant successfully argued themselves exempt from liability under statutory exceptions. The ramifications of this decision have yet to be fully measured, as they have only begun to permeate consumer law jurisprudence. [3] But undoubtedly, effects will only constrict consumers' remedies under this statute, a fallout contra to the intent of Act as originally enacted. The holding in *Globe* should be limited to the unique industry of credit life insurance and should not penetrate other matters subject to general regulation.

Part I of this paper will provide some background on the Michigan Consumer Protection Act, its effect and purpose. Part II will give an overview of how the decision in *Smith v. Globe* was decided too broadly. Part III gives insight on how the decision could severely limit consumer rights. Part IV provides guidance for attorneys in dealing with MCPA claims and avoiding more exemptions. Part V is a conclusion.

Background

The MCPA was enacted in 1977 to protect consumers in their purchases of goods primarily used for personal, family or household purposes.[4] The power to sue under the MCPA is afforded to any "person"[5] seeking declaratory judgments or injunctions,[6] who individually or as a class[7] "suffers a loss," monetary or otherwise.[8] A successful plaintiff may recover actual damages, or statutory damages of "$250.00, whichever is greater, together with reasonable attorneys' fees."[9] This fee shifting provision was attractive for private attorneys, and effectively provided the general public access to the courts and competent representation.

When this law went into effect, it seemed a very broad tool for redressing consumer grievances against deceptive or unfair business practices in trade or commerce.[10] Essentially, "the breadth of the MCPA prohibitions are so great that it is arguable that almost any breach of contract will be a violation of the Act."[11] For example, section 3 of the MCPA enumerates about thirty-three examples of "[u]nfair, unconscionable, or deceptive methods, acts, or practices in conduct trade or commerce,"[12] the majority of which appear as a form of strict liability. For the most part, a plaintiff bringing a cause of action pursuant to the MCPA need not prove intent or knowledge of the offending party for a *prima facie* showing of liability. Rather, a plaintiff need only establish the facts, and in doing so will ultimately restrict the opposing party's defenses.

The legislature drafted the MCPA broadly enough to include most unfair business conduct. However, they also recognized that certain some business transactions are already regulated by another entity. The MCPA exempts these regulated businesses, and their transactions, from liability in section 4 of the statute, which reads in part:

(1) This act does not apply to either of the following:

(a) A transaction or conduct *specifically authorized* under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States (*emphasis added*)….

(2) Except for the purposes of an action filed by a person under section 11, this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by any of the following:[13]

(a) The Banking Code,[14]

(b) The Public Service Commission Act,[15]

(c) The Motor Carriers Act,[16]

(d) The Savings Bank Act,[17] or

(e) The Non-Profit Dental Care Corporation Act.[18]

(3) This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2101 to 500.2093

(4) The burden of proving an exemption from this act is upon the person claiming the exemption.[19]

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These exemptions were implemented to shield specific businesses against litigation when their conduct, though possibly violative of several MCPA provisions, was "specifically authorized" by another law.

The main purpose of the section 4(2) exemptions is to minimize contradictions between regulated conduct and the MCPA, since contradiction would stem commerce.[20] The legislature clearly intended to minimize conflict between the MCPA and conduct already "specifically authorized" in a regulated industry. For instance, the Credit Reform Act[21] allows a depository institution to charge credit card interest at unlimited percentage rates. Absent the banking industry exemption, that depository institution could be held liable under section 3(z) of the MCPA by "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold."[22]

Section 4(2) also sought "to avoid subjecting certain businesses to simultaneous actions by both the Attorney General and the regulatory agency regarding the same [unconscionable] conduct."[23] However, the legislature still preserved the right of private action, recognizing that complicated regulatory schemes create difficulty for consumers seeking to vindicate their rights in those areas.[24]

Michigan Supreme Court's Overly Broad Analysis

The *Globe* case involved a sale of credit life and disability insurance policy to Robert Smith who was 47-years at the time of the transaction in 1992. On his application, Smith made slash marks in the "no" boxes to deny diagnosis of or treatment for either a heart condition or diabetes. But Smith had been diagnosed with coronary heart disease and was an insulin-dependant diabetic. He actually died of a fatal heart attack after making only two payments. Defendant insurance company alleged that Smith had made material misrepresentations on the application, and so denied Smith's surviving daughter any benefits. Smith's daughter brought claims of breach of contract and a violation of the MCPA. The Michigan Supreme Court affirmed dismissed the breach of contract claim. But it is the Court's overly broad analysis of the MCPA claim regarding the scope of exemptions under section 4 that is of concern here.

The Court in *Globe* examined exemption issues in the seminal case of *Attorney General v. Diamond Mortgage*,[25] but disagreed with how narrow the exemptions were construed. In *Diamond*, the question involved whether real estate brokers could escape MCPA liability if regulated by the Michigan Department of Licensing and Regulation. The Court in *Diamond* held that although licensing for real estate brokers may be regulated, the deceptive business conduct complained of is not "specifically authorized."[26] Essentially, the *Diamond* Court reasoned that the legislature would not "specifically authorize" unlawful activity and "the focus is on whether the transaction **at issue**, not the alleged misconduct, is 'specifically authorized.'"[27] The *Globe* Court agreed that "the issue of exemption is not whether the defendant's conduct was 'specifically authorized' by law."[28] However, the *Globe* Court did not focus on the transaction at issue, but rather on "whether the general transaction was" specifically authorized.[29]

In construing the scope of "specifically authorized" in *Globe* under section 4(1)(a) of the MCPA, the Court held:

> 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. Therefore, we conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized" under laws administered by a regulatory board or officer…(**emphasis added**).[30]

This analysis is too broad. The *Unfair and Deceptive Acts and Practices* ("UDAP") manual considers this an "all too common mistake" when court's interpret "language exempting 'permitted' or 'authorized practices' as if the statute exempted 'any regulated practice'….This has disastrous effects because the decision is now precedent that all sorts of regulated professions –from automobile dealers to plumbers—are exempted."[31] The UDAP's prediction is true for Michigan.

It wasn't long before the insurance industry was exempt as well. In reference to the insurance industry, the Supreme Court of Michigan reasoned that "private actions are permitted against an insurer pursuant to § 11of the MCPA regardless of whether the insurer's activities are 'specifically authorized'"[32] by chapter 20 of the Insurance Code. The Court left open the possibility of a private cause of action. However, this "loophole" was closed shortly afterward. Lobbying efforts carved-out a statutory exemption for the insurance industry as a whole, [33] effective since March 28, 2001.[34]

Ripple Effects

The Court's broad analysis may have diluted the MCPA's intended potency. "Under *[Globe]* if the general transaction is specifically authorized by statute, e.g., selling credit life insurance; then even if the defendant has engaged in unfair or deceptive trade practices in selling the credit life insurance, the transaction is exempt from MCPA liability."[35] Consumers would be left sans remedy and sans representation, since attorneys are less likely to advocate on behalf of consumers when they would be unsuccessful in obtaining reasonable attorney fees. Consumers would no longer be protected at all.

Many regulating bodies or other "state agencies are ill equipped to investigate all consumer complaints, especially if the injury to the consumer is minor or the consumer complaint involves matters ancillary to the core regulatory jurisdiction of the agency."[36] If "specifically authorized" is viewed by courts to mean "generally regulated," then every and "all matters covered by regulatory schemes may be exempt from [the MCPA, such as]: Credit and Finance, Automobiles, Telecommunications, Occupational Code (Plumbing, Heating and Cooling, Construction, Mechanical, Electrical), Professionals (Law, Medicine…Veterinarians, Accountants), Landlord-Tenant, Any licensed entity, Real Estate, [and] Utility Regulation."[37] This *Globe* exemption has created a potential for such tremendous aftermath, that it has indeed eaten the rule itself.

Confining *Globe*

Although the Court in *Globe* noted that "insurance companies are not 'like most businesses,'"[38] it fails, as Justice Cavanagh noted in his concurrence, in "provid[ing] meaningful examples where a consumer would not be blocked by subsection 4(1)(a) under its reading of the terms 'specifically authorized.'"[39] Essentially, any MCPA case reaching the Michigan Supreme Court will be subjected to an ad hoc determination over whether that industry is regulated or not.[40] It is "not unreasonable to predict that as long as the Supreme Court maintains its present conservative majority" that such ad hoc determinations "will result in exemptions for regulated industries."[41]

To mitigate future *Globe* backlash, attorneys should exercise caution in pursuing claims under the MCPA. Attorneys need to analyze whether their case involves a business industry regulated by any sort of board, commission, or agency. Also, attorneys must analyze whether the conduct in question could be construed as "generally regulated" activity. Attorneys must be mindful "not only whether the trial court will find an exemption…but whether the defendant [in their case] may be willing to pursue the case" all the way to the Michigan Supreme Court, risking an exemption for that entire industry.[42] If court review under section 4 is probable, and exemption issues are uncertain, then attorneys should avoid the risk of injuring the MCPA further with potential adverse rulings.

Avoiding the MCPA at all costs is not, however, a pragmatic solution. The time will inevitably arise when a claim under the statute is either necessary or attractive for zealous advocacy on behalf of clients. In these cases, an attorney might be cognizant of other statutes relevant to her case and seek remedy under those in conjunction with the MCPA. "In many, if not most cases, combining the MCPA with other theories of liability [ensures that] proving the MCPA count will be easier."[43]

Stanley F. Pruss, Assistant Attorney General in Charge of the Consumer Protection Division of the Michigan Department of Attorney General, in Lansing, Michigan advises that agency correspondence could be essential in avoiding more *Globe* exemptions.[44] "State agencies that regulate trades, professions and commerce through licensing cannot and do not address the full array of harms suffered by consumers."[45] Many state agencies will, in writing, decline action on behalf of consumers for lack of jurisdiction. Pruss emphasizes that use of such agency correspondence is critical both "to demonstrate that the transaction or conduct is not covered by [the agency's] regulatory scheme and that the **consumer will be denied any remedy**" otherwise.[46]

If an attorney's MCPA claim is submitted for a section 4 review, he should fiercely assert every argument against the wrongly decided *Globe* decision every time. A good start is pleading that the *Globe* holding should be confined to the insurance industry, and not infiltrate into other realms of trade or commerce.

Another tactic is a constructionists approach. The MCPA was designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve this goal.[47] In reviewing statutory language, a court should avoid construction that creates surplusage.[48] "Statutory provisions must also be read in the context of the entire statute so as to produce a harmonious whole."[49] It is true that parts of section 3 already do envelop areas addressed by regulatory schemes. Section 3(1)(o), for example, prohibits practices "causing a probability of confusion as to credit if credit is extended in the transaction."[50] It may be effective to argue textually, pointing out that an overly broad reading of section 4 would create surplusage. For example, a *Globe* analysis should exempt issues of credit because "state and federal law comprehensively regulates virtually all aspects of credit."[51] Clearly, the legislature did not intend this a broad construction when it creates surplusage and has a nugatory effect.[52] The same could be said for section 3(1)(l), when contractors are regulated under the Occupational Code, and section 3(1)(e), when standards and grades are often established by regulatory agencies.[53]

From a textual perspective, the plain meaning of "specifically authorized" does not equate with "generally regulated."[54] The Michigan Supreme Court "iterates often that its primary analytical tenet is fidelity to the ordinary meaning of the words used by the legislature."[55] Courts in other states with similar UDAP statutes that prohibit unfair practices in trade or commerce have made this same error, and the fallout was massive.[56] By failing to construe the statute according to its plain meaning, and when it became evident that phrasing such as "generally regulated"[57] instead of "specifically permitted" inevitably touched on all aspects of trade or commerce, these courts subsequently rectified the errors. There is no reason to believe that these same errors will not occur in Michigan as they did in these other states, such as in South Carolina or New Hampshire.[58] California and New Jersey take a slightly different approach. Those states uphold their MCPA analogs in the face of regulatory schemes until a conflict is "irreconcilable,"[59] or "direct and unavoidable"[60] with that regulatory scheme.

Conclusion

The MCPA certainly may appear to be at the threshold of demise, but attorneys are not completely powerless in overcoming this badly flawed decision. Attorneys essentially have three options. They may (1) avoid pleading the MCPA until legislative amendments or favorable case law provide stability, (2) plead the MCPA wisely and avoid review on exemption matters, or (3) employ every possible tactic and argument available to restrict the effects of *Globe* altogether. The MCPA is too important as a statute to simply atrophy into inexistence. But careful and prudent steering might champion it back to where it belongs as a protective measure against unconscionable trade practices.

Endnotes

1 460 Mich 446; 597 NW2d 28 (1999).

2 MCL § 445.901 *et seq.*

3 Interview with Stanley F. Pruss, Assistant Attorney General in Charge, Michigan Department of Attorney General, Consumer Protection

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Division, in Lansing, MI (May 21, 2002).

[4] *Noggles v Battle Creek Wrecking, Inc.*, 153 Mich App 363 (1986).

[5] The statute defines "person" as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity." MCL 445.902(c).

[6] MCL 445.911(1)(a) and (b).

[7] MCL 445.911(2) and (3).

[8] *Mayhall v AH Pond Co., Inc.*, 129 Mich App 178 (1983) (where defendant seller represented to buyer that diamond was perfect when it wasn't, buyer could recover under the MCPA, even without suffering monetary damages, since expectation was frustrated).

[9] MCL 445.911(2)

[10] The statute in part defines "trade or commerce" as business conduct such as "providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d).

[11] Gary M. Victor, *Making Consumer Law Part of Your Practice: How to Recognize and Pursue Fee-Generating Cases*, I.C.L.E. Course Handbook, § 1-4 (2002).

[12] MCL § 445.903

[13] MCL 443.904(1) and (2)

[14] 1999 PA 276, MCL 487.111.01 to 487.15105

[15] 1939 PA 3, MCL 460.1 to 460.10cc.

[16] 1933 PA 254, MCL 475.1 to 479.43

[17] 1996 PA 354, MCL 487.3101 to 487.3804

[18] 1925 PA 285, MCL 490.1 to 490.31

[19] MCL 443.904(3) and (4)

[20] Gary M. Victor, Address at the ICLE Seminar, (Feb. 15, 2002)

[21] MCL 445.1854

[22] MCL 445.903(z)

[23] Gary M. Victor, *Making Consumer Law Part of Your Practice: How to Recognize and Pursue Fee-Generating Cases*, I.C.L.E. Course Handbook, § 1-7 (2002).

[24] See *Noggles*, supra.

[25] 414 Mich 603; 327 NW2d 805(1982)

[26] *Id.* at 617

[27] (**emphasis added**), *Smith v Globe Life Insurance Co.*, 460 Mich. 446, 464 (1999).

[28] Victor, I.C.L.E. Course Handbook, § 1-8 (2002).

[29] *Id.*

[30] *Globe,* supra at 465

[31] *Unfair and Deceptive Acts and Practices,* 4th ed., National Consumer Law Center, §2.3.3.3.2

[32] *Globe*, supra at 467

[33] Victor, I.C.L.E. Course Handbook, § 1-8 (2002).

[34] *Id.*

[35] *Id.*

[36] Brief of Amicus Curiae Attorney General Jennifer M. Granholm at17, *Winans v Shoal Excavating & Construction, Inc.,* (Mich. Ct. App. 2001) (No. 230944)

[37] Stanley F. Pruss, *Globe and You, Where its been – Where its going*, Address at the Kellog Center, East Lansing MI, (2001)

[38] *Globe*, supra at fn 12

[39] *Id.* at 480-81

[40] Gary M. Victor, Address at the ICLE Seminar, (Feb. 15, 2002)

[41] Victor, I.C.L.E. Course Handbook, § 1-8 (2002).

[42] *Id.*

[43] *Id.* at §1-9 (*citing Dix v American Bankers Life Assurance Co.*, 429 Mich 410 (1987))

[44] Stanley F. Pruss, *Globe and You, Where its been – Where its going*, Address at the Kellog Center, East Lansing MI, (2001).

[45] Brief of Amicus Curiae Attorney General Jennifer M. Granholm at 17, *Winans v Shoal Excavating & Construction, Inc.*, (Mich. Ct. App. 2001) (No. 230944)

[46] See Pruss, *Globe and You*, Address, supra.

[47] *Forton v Lazar*, 239 Mich App 711; 609 NW2d 850 (2000), *lv denied*, 463 Mich 969; 622 NW2d 61 (2001) (where court suggested for an issue not brought on appeal that residential builders should be exempt under the MCPA because they are regulated by the Occupational Code and the Residential Builders' and Maintenance and Alteration Contractors' Board).

[48] See *Wickens v Oakwood Healthcare System*, 453 Mich 60; 631 NW2d 690 (2001).

[49] See Granholm Amicus, supra at 6 (*citing People v Lounsbery*, 246 Mich App 506; 633 NW2d 438 (2001)).

[50] See MCL 443.903(1)(o)

[51] See Granholm Amicus, supra at 7

[52] *Id.*

[53] *Id.*

[54] See Pruss, *Globe and You*, Address, supra.

[55] *Id.*

[56] See *Ward v Dick Dyer & Assoc, Inc.*, 403 SE2d 310 (1991) (where South Carolina Supreme Court recognized inconsistent results in deciding exemptions under a "general activity" test recanted its position for interpreting the scope of regulated activity and ruled that only "specifically permitted" practices were exempt from liability under the Unfair Trade Practices Act).

[57] See *State Ex Rel McLeod v Rhoades*, 275 SC 104; 267 SE2d 539 (1980) (where the South Carolina Supreme Court interpreted the scope of their Unfair Trade Practices Act to exempt "generally regulated" transactions like selling stock since the act is permitted by the Security and Exchange Commission).

[58] See *Rousseau v Eshleman*, 519 A2d 243 (1986) (attorneys were exempt under a "generally regulated" analysis)(But See also *Gilmore v Bradgate Associates, Inc.*, 604 A2d 555, 557 (1992)(where court reversed their "generally regulated" approach and held instead that their consumer protection statute "only exempts those actions which are permitted by a regulatory board or office.")

[59] See California's Supreme Court decision in *Stop Youth Addiction, Inc v Lucky Stores, Inc*, 950 P2d 1086, 1100 (1998).

[60] See New Jersey's Supreme Court decision in *Lemelledo v Beneficial Management Corp*, 696 A2d 546, 554 (1997).

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