

**A FEDERAL JUDGE HOLDS NON-ECONOMIC DAMAGES
AVAILABLE UNDER THE MCPA**

By
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INTRODUCTION

The Michigan Consumer Protection Act (MCPA)¹ provides that in an individual action a “person who suffers a loss” may recover \$250 or “actual damages”, whichever is greater, together with reasonable attorneys fees.² Ever since the enactment of the MCPA some twenty-five years ago, there has been a question whether the term “actual damages” includes non-economic damages for such items as mental anguish and pain and suffering. In *Avery v Industry Mortgage Co.*,³ Judge Hillman, the senior district judge of Michigan’s Western District, Southern Division, has finally given us a well-reasoned, definitive answer. Non-economic damages are indeed available under the MCPA.

THE CASE AND COURT’S REASONING

Avery involved a suit by mortgagors against their mortgagee following a fire loss.⁴ The complaint, containing claims for non-economic damages, alleged that the mortgagee violated the MCPA by misleading plaintiffs regarding insurance coverage and the status of their mortgage.⁵ The suit was filed in Montcalm County and removed to federal court on the basis of diversity.⁶ The defendant moved to dismiss plaintiffs’ claims for non-economic damages. The matter was referred to the magistrate judge who concluded in his Report and Recommendation that the term “actual damages” in the MCPA did not include non-economic damages.⁷ Plaintiff objected to this conclusion and Judge Hillman reviewed the issue *de novo*.⁸

As this issue was one of first impression and the MCPA fails to define either “loss” or “actual damages”, the Court was charged with the responsibility of interpreting the statute. The

first question was the meaning of the word “loss”. The defendant argued that since statutes like the Whistleblowers Protection Act⁹ (WPA) and the Elliot-Larsen Civil Rights Act¹⁰ use the words “injury or loss” whereas the MCPA uses only the word “loss”, there was a legislative intention to limit the MCPA remedy. The Court disagreed, noting that Michigan courts have held the purpose of the MCPA is to protect consumers and that it is a remedial statute subject to a liberal interpretation.¹¹

The Court reasoned that there was no evidence that the legislature considered either the WPA or Elliot-Larsen when enacting the MCPA, and more significantly, that a Michigan appellate court has already interpreted the word “loss” in the statute to include the concept of “injury”.¹² *Mayhall v. A.H. Pond Co, Inc*¹³ involved both the MCPA and the Pricing and Advertising Act¹⁴ (PAA), each of which require the plaintiff to have suffered a “loss” in order to maintain an individual action for damages. The *Mayhall* Court concluded that by using the word “loss” in each of these statutes, the legislature intended to incorporate the “common-law requirement of injury”.¹⁵ Judge Hillman agreed with *Mayhall’s* analysis and concluded that there was “no meaningful evidence that by using the word ‘loss’ the legislature demonstrated an implicit intent to limit remedies” under the MCPA.¹⁶

The next issue was the meaning of “actual damages”. The defense had argued that “actual damages” should be limited to pecuniary loss, a position accepted by the magistrate. Although the Court did not articulate the question in precisely this manner, it boils down to whether violations of the MCPA should be treated as torts or breaches of contract. Judge Hillman proceeded with an analysis of these theories in relation to the MCPA.

The Court noted the general rule that non-economic damages are not available in breach of contract actions unless it can be reasonably said that such damages were contemplated by the

parties at the time that the contract was made.¹⁷ In tort cases, however, such as those based in fraud or misrepresentation, non-economic damages for such items as mental distress and anguish are available.¹⁸ For guidance on the issue of how to treat violations of a statutory duty, the Court turned to *Phillips v. Butterball Farms Co, Inc.*¹⁹

In *Phillips*, the plaintiff claimed a retaliatory discharge on the basis of her filing a workers compensation claim. The question was whether the plaintiff was entitled to non-economic damages as a result of defendant's violations of the Worker's Disability Compensation Act.²⁰ The *Phillips* Court concluded that they were. Judge Hillman cited *Phillips* for the proposition that:

Rights arising from a breach of a private agreement, which sounds in contract, are distinct from those arising from a breach of statutory duty, which sounds in tort.²¹

The Court's next step was to discuss *Phinney v. Perlmutter*.²² In *Phinney*, the Court applied *Phillips*' non-economic damages analysis to a fraud claim and concluded that non-economic damages were available.²³ Judge Hillman reasoned that since Michigan courts analyzing MCPA and PAA cases analogized them to common-law fraud,²⁴ if non-economic damages were available for fraud claims, they should also be available for MCPA claims. He concluded:

[o]n the basis of *Phinney*, therefore, noneconomic damages are recoverable whenever they are determined to be the legal and natural consequences of a wrongful act and reasonably could have been anticipated.²⁵

The Court then dealt with the defense argument based on *Pantelas v Montgomery Ward & Co, Inc.*²⁶ *Pantelas* held that mental distress damages were not recoverable under the PAA. Judge Hillman reasoned that the defense reliance on *Pantelas* as misplaced for three reasons:

First, the *Phinney* court held that the *Pantelas* discussion of the damages available in common-law fraud was dicta. Second, the *Phinney* panel noted that if

the *Pantelas* discussion of fraud damages were not dicta, it would fall (sic) to follow earlier Michigan precedent permitting recovery of such damages in fraud cases. Third, the *Phinney* court noted that the *Pantelas* case did not address a situation in which the defendant had engaged in an intentional wrong. Instead, the defendant had negligently violated the PAA by not having a sufficient quantity of advertised paint rollers in stock at the time of advertisement.²⁷

Of course, not every MCPA case will provide a factual context for an award including non-economic damages. Judge Hillman acknowledged this with his final conclusion.

I am satisfied that a determination whether noneconomic damages are available must be based on the application of the standard articulated by the *Phinney* court: whether the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated. As a result, the availability of mental distress damages will turn on the facts of each case and ordinarily will be a question for the jury to determine, unless no genuine dispute exists that such damages could not naturally flow from the type of breach alleged.²⁸

CONCLUSION

As stated by the Supreme Court in *Dix v American Bankers Life Assurance*,²⁹

[t]he Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices. . .³⁰

Many of the unfair and deceptive practices that consumers are subjected to produce non-economic damages such as mental distress and anguish. For twenty-five years the question of whether the MCPA could be used to compensate consumers for these “losses” had remained unanswered. That question has now been answered by Judge Hillman in *Avery v Industry Mortgage Co.*³¹ In an MCPA case, whenever non-economic damages are “the legal and natural consequences of the wrongful act and might reasonably have been anticipated”,³² they are recoverable.

¹ MCL §445.901, *et seq.*

² MCL §445.911(2).

³ 135 FSupp2d 840 (WD Mich 2001).

⁴ *Avery* at 841.

⁵ *Id.*

⁶ *Id* at 840.

⁷ *Id* at 840-841.

⁸ *Id* at 841.

⁹ MCL §15.363, *et seq.*

¹⁰ MCL §372801, *et seq.*

¹¹ *Id* at 842 citing *Forton v Laszar*, 239 Mich.App. 711 (2000) and *Price v Long Realty, Inc*, 199 Mich App 461 (1993).

¹² *Id* at 842-843.

¹³ 129 Mich App 178 (1983).

¹⁴ MCL §445.350, *et seq.*

¹⁵ 129 Mich App at 183.

¹⁶ *Avery* at 843.

¹⁷ *Id* citing *Kewin v Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401 (1980).

¹⁸ *Id* citing *Veselenak v Smith*, 414 Mich. 567 (1982).

¹⁹ 448 Mich 239 (1995)

²⁰ MCL §418.301(11).

²¹ *Avery* at 183.

²² 222 Mich App 513 (1997).

²³ *Avery* at 843.

²⁴ *Id* citing *Zine v Chrysler Corp*, 236 Mich App 261 (1999) and *Mayhall v. A.H. Pond Co, Inc*, 129 Mich App 178 (1983).

²⁵ *Avery* at 843-844.

²⁶ 169 Mich App 273 (1988).

²⁷ *Avery* at 844.

²⁸ *Id* at 845.

²⁹ 429 Mich 410 (1987).

³⁰ *Id* at 417.

³¹ 135 FSupp2d 840 (WD Mich 2001).

³² *Id* at 845.