House
Legislative
Analysis
Section

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MCPA INSURANCE EXEMPTIONS

House Bill 5332 as enrolled
Public Act 432 of 2000
First Analysis (1-18-01)

Sponsor: Rep. Clark Bisbee
House Committee: Insurance
Senate Committee: Financial Services

THE APPARENT PROBLEM:

In light of recent court decisions, representatives of insurance companies are seeking amendments to the Michigan Consumer Protection Act that they say will restore the proper relationship between the MCPA and the Insurance Code, clarifying and restating the provisions in the act regarding the ability of consumers to bring insurance-related lawsuits. (See *Background Information.*)

THE CONTENT OF THE BILL:

House Bill 5332 would amend the Michigan Consumer Protection Act in the following ways.

• It would specify that the MCPA does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice made unlawful by Chapter 20 of the Insurance Code. Chapter 20 addresses unfair and prohibited trade practices and frauds and contains within it the Uniform Trade Practices Act.

• It would also amend an existing provision that describes the interaction between the MCPA and various other regulatory acts. Currently, the Michigan Consumer Protection Act says that except for the purposes of an action filed by a person under Section 11 (which deals with private causes of action brought by consumers), the act does not apply to an unfair, unconscionable, or deceptive method, act, or practice made unlawful by any of a number of regulatory statutes: Chapter 20 of the Insurance Code; the Banking Code; the Public Service Commission Enabling Act; the Motor Carrier Act; and the act governing nonprofit dental care corporations. The bill would remove the reference to the Insurance Code from this section (since such trade practices would become exempt as noted in the paragraph above, even from Section 11), and would remove the reference to nonprofit dental care corporations. The bill would add the Credit Union Act and the Savings Bank Act to the list of statutes cited in the section. It also would amend this section to say that, except for actions under Section 11, the act does not apply to *or create a cause of action for* an unfair, conscionable, or deceptive method, act, or practice made unlawful under one of the previously mentioned regulatory schemes.

• It would eliminate the reference to the Banking Code of 1969 and replace it with a reference to the recently enacted Banking Code of 1999.

MCL 445.904

BACKGROUND INFORMATION:

The Michigan Consumer Protection Act, enacted in 1976, prohibits a wide variety of unfair trade practices. It is enforced primarily by the Office of Attorney General, which has broad powers to deal with complaints, as do local prosecutors. The act also permits private individuals to bring lawsuits.

The Michigan Consumer Protection Act contains a provision that says the act does not apply 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." [Section 4(1)(a)]

The MCPA also says, as noted earlier, that "except for the purposes of an action filed by a person under section 11, the act shall not apply to an unfair, unconscionable, or deceptive method, act, or practice which is made unlawful by . . . Chapter 20 of the Insurance Code", as well as a number of other regulatory acts. (Emphasis added) [Section 4(2)(a)]

Section 11 of the act cited above allows individuals to bring private actions, including obtaining a declaratory judgment that a method, act, or practice is unlawful under the MCPA; enjoining . . . a person who is

engaging or is about to engage in an unlawful method, practice, or act; bringing an action to recover actual damages or $250, whichever is greater, together with reasonable attorneys' fees, for a violation of the act ; and bringing a class action for damages caused by unlawful methods, acts, or practices.

A number of court decisions have addressed the meaning and interrelationship of these provisions, sometimes in conflicting ways. In 1999, the Michigan Supreme Court decided Smith v Globe Life, a case involving the sale of credit life insurance. A trial court had granted summary disposition to the defendant life insurance company in the case, saying the MCPA did not apply to activity regulated by the state insurance commissioner and relying on a 1985 Michigan Court of Appeals ruling, known as Kekel v Allstate Insurance Company. The supreme court disagreed with the trial court and said the defendant was not entitled to summary disposition with regard to the plaintiff's MCPA claims (and remanded the case to the trial court). The court said:

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

Earlier, in 1997, the court of appeals panel that addressed Smith v Globe Life had also overturned the trial court, saying in its opinion that the 1985 Kekel decision was an erroneous interpretation of the MCPA. But, the appeals court opined that while Section 4(1)(a) exempted from the MCPA a transaction or conduct that was specifically authorized, the section said nothing about a transaction or conduct that was generally regulated. The 1999 state supreme court decision, however, disagreed with the appeals court, saying, "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 paragraph 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 the statutory authority of this state or the United States.'" As mentioned above, however, the supreme court found that paragraph 4(2)(a) allowed for a private cause of action.

(In a dissent, two justices agreed with the result reached by the majority regarding the MCPA claim but disagreed with the majority's analysis. In brief, the dissent said that in such a case, "the proper inquiry should be first to determine whether the specific transaction or conduct at issue, as opposed to the general transaction, is 'specifically authorized . . .'" The dissenting opinion said "general transactions or conduct subject to licensing are not necessarily exempt from the MCPA" and that 'subject to regulation' is not the same as 'specifically authorized' as the majority appeared to be saying.)

FISCAL IMPLICATIONS:

The bill would have no fiscal implications to state and local government, according to the House Fiscal Agency. (HFA fiscal note dated 11-3-00)

ARGUMENTS:

For:

House Bill 5332 properly removes from the Michigan Consumer Protection Act the ability of private individuals to bring lawsuits regarding trade practices branded as unfair, unconscionable, or deceptive by Chapter 20 of the Insurance Code. Insurance industry spokespersons say this resolves confusion generated by a recent court decision in this area and restores their understanding of the original purpose of the act. The Insurance Code is the proper statute for the regulation of the trade practices of insurance companies and other participants in the insurance industry. There is no need for a duplicate set of remedies in another statute. People who are aggrieved by actions by insurance companies have ample protection under Chapter 20 of the Insurance Code. State insurance regulators are up to the task of responding to and resolving consumer complaints, as well as taking action against insurers who violate the Insurance Code. (Moreover, some insurance industry representatives say consumers can still bring insurance-related actions under the MCPA if Chapter 20 is not involved; that is, they can bring lawsuits, including class actions, against insurance

companies under Section 3 of the MCPA, which lists a large number of unfair trade practices.)

Against:

Critics of House Bill 5332 say that the bill diminishes the rights of consumers by preventing them from bringing private causes of action under the Michigan Consumer Protection Act against insurance companies for committing unfair and deceptive trade practices in violation of the Chapter 20 of the Insurance Code (the Uniform Trade Practices Act). A recent Michigan Supreme Court decision affirmed this right. Since Chapter 20 of the Insurance Code allows no private cause of action for a consumer, the only recourse for consumers under the bill would be to seek remedies through the administrative procedures offered by state insurance regulators. The bill weakens the ability of consumers to resolve conflicts with insurers. Furthermore, a representative of the Attorney General's Office said it would reduce the ability of its consumer protection division to address insurance-related consumer complaints. That agency says that when the individual's right to sue is constricted, it reduces the leverage of the AG's office and reduces its ability to solve problems. It also, by separating out insurance transactions, would mean that multifaceted consumer complaints with an insurance component would have to be dealt with separately. To cite an example from an assistant attorney general, a case could involve the sale of new windows to a senior citizen financed by a home improvement company through a second mortgage at a high interest rate that also carried with it unwanted credit insurance.

Analyst: C. Couch

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