

SENATE BILL No. 753

September 13, 2005, Introduced by Senators CHERRY, PRUSI, CLARK-COLEMAN, TOY, SCHAUER, JACOBS, BASHAM, BARCIA, OLSHOVE, BRATER and SCOTT and referred to the Committee on Commerce and Labor.

A bill to amend 1976 PA 331, entitled "Michigan consumer protection act," by amending sections 3 and 11 (MCL 445.903 and 445.911), section 3 as amended by 2004 PA 462, and by adding section 3e.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 3. (1) Unfair, unconscionable, or deceptive methods,
2 acts, or practices in the conduct of trade or commerce are unlawful
3 and are defined as follows:

4 (a) Causing a probability of confusion or misunderstanding as
5 to the source, sponsorship, approval, or certification of goods or
6 services.

7 (b) Using deceptive representations or deceptive designations
8 of geographic origin in connection with goods or services.

1 (c) Representing that goods or services have sponsorship,
2 approval, characteristics, ingredients, uses, benefits, or
3 quantities that they do not have or that a person has sponsorship,
4 approval, status, affiliation, or connection that he or she does
5 not have.

6 (d) Representing that goods are new if they are deteriorated,
7 altered, reconditioned, used, or secondhand.

8 (e) Representing that goods or services are of a particular
9 standard, quality, or grade, or that goods are of a particular
10 style or model, if they are of another.

11 (f) Disparaging the goods, services, business, or reputation
12 of another by false or misleading representation of fact.

13 (g) Advertising or representing goods or services with intent
14 not to dispose of those goods or services as advertised or
15 represented.

16 (h) Advertising goods or services with intent not to supply
17 reasonably expectable public demand, unless the advertisement
18 discloses a limitation of quantity in immediate conjunction with
19 the advertised goods or services.

20 (i) Making false or misleading statements of fact concerning
21 the reasons for, existence of, or amounts of price reductions.

22 (j) Representing that a part, replacement, or repair service
23 is needed when it is not.

24 (k) Representing to a party to whom goods or services are
25 supplied that the goods or services are being supplied in response
26 to a request made by or on behalf of the party, when they are not.

27 (l) Misrepresenting that because of some defect in a consumer's

1 home the health, safety, or lives of the consumer or his or her
2 family are in danger if the product or services are not purchased,
3 when in fact the defect does not exist or the product or services
4 would not remove the danger.

5 (m) Causing a probability of confusion or of misunderstanding
6 with respect to the authority of a salesperson, representative, or
7 agent to negotiate the final terms of a transaction.

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

11 (o) Causing a probability of confusion or of misunderstanding
12 as to the terms or conditions of credit if credit is extended in a
13 transaction.

14 (p) Disclaiming or limiting the implied warranty of
15 merchantability and fitness for use, unless a disclaimer is clearly
16 and conspicuously disclosed.

17 (q) Representing or implying that the subject of a consumer
18 transaction will be provided promptly, or at a specified time, or
19 within a reasonable time, if the merchant knows or has reason to
20 know it will not be so provided.

21 (r) Representing that a consumer will receive goods or
22 services "free" or "without charge", or using words of similar
23 import in the representation, without clearly and conspicuously
24 disclosing with equal prominence in immediate conjunction with the
25 use of those words the conditions, terms, or prerequisites to the
26 use or retention of the goods or services advertised.

27 (s) Failing to reveal a material fact, the omission of which

1 tends to mislead or deceive the consumer, and which fact could not
2 reasonably be known by the consumer.

3 (t) Entering into a consumer transaction in which the consumer
4 waives or purports to waive a right, benefit, or immunity provided
5 by law, unless the waiver is clearly stated and the consumer has
6 specifically consented to it.

7 (u) Failing, in a consumer transaction that is rescinded,
8 canceled, or otherwise terminated in accordance with the terms of
9 an agreement, advertisement, representation, or provision of law,
10 to promptly restore to the person or persons entitled to it a
11 deposit, down payment, or other payment, or in the case of property
12 traded in but not available, the greater of the agreed value or the
13 fair market value of the property, or to cancel within a specified
14 time or an otherwise reasonable time an acquired security interest.

15 (v) Taking or arranging for the consumer to sign an
16 acknowledgment, certificate, or other writing affirming acceptance,
17 delivery, compliance with a requirement of law, or other
18 performance, if the merchant knows or has reason to know that the
19 statement is not true.

20 (w) Representing that a consumer will receive a rebate,
21 discount, or other benefit as an inducement for entering into a
22 transaction, if the benefit is contingent on an event to occur
23 subsequent to the consummation of the transaction.

24 (x) Taking advantage of the consumer's inability reasonably to
25 protect his or her interests by reason of disability, illiteracy,
26 or inability to understand the language of an agreement presented
27 by the other party to the transaction who knows or reasonably

1 should know of the consumer's inability.

2 (y) Gross discrepancies between the oral representations of
3 the seller and the written agreement covering the same transaction
4 or failure of the other party to the transaction to provide the
5 promised benefits.

6 (z) Charging the consumer a price that is grossly in excess of
7 the price at which similar property or services are sold.

8 (aa) Causing coercion and duress as the result of the time and
9 nature of a sales presentation.

10 (bb) Making a representation of fact or statement of fact
11 material to the transaction such that a person reasonably believes
12 the represented or suggested state of affairs to be other than it
13 actually is.

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

17 (dd) Subject to subdivision (ee), representations by the
18 manufacturer of a product or package that the product or package is
19 1 or more of the following:

20 (i) Except as provided in subparagraph (ii), recycled,
21 recyclable, degradable, or is of a certain recycled content, in
22 violation of guides for the use of environmental marketing claims,
23 16 CFR part 260.

24 (ii) For container holding devices regulated under part 163 of
25 the natural resources and environmental protection act, 1994 PA
26 451, MCL 324.16301 to 324.16303, representations by a manufacturer
27 that the container holding device is degradable contrary to the

1 definition provided in that act.

2 (ee) Representing that a product or package is degradable,
3 biodegradable, or photodegradable unless it can be substantiated by
4 evidence that the product or package will completely decompose into
5 elements found in nature within a reasonably short period of time
6 after consumers use the product and dispose of the product or the
7 package in a landfill or composting facility, as appropriate.

8 (ff) Offering a consumer a prize if in order to claim the
9 prize the consumer is required to submit to a sales presentation,
10 unless a written disclosure is given to the consumer at the time
11 the consumer is notified of the prize and the written disclosure
12 meets all of the following requirements:

13 (i) Is written or printed in a bold type that is not smaller
14 than 10-point.

15 (ii) Fully describes the prize, including its cash value, won
16 by the consumer.

17 (iii) Contains all the terms and conditions for claiming the
18 prize, including a statement that the consumer is required to
19 submit to a sales presentation.

20 (iv) Fully describes the product, real estate, investment,
21 service, membership, or other item that is or will be offered for
22 sale, including the price of the least expensive item and the most
23 expensive item.

24 (gg) Violating 1971 PA 227, MCL 445.111 to 445.117, in
25 connection with a home solicitation sale or telephone solicitation,
26 including, but not limited to, having an independent courier
27 service or other third party pick up a consumer's payment on a home

1 solicitation sale during the period the consumer is entitled to
2 cancel the sale.

3 (hh) Except as provided in subsection (3), requiring a
4 consumer to disclose his or her social security number as a
5 condition to selling or leasing goods or providing a service to the
6 consumer, unless any of the following apply:

7 (i) The selling, leasing, providing, terms of payment, or
8 transaction includes an application for or an extension of credit
9 to the consumer.

10 (ii) The disclosure is required or authorized by applicable
11 state or federal statute, rule, or regulation.

12 (iii) The disclosure is requested by a person to obtain a
13 consumer report for a permissible purpose described in section 604
14 of the fair credit reporting act, 15 USC 1681b.

15 (iv) The disclosure is requested by a landlord, lessor, or
16 property manager to obtain a background check of the individual in
17 conjunction with the rent or leasing of real property.

18 (v) The disclosure is requested from an individual to effect,
19 administer or enforce a specific telephonic or other electronic
20 consumer transaction that is not made in person but is requested or
21 authorized by the individual if it is to be used solely to confirm
22 the identity of the individual through a fraud prevention service
23 database. The consumer good or service shall still be provided to
24 the consumer upon verification of his or her identity if he or she
25 refuses to provide his or her social security number but provides
26 other information or documentation that can be used by the person
27 to verify his or her identity. The person may inform the consumer

1 that verification through other means than use of the social
2 security number may cause a delay in providing the service or good
3 to the consumer.

4 (ii) If a credit card or debit card is used for payment in a
5 consumer transaction, issuing or delivering a receipt to the
6 consumer that displays any part of the expiration date of the card
7 or more than the last 4 digits of the consumer's account number.
8 This subdivision does not apply if the only receipt issued in a
9 consumer transaction is a credit card or debit card receipt on
10 which the account number or expiration date is handwritten,
11 mechanically imprinted, or photocopied. This subdivision applies to
12 any consumer transaction that occurs on or after March 1, 2005,
13 except that if a credit or debit card receipt is printed in a
14 consumer transaction by an electronic device, this subdivision
15 applies to any consumer transaction that occurs using that device
16 only after 1 of the following dates, as applicable:

17 (i) If the electronic device is placed in service after March
18 1, 2005, July 1, 2005 or the date the device is placed in service,
19 whichever is later.

20 (ii) If the electronic device is in service on or before March
21 1, 2005, July 1, 2006.

22 (jj) Violating section 11 of the identity theft protection
23 act, **2004 PA 452, MCL 445.71.**

24 **(KK) VIOLATING SECTION 3E.**

25 (2) The attorney general may promulgate rules to implement
26 this act under the administrative procedures act of 1969, 1969 PA
27 306, MCL 24.201 to 24.328. The rules shall not create an additional

1 unfair trade practice not already enumerated by this section.
2 However, to assure national uniformity, rules shall not be
3 promulgated to implement subsection (1)(dd) or (ee).

4 (3) Subsection (1)(hh) does not apply to either of the
5 following:

6 (a) Providing a service related to the administration of
7 health-related or dental-related benefits or services to patients,
8 including provider contracting or credentialing. This subdivision
9 is intended to limit the application of subsection (1)(hh) and is
10 not intended to imply that this act would otherwise apply to
11 health-related or dental-related benefits.

12 (b) An employer providing benefits or services to an employee.

13 **SEC. 3E. (1) DURING AN EMERGENCY PERIOD AND IN AN EMERGENCY**
14 **AREA, A PERSON OR THAT PERSON'S AGENT OR EMPLOYEE SHALL NOT RENT OR**
15 **SELL OR OFFER TO RENT OR SELL AT AN UNCONSCIONABLE PRICE ANY**
16 **ESSENTIAL COMMODITY, INCLUDING, BUT NOT LIMITED TO, SUPPLIES,**
17 **SERVICES, PROVISIONS, OR EQUIPMENT, THAT IS NECESSARY FOR**
18 **CONSUMPTION OR USE AS A DIRECT RESULT OF THE EMERGENCY OR IMPOSE AN**
19 **UNCONSCIONABLE PRICE FOR THE RENTAL OR LEASE OF ANY DWELLING UNIT**
20 **OR SELF-STORAGE FACILITY.**

21 (2) A PRICE INCREASE APPROVED BY AN APPROPRIATE GOVERNMENTAL
22 AGENCY IS NOT A VIOLATION OF THIS SECTION.

23 (3) THIS SECTION DOES NOT APPLY TO A SALE BY A GROWER,
24 PRODUCER, OR PROCESSOR OF A RAW OR PROCESSED FOOD PRODUCT, EXCEPT
25 FOR A RETAIL SALE OF THAT PRODUCT TO AN ULTIMATE CONSUMER WITHIN
26 THE EMERGENCY AREA.

27 (4) FOR PURPOSES OF THIS SECTION, IT IS PRIMA FACIE EVIDENCE

1 THAT A PRICE IS UNCONSCIONABLE IF EITHER OF THE FOLLOWING APPLIES:

2 (A) THE AMOUNT CHARGED REPRESENTS A GROSS DISPARITY BETWEEN
3 THE PRICE OF THE COMMODITY OR RENTAL OR LEASE OF ANY DWELLING UNIT
4 OR SELF-STORAGE FACILITY THAT IS THE SUBJECT OF THE OFFER OR
5 TRANSACTION AND THE AVERAGE PRICE AT WHICH THAT COMMODITY OR
6 DWELLING UNIT OR SELF-STORAGE FACILITY WAS RENTED, LEASED, SOLD, OR
7 OFFERED FOR RENT OR SALE IN THE USUAL COURSE OF BUSINESS DURING THE
8 30 DAYS IMMEDIATELY PRECEDING A DECLARATION OF A STATE OF
9 EMERGENCY, AND THE INCREASE IN THE AMOUNT CHARGED IS NOT
10 ATTRIBUTABLE TO ADDITIONAL COSTS INCURRED IN CONNECTION WITH THE
11 RENTAL OR SALE OF THE COMMODITY OR RENTAL OR LEASE OF ANY DWELLING
12 UNIT OR SELF-STORAGE FACILITY OR NATIONAL OR INTERNATIONAL MARKET
13 TRENDS.

14 (B) THE AMOUNT CHARGED GROSSLY EXCEEDS THE AVERAGE PRICE AT
15 WHICH THE SAME OR A SIMILAR COMMODITY WAS READILY OBTAINABLE IN THE
16 TRADE AREA DURING THE 30 DAYS IMMEDIATELY PRECEDING A DECLARATION
17 OF A STATE OF EMERGENCY, AND THE INCREASE IN THE AMOUNT CHARGED IS
18 NOT ATTRIBUTABLE TO ADDITIONAL COSTS INCURRED IN CONNECTION WITH
19 THE RENTAL OR SALE OF THE COMMODITY OR RENTAL OR LEASE OF ANY
20 DWELLING UNIT OR SELF-STORAGE FACILITY OR NATIONAL OR INTERNATIONAL
21 MARKET TRENDS.

22 (5) AS USED IN THIS SECTION:

23 (A) "COMMODITY" MEANS ANY GOODS, SERVICES, MATERIALS,
24 MERCHANDISE, SUPPLIES, PROVISIONS, EQUIPMENT, RESOURCES, OR OTHER
25 ARTICLE OF COMMERCE AND INCLUDES, WITHOUT LIMITATION, FOOD, WATER,
26 ICE, CHEMICALS, PETROLEUM PRODUCTS, AND LUMBER NECESSARY FOR
27 CONSUMPTION OR USE AS A DIRECT RESULT OF AN EMERGENCY.

1 (B) "EMERGENCY AREA" MEANS AN AREA OF THIS STATE SUBJECT TO A
2 STATE OF EMERGENCY DECLARED BY THE GOVERNOR UNDER THE EMERGENCY
3 MANAGEMENT ACT, 1976 PA 390, MCL 30.401 TO 30.421, OR UNDER 1945 PA
4 302, MCL 10.31 TO 10.33, OR A STATE OF ENERGY EMERGENCY DECLARED BY
5 THE GOVERNOR UNDER 1982 PA 191, MCL 10.81 TO 10.89.

6 (C) "EMERGENCY PERIOD" MEANS THE PERIOD DURING WHICH A STATE
7 OF EMERGENCY DECLARED BY THE GOVERNOR IS EFFECTIVE UNDER THE
8 EMERGENCY MANAGEMENT ACT, 1976 PA 390, MCL 30.401 TO 30.421, OR
9 UNDER 1945 PA 302, MCL 10.31 TO 10.33, OR A STATE OF ENERGY
10 EMERGENCY DECLARED BY THE GOVERNOR UNDER 1982 PA 191, MCL 10.81 TO
11 10.89.

12 Sec. 11. (1) Whether or not he OR SHE seeks damages or has an
13 adequate remedy at law, a person may bring an action to do either
14 or both of the following:

15 (a) Obtain a declaratory judgment that a method, act, or
16 practice is unlawful under section 3.

17 (b) Enjoin in accordance with the principles of equity a
18 person who is engaging or is about to engage in a method, act, or
19 practice which is unlawful under section 3.

20 (2) Except in a class action, a person who suffers loss as a
21 result of a violation of this act may bring an action to recover
22 actual damages or \$250.00, whichever is greater, together with
23 reasonable ~~attorneys'~~ **ATTORNEY** fees.

24 (3) A person who suffers loss as a result of a violation of
25 this act may bring a class action on behalf of persons residing or
26 injured in this state for the actual damages caused by any of the
27 following:

1 (a) A method, act, or practice in trade or commerce defined as
2 unlawful under section 3.

3 (b) A method, act, or practice in trade or commerce declared
4 to be unlawful under section 3(1) by a final judgment of the
5 circuit court or an appellate court of this state which is either
6 reported officially or made available for public dissemination
7 pursuant to section 9 by the attorney general not less than 30 days
8 before the method, act, or practice on which the action is based
9 occurs.

10 (c) A method, act, or practice in trade or commerce declared
11 by a circuit court of appeals or the supreme court of the United
12 States to be an unfair or deceptive act or practice within the
13 meaning of section 5(a)(1) of the federal trade commission act, 15
14 ~~U.S.C.~~ **USC** 45(a)(1), in a decision which affirms or directs the
15 affirmance of a cease and desist order issued by the federal trade
16 commission if the order is final within the meaning of section 5(g)
17 of the federal trade commission act, 15 ~~U.S.C.~~ **USC** 45(g), and which
18 is officially reported not less than 30 days before the method,
19 act, or practice on which the action is based occurs. For purposes
20 of this subdivision, a method, act, or practice shall not be deemed
21 to be unfair or deceptive within the meaning of section 5(a)(1) of
22 the federal trade commission act solely because the method, act, or
23 practice is made unlawful by another federal statute that refers to
24 or incorporates section 5(a)(1) of the federal trade commission
25 act.

26 (4) On motion of a person and without bond in an action
27 brought under subsection (3), the court may make an appropriate

1 order: to reimburse persons who have suffered damages; to carry out
2 a transaction in accordance with the aggrieved persons' reasonable
3 expectations; to strike or limit the application of unconscionable
4 clauses of contracts to avoid an unconscionable result; or to grant
5 other appropriate relief. The court after a hearing may appoint a
6 receiver or order sequestration of the defendant's assets if it
7 appears to the satisfaction of the court that the defendant
8 threatens or is about to remove, conceal, or dispose of his **OR HER**
9 assets to the detriment of members of the class.

10 (5) If at any stage of proceedings brought under subsection
11 (3) the court requires that notice be sent to the class, a person
12 may petition the court to require the defendant to bear the cost of
13 notice. In determining whether to impose the cost on the defendant
14 or the plaintiff, the court shall consider the probability that the
15 person will succeed on the merits of his **OR HER** action.

16 (6) If the defendant shows by a preponderance of the evidence
17 that a violation of this act resulted from a bona fide error
18 notwithstanding the maintenance of procedures reasonably adapted to
19 avoid the error, the amount of recovery shall be limited to actual
20 damages.

21 (7) An action under this section shall not be brought more
22 than 6 years after the occurrence of the method, act, or practice
23 which is the subject of the action ~~nor~~ **OR** more than 1 year after
24 the last payment in a transaction involving the method, act, or
25 practice which is the subject of the action, whichever period of
26 time ends at a later date. However, when a person commences an
27 action against another person, the defendant may assert, as a

1 defense or counterclaim, any claim under this act arising out of
2 the transaction on which the action is brought.

3 (8) THIS SECTION DOES NOT APPLY TO A VIOLATION OF SECTION
4 3(1)(KK).