

Legislative Analysis



CONSUMER PROTECTION ACT: STATUTORY CONSTRUCTION OF EXEMPTIONS

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House Bill 4915 with House committee amendment

Sponsor: Rep. Robert Jones

Committee: Judiciary

Complete to 12-11-09

A SUMMARY OF HOUSE BILL 4915 AS REPORTED FROM COMMITTEE 11-4-09

The bill would amend the Michigan Consumer Protection Act, which prohibits certain business practices that deceive or mislead consumers. The act currently says it does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of Michigan or the United States.

House Bill 4915 would specify, however, that the existence of a rule or statute or the grant of a license that regulates or authorizes a *general transaction* of a person engaged in trade or commerce does not exempt that person from the act. In addition, the bill specifies that the general exemption cited above does not exempt a person engaged in trade or commerce from the requirements of the act on the basis that the *general conduct* of the business of that person is regulated by law.

[Under the act, a consumer can bring an action to stop a business from using an illegal practice (injunctive relief), sue to recover actual damages or \$250 (whichever is greater) as well as reasonable attorneys' fees, or file a class action lawsuit. The state attorney general and county prosecutors can also initiate actions against businesses.]

The Michigan Consumer Protection Act also specifies that, except for certain actions by a private party, the act also 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 Banking Code, Motor Carrier Act, Savings Bank Act, Credit Union Act, the Public Commission Service Act, or Chapter 20 of the Insurance Code. The act also exempts acts done by owners, publishers, agents, or employees of communication media (newspapers, television stations, etc.) in the publication or dissemination of advertisements unless the advertisements were known to the media personnel to be false, misleading, or deceptive or the media personnel had a direct financial interest in the sale or distribution of the advertised goods, service, or products. The bill would not amend these provisions.]

BACKGROUND INFORMATION:

The bill seeks to address concerns raised by consumer advocates, who believe that a 1999 Michigan Supreme Court decision in essence gutted the state's primary consumer

protection law, leaving consumers who feel they were harmed by a business's deceptive or unfair business practices without recourse. *Smith v Globe*, 460 Mich 446, (1999). The Michigan Consumer Protection Act (MCPA), which prohibits certain business practices that deceive or mislead consumers, exempts a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of Michigan or the United States. Prior to *Smith*, the exemption was interpreted as not automatically excluding from action under the MCPA the conduct of an individual just because the individual was licensed by a state agency, as discussed in *Attorney General v Diamond Mortgage Co*, 141 Mich 603, 617 (1982). In *Diamond Mortgage Co.*, the legal question was raised as to whether the defendants were exempt under the Michigan Consumers Protection Act (MCPA). The case, which included other legal questions as well, was dismissed by both the trial and appellate courts. In the action, the attorney general contended that Diamond Mortgage's business practices violated the MCPA and the state's usury statutes.

As to the question of exemption under the MCPA, the court agreed with the attorney general "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." The court also wrote that for that case, they needed to "only decide that real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business."

According to a report issued by the Consumer Law Section of the Michigan State Bar entitled, *Who's In and Who's Out? The MCPA Loophole Created by the Michigan Supreme Court*, the *Smith* decision interpreted the statute differently. *Smith* centered on the sale of credit insurance by a licensed insurance company. The court ruled in favor of the insurance company, in effect making entire businesses exempt from the MCPA "as long as the general transactions of that business were specifically authorized by statute." In a 2007 case, the supreme court confirmed that interpretation "by ruling that residential builders and home improvement contractors, and all other business licensed under the Michigan Occupational Code, are exempt from the MCPA." *Liss v Lewiston-Richards, Inc.*

According to the Consumer Law Section, the rulings in these two cases, *Smith* and *Liss*, basically say that "whenever a business engages in a general type of transaction that it is allowed to do by a state or federal law administered by a board or officer, it is exempt from the MCPA, no matter what unfair or deceptive conduct it may have used during the transaction. As such, consumers are left with "few if any effective remedies to redress unfair or deceptive practices they may have been subjected to by such regulated businesses." In fact, of the 13,122 complaints received by the attorney general in 2008, at least 72 percent were against businesses likely to be exempt under the MCPA under the *Smith* interpretation.

Supporters of the legislation say that the bill will restore the MCPA to its original intent and grant consumers an efficient and low-cost option to recoup losses for damages from unfair or deceptive business practices. They say that courts have sufficient authority to identify and toss out frivolous lawsuits, and so the legislation should not significantly increase litigation.

Opponents of the legislation maintain that existing regulatory statutes provide sufficient penalties and remedies for a broad range of conduct by licensed or registered individuals. They say that the focus of Michigan businesses and employers should be on building and rebuilding Michigan's economy, not on defending themselves against litigation that would impose a second, and potentially inconsistent, layer of regulation.

FISCAL IMPACT:

House Bill 4915 would have an indeterminate fiscal impact on the Department of Attorney General and on the Judiciary. Increased costs would depend on the number and nature of additional cases brought by the Attorney General and/or consumers given the change in provisions of the Michigan Consumer Protection Act.

POSITIONS:

The following organizations indicated support for, or testified in support of, the bill:

Michigan Advocacy Project
Michigan Association for Justice
Negligence Law Section – State Bar of Michigan
Michigan Citizen Action
AARP/Michigan
United Auto Workers (UAW)
AFL-CIO
Consumer Law Section – Michigan State Bar

The following organizations indicated opposition to, or testified in opposition to, the bill:

Life Insurance Association of Michigan
Michigan Lawsuit Abuse Watch
Michigan Chamber of Commerce
Michigan Insurance Coalition
National Federation of Independent Business/Michigan (NFIB)
Michigan Health & Hospital Association (MHA)
American Council of Life Insurers (ACLI)
Michigan Association of Insurance Agents
Michigan Grocers Association
Michigan Bankers Association
AT&T
Johnson & Johnson

Michigan Association of Home Builders
Michigan Association of CPAs
Michigan Retailers Association
Michigan Veterinary Medical Association
Small Business Association of Michigan
Property Casualty Insurance Association of America
Securities Industry Financial Markets Association
Michigan Association of Health Plans
Grand Rapids Area Chamber of Commerce
Insurance Institute of Michigan
Detroit Regional Chamber
Auto Dealers of Michigan, LLC
Michigan Association of Realtors
Michigan Business & Professional Association
Jackson National Life Insurance Company
Michigan Credit Union League
Farm Bureau Insurance
Michigan Cable Telecommunications Association
American Insurance Association
Michigan Academy of Family Physicians
American Tort Reform Association
GlaxoSmithKline
MichBio
Michigan Concrete Association
Michigan Financial Services Association
Michigan Food and Beverage Association
Michigan Infrastructure and Transportation Association
Michigan Licensed Beverage Association
Michigan Lumber and Building Materials Association
Michigan Mortgage Lenders Association
Michigan Osteopathic Association
Michigan Restaurant Association
Michigan State Medical Society
National Association of Insurance and Financial Advisors
National Association of Mutual Insurance Companies
Pfizer
PhRMA
Telecommunications Association of Michigan

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.