STATE OF MICHIGAN
IN THE SUPREME COURT

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ex rel The People of the State of Michigan, Plaintiff-Appellant,	Supreme Court No. 165961
	Court of Appeals No. 362272
v	Ingham Circuit Court No. 2022-000058-CZ
ELI LILLY AND COMPANY, Defendant-Appellee.	

AMICUS CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INSURANCE ALLIANCE OF MICHIGAN, MICHIGAN ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS, MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION, MICHIGAN FARM BUREAU, MICHIGAN GROUND WATER ASSOCIATION, MICHIGAN MANUFACTURERS ASSOCIATION, MICHIGAN RETAILERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., SMALL BUSINESS ASSOCIATION OF MICHIGAN, AND AMERICAN TORT REFORM ASSOCIATION

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Michigan Chamber of Commerce (the "Chamber") is a nonprofit corporation representing approximately 5,000 member businesses of all sizes and types, which collectively employ over a million Michiganders in all 83 counties of the State. Founded in 1959, the Chamber has advocated for the continual development of law and public policy that will enhance Michigan's economic competitiveness and make Michigan the best state in the country in which to live, work, raise a family, or build a business.

Associated Builders and Contractors of Michigan ("ABC") is a statewide trade association representing the commercial and industrial construction industries. Dedicated to open competition, equal opportunity and accountability in construction, ABC promotes the development of businesses and tradespeople that work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work.

The Michigan Automobile Dealers Association ("MADA") is a statewide non-profit trade association that represents the unique interests of the more than 600 franchised new-vehicle dealerships in the State. Founded in 1921, MADA works to protect dealers from unfair regulations and legislation on both the state and national levels.

The Insurance Alliance of Michigan ("IAM") is the principal state government-affairs and public-information association consisting of insurers, groups, and related organizations operating in Michigan. Its members include property/casualty insurers representing approximately 94% of the Michigan auto-insurance market, 90% of the Michigan home-insurance market, and 60% of the Michigan commercial-insurance market. Its purpose is to serve the industry and consumers by

[1] In accord with MCR 7.312(H)(5), Amici Curiae confirm that no counsel for any party authored this brief in whole or in part and that no party made a monetary contribution intended to fund the preparation or submission of this brief.

providing educational, media, legislative, and public information on significant issues affecting the insurance business in Michigan.

The Michigan Association of Certified Public Accountants ("MICPA"), founded over 120 years ago, serves more than 17,500 members statewide. Its mission is to serve its members, the CPA profession and the public through a variety of advocacy, education and outreach programs.

The Michigan Cable Telecommunications Association ("MCTA"), established in 1981, represents the cable television and telecommunications industry in the Michigan Legislature and Michigan Public Service Commission on issues affecting telecommunications businesses and customers, and fosters a positive image of the cable industry in Michigan. MCTA has been a major force in helping shape public policy in Michigan to allow new technologies to flourish.

Michigan Farm Bureau was founded in 1919 and represents farms of all sizes and varying styles of production throughout the State. Michigan Farm Bureau is the voice of Michigan agriculture, one of Michigan's primary economic drivers. Its mission is to represent, protect, and enhance the business, economic, social, and educational interests of its members.

Michigan Ground Water Association ("MGWA"), founded in 1928 as the Michigan Well Drillers Association, works to educate its members to provide, protect and promote groundwater as a safe and viable resource. MGWA has a diverse membership invested in this goal, including contractors, technicians, suppliers, and manufacturers throughout the State.

The Michigan Manufacturers Association ("MMA") is an association of approximately 1,800 private Michigan businesses that exists to promote the interests of Michigan businesses and the public in the proper administration of laws; study matters of general interest to its members; and otherwise to promote the general business and economic climate of the State of Michigan.

Through effective representation of its membership on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan.

The Michigan Retailers Association ("MRA") is the nation's largest state retail association and is the unified voice of Michigan's retail industry, with 5,000 member businesses that manage 15,000 stores and websites across the State. Michigan retailers provide more than 870,000 jobs to Michigan workers and are responsible for 20% of Michigan's total economic activity.

National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Small Business Association of Michigan ("SBAM") is the only statewide and state-based association that focuses solely on serving the needs of Michigan's small business community. SBAM has served small businesses in all 83 counties of Michigan since 1969.

American Tort Reform Association ("ATRA") is the nation's first organization exclusively dedicated to reforming the civil justice system. ATRA is a nonprofit, non-partisan nationwide network of state-based legal reform coalition organizations backed by 142,000 grassroots supporters working to bring greater fairness, predictability, and efficiency to the civil justice system in the United States by advocating for tort reform and liability reform through public education and the enactment of legislation.

The interests of Amici Curiae are coextensive with the interests of Michigan citizens. Amici Curiae represent a wide range of practitioners and small, medium, and large commercial enterprises that form the backbone of Michigan's economy. From manufacturing, to retail, to professional health and financial services, Amici Curiae represent industries crucial to ensuring a thriving and competitive economy in Michigan.

Many of Amici Curiae's members operate in industries already subject to extensive state and federal regulation, and they devote substantial resources to comply with those regulations. The Attorney General's case against Defendant-Appellee Eli Lilly and Company ("Lilly") aims to overturn this Court's decades-long application of the exemption under the Michigan Consumer Protection Act ("MCPA"), see MCL 445.904(1)(a), which covers the transactions and conduct of many of Amici Curiae's members and constituents. See *Smith v Globe Life Ins* Co, 460 Mich 446, 465; 597 NW2d 28 (1999); *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007). As the diversity of Amici Curiae shows, the issues in this case do not simply affect one type of business or one area of the private sector. These issues are of critical concern for all participants in Michigan's economy. Amici Curiae have a clear and significant interest in seeing that this Court's sound precedent applying MCL 445.904(1)(a) remains good law. Exposure to additional liability under the MCPA for transactions or conduct that is already overseen by state and federal regulatory authorities would overburden many of Amici Curiae's members and disrupt their long-standing reliance on this Court's precedent.

INTRODUCTION AND REASONS TO DENY LEAVE

Nearly a quarter of a century ago, this Court held in *Smith* that the MCPA bars lawsuits against companies doing business in Michigan when they are already specifically regulated under other laws and regulations. For twenty-five years, the courts have capably and predictably

followed this stable precedent. And for twenty-five years the Legislature has repeatedly *reenacted* MCL 445.904(1)(a) word-for-word, and has repeatedly rejected attempts to repeal it.

Nothing has changed. The Court of Appeals here had no trouble applying this Court's straightforward precedent in *Smith* and *Liss* to reject an MCPA claim against Lilly. The Court of Appeals left its decision unpublished since it broke no new ground, and no judge dissented.

Now, though, the Attorney General and several amicus parties have urged this Court to overrule its decades' old MCPA precedent. The Court should decline the invitation. As this Court has recognized, the MCPA exemption serves important policy aims. The idea is that when other laws and regulations on the books specifically regulate a business's transactions or conduct, consumers are already protected. Layering on another level of lawsuits does little to protect consumers and much to burden Michigan businesses—all while lining the pockets of lawyers on both sides of the dispute. Further, while this case involves a global pharmaceutical company, most of the businesses that would be affected by a decision overturning *Smith* and *Liss* are not large multinational corporations. Like many of Amici Curiae's members, they are small-to-medium-sized businesses and individual practitioners who cannot afford to defend a wellspring of newly authorized consumer lawsuits. The MCPA exemption represents the Legislature's attempt to balance consumer protection with promotion of a healthy business climate in the State. This Court's decisions in *Smith* and *Liss* interpret the plain language of MCL 445.904(1)(a) to ensure that Michigan's courts uniformly apply the exemption in conformity with that legislative intent.

Michigan's businesses and professionals whose transactions or conduct are subject to substantial governmental regulations—including many of Amici Curiae's members—already invest heavily in the safety of their products and services. By exempting highly regulated

businesses and industries from the MCPA where their transactions or conduct is already specifically authorized by law or regulation, the Legislature has ensured that consumers remain safe *and* that businesses can flourish in the Michigan economy. Amici Curiae respectfully request that the Court uphold its longstanding law and deny leave to appeal, or, in the alternative, peremptorily affirm the decision below.

ARGUMENT

I. This Court correctly decided *Smith* and *Liss*.

The MCPA does not apply to "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under the statutory authority of this state or the United States." MCL 445.904(1)(a). This Court has twice explained that, to determine whether "a transaction or conduct" is "specifically authorized" under § 904(1)(a), courts must inquire "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999); *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 206; 732 NW2d 514 (2007). These decisions comport with the plain language of the MCPA, and the Court has no reason to overturn them.

In *Smith*, the plaintiff sued the defendant insurer under the MCPA, claiming that the insurer mispresented the terms of its insurance policy. 460 Mich at 451. But the *Smith* Court rejected the plaintiff's argument that her MCPA claim was not exempt because the insurance regulations did not "authorize . . . fraudulent insurance practices," and it held that her claim fell within the § 904(1)(a) exemption. *Id.* at 463, 468. Applying *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982), this Court in *Smith* explained that the "focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" 460 Mich at 464. Further, the appropriate test under § 904(1)(a) asks "whether the general transaction is specifically

authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id.* at 465. Eight years later in *Liss*, this Court reaffirmed *Smith*'s holding and concluded after close analysis of the statutory text that the phrase "specifically authorized" under the MCL 445.904(1)(a) exception "requires a general transaction that is 'explicitly sanctioned'" by law. 478 Mich at 212-13.

Smith's application of § 904(1)(a) has stood for over two decades—and for good reason. Lower courts have successfully applied *Smith*'s clear test to claims arising under the MCPA. See Lilly's Answer to the Attorney General's Application for Leave to Appeal at 33 (collecting cases where courts have applied the *Smith* test to claims under the MCPA). Contrary to the Attorney General's argument, *Smith* and *Liss* are based on the text of the MCPA, which exempts a "specifically authorized . . . transaction **or** conduct" from liability where that transaction or conduct is authorized by Michigan or federal regulatory law. MCL 445.904(1)(a) (emphasis added). The Attorney General's claim that this Court's use of the word "general" to parse the statutory text in *Smith* and *Liss* "guts" the statute's protections is unfounded. This Court's use of the word "general" did not artificially broaden the exception's reach. Instead, it simply helped to make sense of the terms "transaction" and "conduct"—which the statute lists in the disjunctive ("transaction **or** conduct")—and to explain that even if no law permits the allegedly wrongful conduct, the exemption applies where the relevant transaction is specifically authorized by law.

As Lilly points out, there is nothing unusual about this Court's use of descriptive words (here, "general") to explain its analysis of how the statutory language operates – e.g., the general transaction or conduct of selling insulin medication is specifically authorized by the applicable federal law. The Legislature did not require any more specificity than that to trigger the exemption, despite the Attorney General's insistence to the contrary. Rather, the Legislature has repeatedly

confirmed the exemption, allowing both state and federal statutory and regulatory schemes to develop with varying levels of specificity in authorizing transactions and conduct. To accept the Attorney General's interpretation – that "specifically authorized" cannot mean *specifically authorized, albeit in general terms* – will lead to legal battles over whether state and federal oversight of industries is *specific enough* to trigger the exemption. As explained in more detail below, the Legislature's repeated validation of *Smith* and *Liss* cannot support that result.

This Court should reject the Attorney General's request to overrule its longstanding precedent. The *Smith* test is a sound application of the MCL 445.904(1)(a) exemption, and, for nearly a quarter of a century, courts have capably followed *Smith*—sometimes allowing an MCPA claim to proceed and other times concluding the claim fell within the exemption. This Court's application of *Smith* and *Liss* effectuates the Legislature's aim to exclude from liability transactions or conduct that are already subject to substantial regulation. Not surprisingly, every legislative effort since *Smith* to amend the MCPA and narrow the scope of MCL 445.904(1)(a) has met with failure. As discussed below, overruling precedent is serious business and the Attorney General has not met her considerable burden to show that it is appropriate here.

II. This Court should retain its *Smith* and *Liss* decisions under principles of stare decisis.

Stare decisis requires rejection of the request to overrule the stable, longstanding precedent of *Smith* and *Liss*. This Court does not undertake a decision to overrule precedent "lightly," *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014), and precedent should be upheld unless there is a "compelling justification . . . to overturn the precedent." *Petersen v Magna Corp*, 484 Mich 300, 315-17; 773 NW2d 564 (2009). The Attorney General fails to show that *Smith* and *Liss* were wrongly decided, and certainly cannot overcome important considerations of stare decisis, including "whether the decision at issue defies 'practical workability,' whether reliance interests

would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Robinson v City of Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000) (citation omitted).

Twenty-five years of case law applying *Smith* demonstrates that *Smith*'s test poses no workability issues and no practical hurdles.[2] Lower courts, both state and federal, have ably applied *Smith* to MCPA claims for years. And, contrary to claims from the Attorney General and her supporting amici, courts have routinely followed *Smith* to apply—and to decline to apply—the MCL 445.904(1)(a) exemption. Compare *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 542-43; 683 NW2d 200 (2004) (MCPA barred claims regarding slot machines because the operation of slot machines was regulated), and *Am Auto Ass'n, Inc v Advanced Am Auto Warranty Services, Inc*, No CIV A 09-CV-12351, 2009 WL 3837234, at *6 (ED Mich Nov 16, 2009)(Appx. Ex. 1)("[W]hile the MCPA does not apply to '[a] transaction or conduct specifically authorized under laws administered by a regulatory board,' the relevant 'transaction or conduct' in this case is the registration of business and domain names, not the sale of insurance and warranties" (quoting *Smith*, 460 Mich at 465), with *Brownlow v McCall Enterprises Inc*, unpublished opinion of the Court of Appeals, issued February 12, 2013 (No 306190), 2013 WL 514598, at **2-3 (Appx. Ex. 2) (MCPA claim related to cleaning air to remove smoke smell not exempt because "general transaction" of cleaning a home was not "specifically authorized"). In short, *Smith*'s

[2] Contrary to the Amici Curiae Brief of Prosecuting Attorneys in Support of the Attorney General's Application for Leave to Appeal, at 12-15, *Smith* and *Liss* are consistent with *Diamond Mortgage*. The *Smith* test, reaffirmed again in *Liss*, is clear: "whether the general transaction is specifically authorized by law." 460 Mich at 465. See *id*. at 463-64 ("*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized'" and applying that ruling); see also *Liss*, 478 Mich at 208-15. The three cases are not inconsistent, and they certainly aren't inconsistent to a degree that would merit overruling *Smith* and *Liss.*

straightforward test applying the MCPA exemption is working as it should. Sometimes under the *Smith* test MCPA claims proceed; sometimes they do not.

Smith and *Liss* were correctly decided, as discussed above. But even if there was some question on this issue, the twenty-five years of reliance by regulated businesses in Michigan weigh strongly against overruling those established precedents. As this Court observed in *Robinson*:

> [T]he mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate. Rather, the Court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance. * * * [T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.

462 Mich at 465-66.

Regulated businesses in Michigan, including many members of Amici Curiae, have relied on *Smith* and *Liss* for a quarter of a century in deciding to locate, invest, and grow in the State. *Smith* and *Liss* are "embedded," "accepted," and "fundamental" in Michigan law, and overruling them "would work an undue hardship because of that reliance." *Smith*, 462 Mich at 465-66. In today's economy, litigation and avoidance of litigation risk represent significant business expenses. Regulatory/administrative oversight is not just an abstract concept. Practically speaking, it means being subjected to audit (including at random); administrative trials/hearings; and exposure to fines and penalties, including professional license suspension or revocation, as well as civil litigation. These regulations include—to list just a few examples affecting Amici Curiae here—the Michigan Occupational Code, MCL 339.101 *et seq*., which strictly regulates at least fifteen different occupations including accountants, real estate brokers and salespersons, architects,

engineers, and more, and provides an extensive scheme of penalties for non-compliance;[3] the Michigan Construction Code, MCL 125.1501 *et seq.*, which provides a detailed regulatory framework governing the construction of buildings and structures and, among other things, provides for the approval of permits for such building and imposes fines and penalties for violation of the statute; and the Michigan Vehicle Code MCL 257.201 *et seq.*, which governs the licensing, classification, and practice of auto dealers throughout the State and details remedies and sanctions for non-compliance (see especially MCL 257.248 – MCL 257.251e). By enacting these statutes, the Legislature has already provided consumers with protection for the transactions and conduct falling under the regulations' ambit, and has ensured that regulated individuals and entities will be held accountable if they fail to comply. For larger businesses, compliance with regulatory obligations often requires establishing and maintaining internal compliance departments. Regulatory oversight keeps businesses and professionals in check, but it also costs them a lot of money.

For instance, as discussed in the Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors in Support of Defendant-Appellee (Oct. 17, 2023), the Michigan Occupational Code, MCL 339.101 *et seq.*, codifies an extensive administrative scheme that already imposes significant and costly regulatory burdens on many different professional occupations throughout Michigan. That includes many of the occupations held by Amici Curiae's members. The Occupational Code includes a dozen categories of "prohibited conduct" that covered persons and entities must internally police and avoid, and it permits aggrieved persons or entities (or the Attorney General) to file a complaint with the Department of

[3] See Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors in Support of Defendant-Appellee (October 17, 2023), at 13-22.

Licensing and Regulatory Affairs (LARA). See MCL 339.604(a)-(l); MCL 339.501. This complaint triggers an immediate investigation by LARA and the possibility of a formal administrative hearing under the Administrative Procedures Act. See MCL 339.502; MCL 339.511.

The Occupational Code also contains separate layers of regulation (and, therefore, compliance obligations) governing conduct and licensure requirements for specific occupations. See, e.g., MCL 339.2404 et seq. (licensure application for residential builders requiring submission of evidence of good moral character to LARA as well as passage of a residential builder's examination); MCL 339.725 (requirements for issuance of a certificate as a certified public accountant in Michigan including examination, education and experience acceptable to the state board of accountancy); MCL 339.734 (itemizing twelve categories of prohibited conduct for Michigan certified public accountants, including but not limited to violations of professional standards related to the issuance of reports on financial statements, violations of state-issued rules of professional conduct, and departure from standards of professional practice applicable to particular engagements); MCL 339.240(b)(requiring residential home builders to complete prelicensure competency coursework and continuing competency activities); MCL 339.2004 (licensure requirements for architects including good moral character, passage of an examination or submission of evidence of equivalent qualification acceptable to the department board of architects); MCL 339.2010 (administrative requirements for professional architecture firms). All such existing administrative requirements (and many, many more) already require covered individuals and entities like many of Amici Curiae's members to continually devote time, money

and attention to ensuring that they comply with applicable state laws and regulations to safeguard against potential complaints and/or penalties for violations.[4]

Regulated businesses of all shapes and sizes have relied on the settled state of the law under the MCPA in deciding to invest and grow in Michigan, under state laws that already subject these businesses to sizeable compliance costs. Overruling *Smith* and *Liss* at this late date "would produce not just readjustments, but practical real-world dislocations." *Id*.

Post-*Smith* legislative history also militates against overruling *Smith* and *Liss*. Since this Court's decision in *Smith*, the Legislature has amended MCL 445.904 three times, in 2000 PA 432;[5] 2003 PA 216;[6] and 2014 PA 251.[7] Each amendment *reenacted* MCL 445.904(1)(a) *verbatim*, leaving the exemption at issue in *Smith* and *Liss* unchanged and intact.

While this Court in *Robinson* noted that "legislative acquiescence" is a "disfavored doctrine of statutory construction," the Court defined "acquiescence" as mere "assent by silence."

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[4] Many of Amici Curiae's members must also comply with equally if not more extensive federal regulations in tandem with state administrative requirements. To take just one illustrative example, automobile dealers in Michigan are subject to federal laws and regulation including but not limited to the Gramm-Leach-Bliley Act, 15 USC 6801 *et seq*., 16 CFR 313 (establishing dealers' responsibility to secure consumers' personal and financial information); the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*. (requiring auto dealers to offer complete information on warranty coverage); the FTC "Used Car Rule," 16 CFR 455 (containing requirements for representing the terms of warranties of used vehicles and for disclosing the mechanical condition of used vehicles); and the Equal Credit Opportunity Act, 15 USC 1691 *et seq*. (requiring auto dealerships extending financing to comply with regulations aimed at prohibiting discrimination in lending).

[5] 2000 PA 432 added a new MCL 445.904(3) which exempts from the MCPA "an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by Chapter 20 of the Insurance Code." See Appx. Ex. 3.

[6] 2003 PA 216 amended the exemptions in MCL 445.904(2)(e) by substituting the newly enacted Credit Union Act in place of a repealed statute that formerly regulated credit unions. See Appx. Ex. 4 and House Fiscal Analysis, Credit Union Act, Appx. Ex. 5.

[7] 2014 PA 251 added a new MCL 445.904(3)(b) which clarified the limitation period for suits under MCL 445.904(3). The amendment responded to this Court's decision in *Converse v Auto Club Group Ins Co*, 493 Mich 877; 821 NW 679 (2012). See Appx. Ex. 6, Enacting sec. 2.

Robinson, 462 Mich at 466 (citation omitted). The Legislature's repeated reenactment of the precise language of MCL 445.904(1)(a) goes far beyond mere "assent by silence." It instead represents legislative *ratification* of the Court's interpretation of that language. "In passing . . . legislation, the legislature is presumed to have known of the judicial interpretation of this Court . . . and, also, to have known that when a statute, clause or provision thereof, has been construed by the court of last resort of this State and the same is substantially re-enacted the legislature adopts such construction." *Jeruzal v Herrick*, 350 Mich 527, 534; 87 NW2d 122 (1957). In accord are *Ford Motor Co. v. City of Woodhaven*, 475 Mich 425, 439-40; 716 NW2d 247 (2006) (it is a "well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation"); and *Bush v Shabahang*,484 Mich 156, 167; 772 NW2d 272 (2009) ("[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.").

As further evidence that *Smith*'s twenty-five-year-old interpretation works just fine, the Legislature itself has repeatedly rejected proposed amendments to MCL 445.904(1)(a) that would have eliminated or curtailed the exemption.[8] In other words, the Legislature is aware of the *Smith* test—and it has consistently rejected numerous calls to overrule it by statute. When "the Legislature has had opportunities to alter the . . . construction of [the law] and has chosen not to do so," this Court should not reverse course. *Luttrell v Department of Corrections*, 421 Mich 93, 106; 365 NW2d 74 (1984). The Legislature has sent a clear signal that *Smith* and *Liss* comport

[8] See Supplemental Amici Curiae Brief Submitted on Behalf of Home Builders Association of Michigan and Michigan Realtors®, pp. 14-16 (March 26, 2024). The most recent proposal to amend MCL 445.904(1)(a) was House Bill No. 5998 of 2022 (Appx. Ex. 7).

with the intended scope of the MCPA's exemption—and that any change in the law should come from the Legislature, not from this Court.

III. This Court's MCPA precedent strikes the right balance between the interests of consumers and the interests of Michigan's regulated businesses and service providers.

Smith's test under the MCL 445.904(1)(a) exemption effectively balances the interests of consumers with the interests of Michigan businesses and professional services providers, like many of Amici Curiae's members here. The MCPA provides consumers an avenue to redress injuries inflicted by "unfair, unconscionable, or deceptive methods, acts, or practices," MCL 445.903, but it recognizes that, in highly regulated industries, regulations already exist to serve as safeguards against that kind of deceptive conduct, MCL 445.904(1)(a). This Court should not alter this well-functioning and well-settled balance.

For the exemption to apply, *Smith* and *Liss* require that the "general transaction" that is the subject of an MCPA claim be "specifically authorized by law," see *Liss*, 478 Mich at 210—and there are plenty of circumstances where, even in a regulated industry, the "general transaction" at issue will fall outside what is "specifically authorized." Since *Smith*, courts have had no trouble allowing an MCPA claim to proceed when the plaintiff's allegations were not aimed at a "general transaction specifically authorized by law." See, e.g., cases discussed at p.9 above. So, contrary to the views of the Attorney General and her supporting amici, *Smith* and *Liss* do not leave Michigan consumers to the mercy of unscrupulous and dishonest businesses. The MCPA exempts from liability claims addressing specifically authorized transactions or conduct in regulated industries, and *Smith*'s test does not stand in the way when an MCPA plaintiff challenges a general transaction that is not specifically authorized by state or federal law. This leaves many commercial practices open to the consumer-driven oversight the MCPA provides.

Not only do would-be MCPA plaintiffs have, in any given case, other claims at their disposal, consumers are also protected in many cases by the very regulations that exempt business transactions from MCPA liability in the first place. See pp. 10-12 above.

In short, the MCL 445.904(1)(a) exemption as properly interpreted by *Smith* does not leave consumers unprotected. Consumers may still—as they have been doing since *Smith*—bring claims under the MCPA when the general transaction at issue is unregulated. Outside of the MCPA, consumers have other claims and other tools at their disposal to challenge allegedly unfair or deceptive practices. Finally, consumers are protected by the regulations themselves, many of which are implemented to ensure the interests and well-being of consumers.

On the other side of the scale, the MCL 445.904(1)(a) exemption and this Court's decisions interpreting the exception in *Smith* and *Liss* preserve important protections for businesses and professionals in regulated industries represented by Amici Curiae. While this case nominally involves claims against Lilly—a large, multinational pharmaceutical company—the Attorney General's goal of overruling *Smith* and *Liss* would unfairly burden not only Lilly, but a far more diverse set of Michigan-centered businesses and licensed service providers, including Amici Curiae's members. Most of the people and companies who would be affected by a decision overturning *Smith* and *Liss* are not large corporations with legal departments and substantial funds on hand to defend consumer lawsuits. They are primarily small businesses: "mom and pop" pet shops; independent retail boutiques; second- or third-generation farmers; local real estate agencies; small-town accountancy practices, and many more. All these businesses and professionals have chosen to come to, or stay in, Michigan to live and work. And all these businesses and professionals have already invested substantial time and resources to ensure that their products, practices, and services comply with extensive laws and regulations. The MCL 445.904(1)(a)

exemption—and this Court's precedent explaining and upholding that exemption—ensures that stakeholders who are already subject to significant regulatory oversight are not unnecessarily overburdened by a flood of consumer-driven lawsuits filed under the MCPA. Indeed, for many small businesses, spending the money necessary to defend even one frivolous lawsuit could put them out of business for good. And there is no doubt that if the Court overturns *Smith* and *Liss*, the result will be an immediate uptick in litigation filed against large and small Michigan businesses alike.

Exempting claims involving already-specifically-regulated transactions or conduct from liability ensures that heavily regulated stakeholders are still able to flourish in the Michigan economy—while ensuring that consumers are sufficiently protected in other ways. The MCL 445.904(1)(a) exemption ensures that these highly regulated businesses are not overloaded by claims under the MCPA when their businesses and products are already subject to significant regulatory oversight. Relieving this burden fosters the smooth and safe functioning of Michigan business and industry. Of course, consumer protection is a critical part of a well-functioning consumer economy. But consumers are already covered in layers of protection when it comes to claims aimed at businesses that operate in industries subject to extensive and extremely detailed regulations. Opening these businesses up to more MCPA claims would simply overburden them, likely to very little consumer benefit.

The decades-old standard in *Smith* and *Liss* ensures that a heavily regulated industry is not subject to a needlessly excessive burden under the MCPA. This was the Legislature's aim in enacting the exemption in MCL 445.904(1)(a), and this Court's longstanding precedent accords with the statute's text and aims. This Court should reject the Attorney General's request to revisit that sensible precedent.

CONCLUSION AND RELIEF REQUESTED

Amici Curiae ask the Court to deny the application for leave to appeal, or in the alternative to peremptorily affirm the decision of the Court of Appeals. The Attorney General's request that this Court overturn its established and well-reasoned precedent in *Smith* and *Liss* is unwarranted based on the text of the statute, the quarter century of application in lower courts, the practical effects of those cases, and the long-standing reliance by regulated businesses in Michigan. *Smith* competently effectuates the MCPA's exemptions and its straightforward test strikes the right balance between protecting consumers while avoiding unnecessary burdens to Michigan businesses. The Court should decline the invitation to overrule *Smith* and *Liss*.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK, AND STONE, P.L.C.

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Dated: May 1, 2024

WORD COUNT CERTIFICATION

Pursuant to MCR 7.212(B)(3), I hereby certify that this brief contains 5401 "countable words" as defined under MCR 7.212(B). The undersigned relies on the word count function of counsel's word processing system, as permitted under MCR 7.212(B)(3).

By: */s/ Scott R. Eldridge*

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, I electronically filed the foregoing document with the Clerk of the Court using the electronic court filing system which will send notification of such filing to all counsel of record.

By: */s/ Scott R. Eldridge*

STATE OF MICHIGAN
IN THE SUPREME COURT

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ex rel The People of the State of Michigan, Plaintiff-Appellant,	Supreme Court No. 165961
	Court of Appeals No. 362272
v	Ingham Circuit Court No. 2022-000058-CZ
ELI LILLY AND COMPANY, Defendant-Appellee.	

AMICUS CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, MICHIGAN AUTOMOBILE DEALERS ASSOCIATION, INSURANCE ALLIANCE OF MICHIGAN, MICHIGAN ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS, MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION, MICHIGAN FARM BUREAU, MICHIGAN GROUND WATER ASSOCIATION, MICHIGAN MANUFACTURERS ASSOCIATION, MICHIGAN RETAILERS ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., SMALL BUSINESS ASSOCIATION OF MICHIGAN, AND AMERICAN TORT REFORM ASSOCIATION

APPENDIX OF EXHIBITS

EXHIBIT	DESCRIPTION
1.	*Am Auto Ass'n, Inc v Advanced Am Auto Warranty Services, Inc*
2.	*Brownlow v McCall Enterprises Inc*
3.	2000 PA 432
4.	2003 PA 216
5.	House Fiscal Agency – Fiscal Analysis Credit Union Act
6.	2014 PA 251
7.	House Bill No. 5998 of 2022

EXHIBIT 1

2009 WL 3837234
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

AMERICAN AUTOMOBILE ASSOCIATION, INC., Plaintiff,
v.
ADVANCED AMERICAN AUTO WARRANTY SERVICES, Inc., Defendant.

Civil Action No. 09–CV–12351.
|
Nov. 16, 2009.

Attorneys and Law Firms

Michael A. Sneyd, Kerr, Russell, Detroit, MI, for Plaintiff.

Hattem A. Beydoun, Jeffrey P. Thennisch, Dobrusin and Thennisch, Pontiac, MI, for Defendant.

OPINION AND ORDER (1) DISMISSING COUNT V OF THE COMPLAINT, (2) DENYING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6), and (3) DENYING PLAINTIFF'S REQUEST FOR AN ORDER UNDER FED. R. CIV. P. 11(c)(3)

PAUL D. BORMAN, District Judge.

I. INTRODUCTION

***1** This is a trademark infringement case. Plaintiff American Automobile Association, Inc. ("AAA" or "Plaintiff") claims that Defendant Advanced American Auto Warranty Services, Inc. ("Defendant") knowingly and willfully infringed on its trademarks in a manner that has caused consumers to falsely believe that Plaintiff is affiliated with Defendant or has endorsed Defendant's products and services.

Plaintiff is a not-for-profit corporation providing over 50 million members throughout the United States, including Michigan, with products and services such as insurance and warranty coverage, travel, vacation, and automobile products and services, financial advice, and discounts. Defendant is a corporation that advertises and sells automobile-related roadside assistance and warranty products and services.

The Complaint, which was filed on June 17, 2009, contains six counts as follows:

Count I: Federal Trademark Infringement, 15 U.S.C. § 1114

Count II: Federal Trademark Infringement and Unfair Competition, 15 U.S.C. § 1125(a)

Count III: Federal Trademark Dilution, 15 U.S.C. § 1125(c)

Count IV: Federal Trademark Cyberpiracy, 15 U.S.C. § 1125(d)

Count V: Trademark Infringement, Mich. Comp. Laws § 429.42

Count VI: Unfair Competition, Mich. Comp. Laws § 445.901

In its response to Defendant's Motion to Dismiss, Plaintiff states that it will not pursue Count V. *See* Pl.'s Resp. at 1 n. 1. Plaintiff also stated at oral argument that it was withdrawing this claim. Therefore, the Court will summarily dismiss Count V.

Now before the Court is Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) [docket entry 14]. Plaintiff filed a response and Defendant filed a reply. The Court heard oral argument on November 5, 2009. In its response brief, Plaintiff argues that the filing of Defendant's motion violates Fed.R.Civ.P. 11(b) and asks the Court to issue an order pursuant to Rule 11(c)(3) requiring Defendant to show cause why it has not violated Rule 11. [1] For the reasons that follow, the Court will deny Defendant's Motion to Dismiss but decline to issue an order under Rule 1 1(c)(3).

II. BACKGROUND

Plaintiff has registered more than 70 trademarks with the United States Patent and Trademark Office. Compl. at ¶ 18. This case arises out of Defendant's alleged infringement of certain of these trademarks. Specifically, the trademarks that are "particularly relevant to this action" include those eight that are listed in the chart contained in paragraph 18 of the Complaint. *See id.* Plaintiff has used these marks "in interstate commerce to identify a wide range of products and services for decades." *Id.* at ¶ 15. Moreover, as stated in the Complaint,

> [o]nly AAA member clubs and those entities that are part of AAA's network of approved service providers are authorized to use or display the AAA Marks. AAA has been selective in authorizing entities to use the AAA Marks in connection with their own products and services. Consequently, AAA members and the public know that any business or website that displays the AAA Marks has been granted permission to do so only because the business maintains an excellent reputation for quality, integrity, reliability, and service.
>
> ***2** 16. As a result of AAA's history and experience providing high quality products and services through the AAA local clubs, and as a result of the continuous and extensive advertising, promotion, and sale of products and services under the AAA Marks, those trademarks have acquired substantial value and fame in the United States and in other countries.
>
> 17. Further, the AAA Marks are widely recognized by consumers in this country and abroad and have acquired enormous goodwill as trademarks identifying high quality and reliable products and services. Indeed, the AAA Marks are distinctive such that consumers recognize that goods and services marketed under the AAA Marks originate, or are approved or endorsed by, AAA and the AAA local clubs.

Id. at ¶¶ 15–17.

Defendant advertises and sells its products and services under, among others, the marks "AAA Warranty Services, Inc.," "A.A.A. Warranty Service, Inc.," "AAA Warranty Service," "AAA Warranty," and "AAA Advanced American Auto & Leasing." *Id.* at ¶ 7. Additionally, Defendant, at one time, has used the following domain names: AAA–WARRANTY.COM, AAAWARRANTY.NET, AAAWARRANTYBYNET.COM, THEAAAWARRANTY.COM, THEAAA–WARRANTY.COM, AAA–WARRANTIES.COM, WARRANTYAAA.COM, WARRANTY–AAA.COM, AAA–WS.COM, AAA–GCC.COM, and AAA–ASIA.COM. *Id.* at ¶¶ 1, 22, 25–26. Defendant apparently continues to use some of these domain names while others are no longer in use. *See id.* at ¶ 28.

According to Plaintiff, it never authorized Defendant to use its trademarks and Defendant's use of the above-listed marks and domain names is "confusingly similar to AAA's famous and distinctive marks ." *Id.* at ¶¶ 2, 20. As stated in the Complaint,

> 22. In or around February 2008, AAA began receiving reports from consumers confused by a company named "AAA Warranty" selling automobile warranties. Immediately upon learning of these reports, AAA investigated the matter and contacted Defendant regarding its use of the infringing business name and unlawful registration and use of the domain name AAA–WARRANTY.COM.
>
> 23. On or about March 5, 2008, AAA sent Defendant a letter to Defendant's business address, requesting that Defendant cease use of the AAA Marks in connection with its business and that it cancel its registration for the domain name AAA–WARRANTY.COM.
>
> 24. Defendant's counsel responded in a letter dated April 1, 2008, denying that Defendant had infringed AAA's Marks or that the website had been registered in bad faith. Thereafter, the two parties entered into extensive and detailed negotiations in an attempt to reach an amicable resolution of the matter. Despite these extensive efforts over a period of months, Defendant ultimately declined to settle and refused to cease the Infringing Uses.

Id. at ¶¶ 22–24. Moreover,

> 29. Despite having been notified repeatedly that its continued, unauthorized Infringing Uses constitute actionable trademark infringement, trademark dilution, cyberpiracy, and unfair competition, Defendant persists in its unlawful use of the AAA Marks, both in actively advertising its business and through using and registering the Infringing Domain Names.
>
> ***3** 30. On information and belief, Defendant's Infringing Uses have been and continue to be of commercial value to Defendant.
>
> 31. On information and belief, at the time Defendant began its Infringing Uses, and at all times thereafter, it was aware, or had reason to know, of AAA's rights in the AAA Marks and knew that those trademarks are distinctive and have become famous and valuable.
>
> 32. Defendant's Infringing Uses lessen the capacity of the AAA Marks to identify and distinguish the produces and services provided or endorsed by, or affiliated

> with, AAA under the AAA Marks and, thus, dilute the distinctive quality of the AAA Marks and damage the reputation, recognition, and goodwill consumer's associate with AAA's products and services.

Id. at ¶¶ 29–32.

Plaintiff seeks injunctive relief and monetary damages. *See* Compl. at pp. 14–16.

III. LEGAL STANDARD UNDER FED. R. CIV. P. 12(b)(6)

Fed.R.Civ.P. 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir.2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby County,* 220 F.3d 433, 446 (6th Cir.2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Tenn. Dep't of Children's Servs.,* 510 F.3d 631, 634 (6th Cir.2007).

As stated by the Supreme Court,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (brackets omitted).

Ashcroft v. Iqbal, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A plaintiff's factual allegations, while "assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir.2007) (emphasis in original). Thus, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Bredesen,* 500 F.3d at 527.

IV. ANALYSIS

A. Defendant's Position

***4** Defendant argues that each count in Plaintiff's Complaint should be dismissed under Fed.R.Civ.P. 12(b)(6). Defendant's principal argument is that each count fails to state a claim upon which relief can be granted because, although Plaintiff states in its Complaint that "AAA has registered with the United States Patent and Trademark Office more than 70 of its AAA Marks," Compl. at ¶ 18, it does not "identify which *particular* mark of the 'AAA Marks,' serves as a basis for each count of the Complaint" (emphasis added). In other words, Defendant claims that it is unclear from the Complaint which of the "more than 70 ... AAA Marks" are "actually be asserted against the Defendant in this action." Defendant contends that all six counts contained in Plaintiff's Complaint should be dismissed on this basis.

Defendant also advances three additional arguments, one relating specifically to Count II and two relating specifically to Count VI. With respect to Count II, Defendant contends that Plaintiff's federal unfair competition claim fails to state a claim upon which relief can be granted because Plaintiff has not alleged, as it must, that "the false designation [has] a substantial economic effect on interstate commerce." *Johnson v. Jones,* 149 F.3d 494, 502 (6th Cir.1998). According to Defendant, "Plaintiff does not allege *any* effect, substantial or otherwise, that Defendant's alleged false designation of origin has resulted in an effect on interstate commerce" (emphasis added).

Additionally, Defendant argues that Count VI, Plaintiff's unfair competition claim under the Michigan Consumer Protection Act ("MCPA"), is barred by a statutory provision that provides an exemption for regulated conduct or transactions. *See* Mich. Comp. Laws § 445.904(1)(a) (stating that the MCPA does not apply to any "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"). Defendant also contends, for the first time in its reply brief, that Count VI should be dismissed because the MCPA does not regulate the conduct complained of in this case. [2]

B. Discussion

Defendant's three arguments are addressed, in turn, below.

1. Defendant's First Argument

First, Defendant argues that it is unclear which particular mark serves as the basis for each count of the Complaint. As Defendant correctly points out, each cause of action asserted by Plaintiff in this case requires an allegation that a particular mark has been infringed. For example, Plaintiff's federal trademark infringement claim (Count I) is governed by 15 U.S.C. § 1114(1), which states that trademark infringement occurs if a person, acting without the permission of a trademark's owner, "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of *a registered mark* in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive" (emphasis added). In order to demonstrate that confusion is likely, courts in this circuit consider eight factors: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; (8) likelihood of expansion of the product lines. *See Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.,* 670 F.2d 642, 648 (6th Cir.1982). Defendant argues that while Plaintiff alleges that it has over 70 registered marks and that eight such marks are "particularly relevant to this action," it does not allege that any of these marks are infringed or that any of them serve as the basis underlying the counts contained in the Complaint. As such, Defendant contends that the Court will be unable to perform the eight-factor "likelihood of confusion" test as to factors (1) and (3), above, because these factors require an examination of the particular mark allegedly infringed, which, again, Defendant contends is not stated in the Complaint.

***5** In its Complaint, Plaintiff states that "[t]his action arises out of Defendant's knowing and willful violation of Plaintiff's rights in its famous and distinctive AAA trademarks ('AAA Marks')." Compl. at ¶ 2. Later in the Complaint, Plaintiff states that eight such marks are "particularly relevant to this action" and lists them in the chart contained in paragraph 18 of the Complaint. *Id.* at ¶ 18. Plaintiff then "repeats and realleges the[se] allegations" in each count of the Complaint. Based on these averments, and having closely examined the Complaint in the aggregate, it is clear that (1) Plaintiff is alleging that the eight marks contained in the chart have been infringed and (2) it is these marks that are being asserted in this case, providing the basis for the claims contained in the Complaint. Although Defendant could have pled its case more clearly, the Court finds that the Complaint survives the plausibility standard of *Twombly* and *Iqbal,* discussed in Section III.

2. Defendant's Second Argument

Defendant's second argument is directed at Count II only. Defendant contends that Plaintiff's federal unfair competition claim fails to state a claim upon which relief can be granted because Plaintiff has not alleged, as it must under *Johnson,* quoted above, that the false designation has a substantial economic effect on interstate commerce.

The plaintiff in *Johnson,* an architect licensed to practice in three states including Michigan, brought suit against another architect and others alleging that his architectural plans and drawings were altered and used without his permission in violation of 15 U.S.C. § 1125(a). *See* 149 F.3d at 496. The plans and drawings at issue concerned the construction of a house located in Michigan. *See id.* at 497. One of the defendants argued that the plaintiff failed to satisfy the "substantial economic effect on interstate commerce" requirement because "the ... house is located in Michigan" and is "bought and sold only in Michigan ... and, therefore, a false designation as to the designing architect cannot affect interstate commerce." *Id.* at 502. The Sixth Circuit rejected this argument, stating that the defendant "fundamentally misperceive[d] the nature of th[e] case." *Id.* The court explained that "the house is only part of the 'goods or services' at issue" and that "[the parties'] *services as architects* are the more relevant 'goods or services.' " *Id.* (emphasis added). Because the plaintiff was licensed to practice, and actually did practice, in three separate states, the court determined that the "substantial economic effect on interstate commerce" requirement was satisfied, holding that if a defendant's "false

designation hinders [the plaintiff's] ability to conduct his interstate ... business, it affects interstate commerce." *Id* .

Applying *Johnson* to the present case, it is clear that Plaintiff has sufficiently alleged a "substantial economic effect on interstate commerce." In its Complaint, Plaintiff states that it "provides its over 50 million members with products and services throughout the United States," Compl. at ¶ 6, that it "use[s] [its] Marks ... in interstate commerce to identify a wide range of products and services," *id.* at ¶ 15, that its "trademarks have acquired substantial value and fame in the United States and in other countries," *see id.* at ¶ 16, and that "Defendant has ... profited from [the] unauthorized use of the AAA Marks ... to the detriment of AAA and its customers." *See id.* at ¶ 5. Boiled down, then, Plaintiff alleges that its "ability to conduct [its] interstate ... business" has been hindered. *See Johnson,* 149 F.3d at 502. Accordingly, Plaintiff has sufficiently alleged a "substantial economic effect on interstate commerce" and Defendant's second argument is therefore unpersuasive.

3. Defendant's Third Argument

***6** Defendant's third argument is directed at Count VI only. Defendant argues that Plaintiff's state law claim for unfair competition under the MCPA should be dismissed pursuant to Mich. Comp. Laws § 445.904(1)(a). Defendant relies solely upon *Smith v. Globe Life Ins. Co.,* 460 Mich. 446, 597 N.W.2d 28 (1999), discussed below, in support of its argument.

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.903. Under Mich. Comp. Laws § 445.904(1)(a), the exemption on which Defendant relies in this case, the MCPA "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." As stated by the Michigan Supreme Court, "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." *Smith,* 460 Mich. at 465, 597 N.W.2d 28 (emphasis added). For example, in *Smith,* a case involving allegedly fraudulent insurance practices in connection with the sale of a credit life insurance policy, the Court determined that the relevant "transaction or conduct" (i.e., the "general transaction") was the sale of credit life insurance and not the *fraudulent* sale of credit life insurance (i.e., the "specific transaction"). *See id.* at 465–466, 597 N.W.2d 28.

Defendant argues that § 445.904(1)(a) applies in the present case because its business is regulated by the Office of Financial and Insurance Regulation and the Michigan Department of Energy, Labor & Economic Growth. As stated by Defendant,

> Plaintiff's allegations arise out of Defendant's sale of automobile insurance and warranties. In Michigan the sale of automobile insurance is regulated by The Office of Financial and Insurance Regulation .... In regards to warranties, the Michigan Department of Energy, Labor & Economic Growth regulates the warrantors of aftermarket vehicle protection devices, systems and services sold in Michigan. Therefore, Defendant's alleged activates [sic] are exempt from liability under the MCPA.

(certain citations omitted).

This argument is clearly without merit. As Plaintiff correctly notes, the allegations in this case do not "arise out of Defendant's sale of automobile insurance and warranties," as Defendant argues. In fact, the nature of Defendant's business is irrelevant. What is relevant is Defendant's registration of business and domain names. Put differently, while the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board," the relevant "transaction or conduct" in this case is the registration of business and domain names, not the sale of insurance and warranties.[3] By contrast, the relevant "transaction and conduct" in *Smith,* the sole case on which Defendant relies, was the sale of a credit life insurance policy, which is a practice that is "specifically authorized under laws administered by a regulatory board." Therefore, Defendant's argument that § 445.904(1)(a) is relevant here simply because its business—the sale of car insurance and warranties—is regulated by the state is inconsistent with the plain language of the exemption and must be rejected.

V. PLAINTIFF'S REQUEST FOR AN ORDER UNDER RULE 11(c)(3)

***7** Plaintiff argues that the filing of Defendant's motion constitutes a violation of Rule 11(b)[4] and that the Court should issue an order under Rule 11(c)(3)[5] requiring Defendant to show cause why it has not violated Rule 11. The Court will decline to issue such an order because the arguments advanced by Defendant in its motion, although "wobbly," are not clearly frivolous, and the Court will decline to find a Rule 11 violation.

VI. ORDER

For the reasons stated above,

IT IS ORDERED that Count V of the Complaint is dismissed.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss [docket entry 14] is denied.

IT IS FURTHER ORDERED that Plaintiff's request for an order under Fed.R.Civ.P. 11(c)(3) is denied.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3837234

Footnotes

1 Plaintiff's Rule 11 argument is addressed in Section V of this Opinion and Order.

2 The Court will not address this argument because it was raised for the first time in Defendant's reply brief. *See, e.g., United States v. Crozier,* 259 F.3d 503, 517 (6th Cir.2001) ("[w]e will generally not hear issues raised for the first time in a reply brief").

3 As Plaintiff notes, the registration of business names is governed by Michigan's Business Corporation Act, which states, in relevant part, that a corporate name "[s]hall not contain a word or phrase, an abbreviation, or derivative of a word or phrase, the use of which is prohibited or restricted by any other statute of this state, unless in compliance with that restriction." Mich. Comp. Laws § 450.1212(1)(c). The Act also provides that "[t]he fact that a corporate name complies with this section does not create substantive rights to the use of that corporate name." *Id.* at § 450.1212(3).

> These provisions demonstrate that the Michigan legislature intended to link the conduct in this case—the registration of business names—to other laws, such as the MCPA. Therefore, Plaintiff is correct that "[t]he MCPA's prohibition on '[u]nfair, unconscionable, or deceptive methods, acts, of practices in the conduct of trade or commerce' ... restricts the [Business Corporation Act's] naming provision" and, accordingly, "Michigan ... law does not ... authorize Defendant's [alleged] use of infringing or confusingly similar AAA-related business names."

4 Rule 11(b) reads as follows:

> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

5 Rule 11(c)(3) reads as follows: "On its own, the court may order an attorney, law firm, or party to show cause why conduct ... has not violated Rule 11(b)."

End of Document

EXHIBIT 2

2013 WL 514598
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ronald BROWNLOW and Susan Travis, Plaintiff–Appellant,
v.
McCALL ENTERPRISE INC, d/b/a Paul Davis Restoration of Washtenaw County, Defendant–Appellee.
and
State Farm Fire & Casualty Co, Defendant.

Docket Nos. 306190, 307883.
|
Feb. 12, 2013.

Washtenaw Circuit Court; LC No. 10–000049–NZ.

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

***1** In this consolidated appeal, plaintiffs appeal two orders. In docket no. 306190, plaintiffs appeal the order granting summary disposition in favor of defendant McCall Enterprise Inc. (McCall). In docket no. 307883, plaintiffs appeal the order granting attorney fees and costs as case evaluation sanctions. We reverse the order granting summary disposition because the Michigan Consumer Protection Act (MCPA) does apply and plaintiffs have presented sufficient evidence to create a question of fact for a jury regarding whether defendant's actions resulted in damage to plaintiffs' home. We therefore also reverse the trial court's award of attorney fees and costs as case evaluation sanctions.

I. FACTS AND PROCEDURAL HISTORY

A small fire occurred in plaintiffs' microwave on March 12, 2007. The fire filled plaintiffs' house with smoke. Plaintiffs reported the claim to their insurer, State Farm Fire & Casualty Co. who a few days later, retained defendant McCall to remove the lingering smoke odor from plaintiffs' home. Defendant placed an ozone generator [1] in plaintiff's kitchen, turned it on and let it run for more than HOW LONG?24 hours. Plaintiffs stayed elsewhere during this time, and when they returned, the ozone generator was removed and their house was aired out. According to plaintiffs, the smoke odor was gone, but there was significant damage to the inside of the house, particularly to tile and rubber surfaces. They also alleged health problems resulting from the level of ozone and the products of ozone reactions.

Plaintiffs filed a complaint against State Farm and McCall, alleging personal injuries and property damage from excessive ozone exposure. Plaintiffs asserted claims of negligence against State Farm and McCall. Additionally, plaintiffs asserted a claim against McCall under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiffs' negligence claims against State Farm and McCall were dismissed and plaintiffs do not appeal that dismissal.

Subsequently, McCall filed a motion for summary disposition on plaintiffs' MCPA claim, arguing that plaintiffs could not prove causation and that McCall was exempt from the act under MCL 445.904(1)(a), which provides that the MCPA 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." The trial court agreed, concluding that the transaction was specifically authorized by McCall's contractor license. McCall then filed a motion for case evaluation sanctions, which was granted. Plaintiffs were ordered to pay costs and fees in the amount of $52,543. Plaintiffs now appeal the summary disposition of their MCPA claim against McCall as well as the case evaluation sanctions.

II. MICHIGAN CONSUMER PROTECTION ACT

In docket no. 306190, plaintiffs argue that that the trial court erred when it granted summary disposition on their claim under the MCPA. A trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v. Barton Malow Co,* 480 Mich. 105, 111; 746 NW2d 868 (2008). When reviewing a motion under MCR 2.116(C)(10), we "consider[ ] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v. Taylor,* 263 Mich.App 618, 621; 689 NW2d 506 (2004). We

"also review[ ] de novo as a question of law the interpretation and application of a statute." *Attorney General v. Merck Sharp & Dohme Corp,* 292 Mich.App 1, 8–9; 807 NW2d 343 (2011).

***2** Under the MCPA, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful." MCL 445.903(1). However, MCL 445.904(1)(a) provides that the MCPA 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." In *Smith v. Globe Life Ins Co,* 460 Mich. 446, 465; 597 NW2d 28 (1999), our Supreme Court explained that

> when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute.... [W]e 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.

Smith was reaffirmed by the Supreme Court in *Liss v. Lewiston–Richards, Inc,* 478 Mich. 203; 732 NW2d 514 (2007), where the Court stated: "Applying the *Smith* test, the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " *Id.* at 212, quoting *Smith,* 496 Mich. at 465.

In this case, McCall was hired to clean the air in plaintiffs' home of the odor of smoke. The inquiry is thus whether the general transaction of cleaning a home is specifically authorized by the statute governing McCall's licensure as a residential builder.

> "Residential builder" means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property. [MCL 339.2401(a).]

The language of the statute makes no reference to cleaning a home. McCall argues that the when it undertook the remediation of smoke odor, it was engaged in repair and alteration of plaintiffs' home. We disagree. "Repair" and "alteration" are specifically authorized activities under MCL 339.2401(a), but neither term is statutorily defined. Therefore, these terms must be accorded their plain and ordinary meanings, informed by the context of the surrounding statute. *Grifith v. State Farm Mut Automobile Ins Co,* 472 Mich. 521, 533; 697 NW2d 895 (2005). The statute as a whole defines a residential builder as someone engaged in "construction," and the terms "repair" and "alteration" fall within a list of types of construction—erection, demolition, addition to, etc—that all involve changes to the physical structure of a building.

***3** Therefore, in the context of MCL 339.2401(a), "repair" means to restore the physical structure of a residential structure after decay or damage. And "alteration" means to "modify" the physical structure of a residential building. Here, the ozone generator was not meant to modify or restore

the physical structure of plaintiffs' home. Rather, it was supposed to remove the smell of smoke from the house. Defendant conceded that operation of the ozone generator required no special knowledge or skill. The fact that removing the odor was done with an ozone generator rather than a can of room deodorizer does not bring the transaction within the ambit of the licensing requirements for residential builders. McCall argues that the machine removed smoke from the structure of the house, but if that were sufficient to bring this activity within the scope of the statute, so would use of a broom or mop as they remove dirt from the structure of a building. Michigan does not require a license for cleaning or janitorial services, but McCall's argument would practically require providers of such services to be licensed as builders. We decline to distort the law in this manner. Therefore, the trial court erred when it determined that the transaction at issue in this case was exempt from the MCPA.

III. CAUSATION UNDER THE MCPA

McCall also argues that summary disposition was appropriate because plaintiffs could not establish causation under the MCPA. Plaintiffs have not appealed the dismissal of their negligence claims and so the only causation issue relevant on appeal concerns the claim for property damage under the MCPA. However, at the trial level the question of causation as to bodily injury was part and parcel of the causation issue and much of the proofs were addressed to those injuries.

McCall[2] requested that the court bar plaintiffs from "relying upon proofs of claimed ozone exposure" and dismiss the complaint or set the matter for a *Daubert*[3] hearing "at which point the court shall makes [sic] its determination as to the admissibility of expert opinions supporting plaintiffs' contentions regarding alleged injuries and damages caused by exposure to ozone."

At the conclusion of the hearing, the trial court dismissed the negligence claims, but not the claims under the MCPA, which included only damages to plaintiffs' home and not for personal injury. Subsequently, defendant sought summary disposition on the MCPA claim, the trial court granted the motion and plaintiff appealed.

We "consider[ ] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh,* 263 Mich.App at 621.

A review of the record reveals that plaintiffs submitted a substantial amount of scientific literature regarding ozone exposure to the trial court. One article references the reactivity of household products to ozone exposure and states: "these heterogeneous reactions have been noted to cause material aging, damage to pigments and damage to cultural artifacts." Poppendieck, et al, *Ozone Reactions with Indoor Materials during Building Disinfection,* 41 Atmospheric Environment 3166–3176 (2007). Another article states, "Heterogeneous reactions involving ozone have a number of undesirable consequences, including cracking of stressed rubber, fading of dyes, damage to photographic materials and deterioration of books. Weschler, *Ozone in Indoor Environments: Concentration and Chemistry,* 10 Indoor Air 269–288 (2000) The articles explain that the damage is a result of reactions that also release chemicals into the air. Other articles noted that ozone interacted with household materials, causing them to release chemicals including formeldahyde into the air, but did not specifically reference any degradation in the function or appearance of the household materials. Moriske, et al, *Concentrations and Decay Rates of Ozone in Indoor Air in Dependence on Building and Surface Materials,* 96, 97 Toxicology Letters 319–323 (1998); Nicolas, et al, *Reactions Between Ozone and Building Products: Impact on Primary and Secondary Emissions,* 41 Atmospheric Environment 3129–3138 (2007). While these latter articles do not directly support plaintiff's position, they tend to confirm that ozone interacts with household materials in a manner that can change the basic chemical structure of the materials.

***4** Plaintiffs also submitted reports from lay and expert witnesses. Daniel Smith wrote that he installed tile and trim work in plaintiffs' home in 2005, and during a walkthrough on May 29, 2007, after the ozone exposure, noted extensive damage to many surfaces and materials that would require repair or replacement. He did not opine regarding the cause of the damages, but estimated repair costs at $150,000–280,000. Verne Brown stated that, if McCall had done its work properly, the ozone levels in the house would not have been high enough to cause structural damage. In a later affidavit he explained how he concluded that the ozone levels in the house were in fact high enough to cause such damage. Roger Wabeke, while focusing mainly on the health risks of ozone, did opine that McCall should have warned plaintiffs of possible damage to materials from ozone exposure.

In addition, plaintiffs provided deposition testimony from defendant's employee that the ozone generator placed in their home by McCall had been set at level "8" on a scale of 0 to 10. Defendant's owner testified that he was aware of the possibility of harm from ozone to humans and building materials, but did not know what levels could cause such harm. Finally, Norbert Schiller testified during the *Daubert* hearing that a study done in the home some time after the incident did find levels of formaldehyde that were "fairly high, above what one would expect in a normal residence."

In response to McCall's final motion for summary disposition, the trial court held that because plaintiffs could not establish the amount of ozone that had been in their home, they could not prove there had been enough ozone to cause the alleged damages. Under these circumstances, however, plaintiffs do not need to establish the precise amount of ozone that McCall released into their home in order to establish that the ozone caused the damage. The trial court found that there was sufficiently reliable information to allow testimony that ozone can cause damage to building materials, stating "it was clear that ozone might have a deleterious effect if it reaches a certain level. And, there was certainly identification of literature that would identify that." The literature and expert reports provided by plaintiffs certainly support the conclusion that ozone can damage household materials. McCall does not dispute that ozone can cause damage to building materials. It is also undisputed that McCall placed an ozone generator in plaintiffs' home, turned it on at a high setting, and left it running for a weekend. Plaintiffs further allege that when they left at the beginning of the weekend in question their home was in good condition, but after it had been exposed to ozone over the weekend a variety of exposed surfaces—including carpet, upholstery, wood, brick, and plastic—had been damaged. Among other things, finish had come off of wood, furniture changed color, bricks were crumbling, plastic had aged, and carpets were sticky. Verne Brown's affidavit states that these deteriorations of materials are consistent with ozone exposure, and one of the articles submitted by plaintiff[4] states that ozone reactions "have been noted to cause material aging, damage to pigments, and damage to cultural artifacts," which is entirely consistent with the damages alleged by plaintiffs. In his affidavit, Verne Brown also calculated the ozone concentrations produced in plaintiffs' home, and concluded that the concentration was extremely high. The record does not contain any evidence contrary to plaintiffs' testimony, and defendants do not directly challenge the existence of these physical changes on appeal, though they do not concede that any damages occurred over the weekend.[5]

***5** Thus, plaintiffs have provided scientific evidence that high levels of ozone damage building materials, that there was a high level of ozone in their house, and that their house suffered damages consistent with exposure to high levels of ozone during the time the exposure occurred. Further, no witness, lay or expert, has advanced any possible cause of the alleged property damages other than the ozone exposure. Therefore, there is sufficient evidence for a jury to conclude that the ozone generator caused the damage to plaintiffs' house without resort to speculation.

IV. CONCLUSION

In Docket No. 306190, we conclude that the trial court erred when it granted summary disposition in favor of McCall on plaintiffs' MCPA claim for damages to their house. We therefore also reverse the award of case evaluation sanctions in Docket No. 307883.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2013 WL 514598

Footnotes

1 The "use of ozone for the removal of indoor contaminants, including odors, evidentially was conceived originally more than 100 years ago. The presumption made to promote ozone for this purpose is that it will oxidize organic compounds to the extent that only carbon dioxide and water vapor remain." Boeniger, *Use of Ozone Generating Devices to Improve Indoor Air Quality,* 56 Am Ind Hyg Assoc J 590–8 (1995).

2 State Farm was dismissed earlier in the case.

3 *Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579; 113 S. Ct 2786; 125 L. Ed 2d 469 (1993).

4 Poppendieck, et al, *Ozone Reactions with Indoor Material During Building Disinfection,* 41 Atmospheric Environment, 3166–3176 (2007).

5 Defendant McCall suggests that the trial court's ruling on the motion in limine, which was not appealed by plaintiff, precludes any finding that plaintiffs have established causation. However, the trial court only barred testimony regarding the level of ozone in the house *after plaintiffs returned* to their home, which was after the ozone generation had ended and the home had been aired out. The court correctly concluded, “There's been no evidence on this record to support a claim that any hazardous or dangerous levels of ozone remained in the home after the ozone generator was in fact turned off.” However, the court did not bar testimony that ozone can cause the type of property damages alleged in this case or that there was a sufficient concentration of ozone during the period the generator was operating to cause such damages.

EXHIBIT 3

Act No. 432
Public Acts of 2000
Approved by the Governor
January 9, 2001
Filed with the Secretary of State
January 9, 2001
EFFECTIVE DATE: March 28, 2001

STATE OF MICHIGAN
90TH LEGISLATURE
REGULAR SESSION OF 2000

Introduced by Rep. Bisbee

ENROLLED HOUSE BILL No. 5332

AN ACT to amend 1976 PA 331, entitled "An act to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties," by amending section 4 (MCL 445.904), as amended by 1993 PA 10.

The People of the State of Michigan enact:

Sec. 4. (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.

(b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.

(2) Except for the purposes of an action filed by a person under section 11, 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 any of the following:

(a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.

(b) 1939 PA 3, MCL 460.1 to 460.10cc.

(c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.

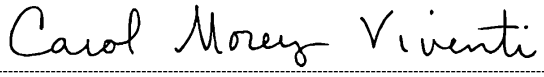
(d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.

(e) 1925 PA 285, MCL 490.1 to 490.31.

(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 500.2001 to 500.2093.

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

Clerk of the House of Representatives.



Secretary of the Senate.

Approved _____

_____

Governor.

EXHIBIT 4

Act No. 216
Public Acts of 2003
Approved by the Governor
December 1, 2003
Filed with the Secretary of State
December 2, 2003
EFFECTIVE DATE: December 2, 2003

STATE OF MICHIGAN
92ND LEGISLATURE
REGULAR SESSION OF 2003

Introduced by Senators Hammerstrom, Basham, Cassis, Leland, Cherry, Van Woerkom, Sanborn, Kuipers, Barcia, Schauer, Thomas, Clark-Coleman, Brater, Clarke, Scott, Switalski, Toy, Jacobs and Jelinek

ENROLLED SENATE BILL No. 493

AN ACT to amend 1976 PA 331, entitled "An act to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties," by amending section 4 (MCL 445.904), as amended by 2000 PA 432.

The People of the State of Michigan enact:

Sec. 4. (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.

(b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.

(2) Except for the purposes of an action filed by a person under section 11, 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 any of the following:

(a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.

(b) 1939 PA 3, MCL 460.1 to 460.10cc.

(c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.

(d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.

(e) The credit union act.

(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 500.2001 to 500.2093.

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

Enacting section 1. This amendatory act does not take effect unless Senate Bill No. 496 of the 92nd Legislature is enacted into law.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Sara E Randall

Clerk of the House of Representatives

Approved _____

_____

Governor

EXHIBIT 5

Fiscal Analysis
CREDIT UNION ACT

Bill/Sponsor

SENATE BILL 490 as passed by the Senate, Sen. Alan Sanborn
SENATE BILL 493 as passed by the Senate, Sen. Beverly Hammerstrom
SENATE BILL 494 as passed by the Senate, Sen. Burton Leland
SENATE BILL 495 as passed by the Senate, Sen. Gerald Van Woerkom
SENATE BILL 496 as passed by the Senate, Sen. Shirley Johnson

House Committee

Commerce

Analysis

Summary

Senate Bill 496 (S-4) would create the Credit Union Act and repeal Public Act 285 of 1925, which currently regulates credit unions. The bill would establish how credit unions would be created, how they would operate and how they would be regulated.

Senate Bills 490, 493, 494 and 495 would amend various laws replacing references to Public Act 285 0f 1925.

Fiscal Impact

The bills would have no fiscal impact on State or local units of government.

Analyst(s)

Steve Stauff

FLOOR ANALYSIS - 10/21/03

Mitchell Bean, Director – House Fiscal Agency
124 N. Capitol Avenue, Lansing, MI 48909
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http://www.house.mi.gov/hfa

EXHIBIT 6

Act No. 251
Public Acts of 2014
Approved by the Governor
June 21, 2014
Filed with the Secretary of State
June 27, 2014
EFFECTIVE DATE: 91st day after final adjournment of 2014 Regular Session

STATE OF MICHIGAN
97TH LEGISLATURE
REGULAR SESSION OF 2014

Introduced by Reps. Leonard, LaFontaine and Cotter

ENROLLED HOUSE BILL No. 5558

AN ACT to amend 1976 PA 331, entitled "An act to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties," by amending section 4 (MCL 445.904), as amended by 2003 PA 216.

The People of the State of Michigan enact:

Sec. 4. (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.

(b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.

(2) Except for the purposes of an action filed by a person under section 11, 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 any of the following:

(a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.

(b) 1939 PA 3, MCL 460.1 to 460.11.

(c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.

(d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.

(e) The credit union act, 2003 PA 215, MCL 490.101 to 490.601.

(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 500.2001 to 500.2093, if either of the following is met:

(a) The method, act, or practice occurred on or after March 28, 2001.

(b) The method, act, or practice occurred before March 28, 2001. However, this subdivision does not apply to or limit a cause of action filed with a court concerning a method, act, or practice if the cause of action was filed in a court of competent jurisdiction on or before June 5, 2014.

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

Enacting section 1. This amendatory act is retroactive and is effective March 28, 2001.

Enacting section 2. This amendatory act is curative and intended to prevent any misinterpretation that this act applies to or creates a cause of action for an unfair, unconscionable, or deceptive method, act, or practice occurring before March 28, 2001 that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093, that may result from the decision of the Michigan supreme court in Converse v Auto Club Group Ins Co, No. 142917, October 26, 2012.

Clerk of the House of Representatives

Secretary of the Senate

Approved .....

Governor

EXHIBIT 7

HOUSE BILL NO. 5998

April 12, 2022, Introduced by Reps. Rabhi, Rogers, Breen, Cavanagh, Hood, Stone, Bezotte, Sneller, Steckloff, Weiss, Tyrone Carter, Brabec, Cynthia Johnson, O'Neal, Thanedar, Koleszar, LaGrand, Neeley, Sowerby, Hope, Brixie, Aiyash, Pohutsky, Haadsma, Morse, Lasinski, Puri, Green, Peterson, Young and Jones and referred to the Committee on Insurance.

A bill to amend 1976 PA 331, entitled

"Michigan consumer protection act,"

by amending section 4 (MCL 445.904), as amended by 2014 PA 251.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 4. (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. **However,**

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 in this state does not exempt that person under this subdivision. This subdivision does not exempt a person engaged in trade or commerce in this state from the requirements of this act on the basis that the general conduct of the business of that person is regulated by law.

(b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.

(2) Except for the purposes of an action filed by a person under section 11, 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 any of the following:

~~(a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.~~

(a) ~~(b)~~ 1939 PA 3, MCL 460.1 to 460.11.

(b) ~~(c)~~ The motor carrier act, 1933 PA 254, MCL 475.1 to ~~479.43.~~**479.42.**

~~(d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.~~

(c) ~~(e)~~ The credit union act, 2003 PA 215, MCL 490.101 to 490.601.

~~(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 500.2001 to 500.2093, if either of the following is met:~~

~~(a) The method, act, or practice occurred on or after March 28, 2001.~~

~~(b) The method, act, or practice occurred before March 28, 2001. However, this subdivision does not apply to or limit a cause of action filed with a court concerning a method, act, or practice if the cause of action was filed in a court of competent jurisdiction on or before June 5, 2014.~~

(3) ~~(4)~~ The burden of proving an exemption from this act is upon the person claiming the exemption.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.