When the Exception Becomes the Rule:

How the Michigan Supreme Court Ignored the Unmistakable Intent of the Legislature in Construing the Michigan Consumer Protection Act and the Difficulty of Undoing Legislation from the Bench

By Karl Heil

Judges rewrote the Consumer Protection Act 17 years ago

The Michigan Consumer Protection Act (MCPA) was enacted to provide consumers with an avenue for relief from businesses that engage in unfair, unconscionable, or deceptive business practices related to consumer products or services. In a five-to-two decision, however, the Michigan Supreme Court interpreted an exemption in the MCPA to exclude claims against insurance companies generally. Based on its plain language, the exemption was intended to exclude only specific conduct on a case-by-case basis if it is authorized by law. In an opinion written by Justice Young, the majority read the exception for “[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” to mean a general transaction that is authorized by law. Based on the majority’s opinion, businesses now argue that if their general activities such as selling appliances, cars, clothing, real estate, etc. are generally authorized or regulated, then those activities are not subject to the MCPA.

Because nearly all businesses are regulated in some capacity by state or federal law, businesses claim that they are exempt from the act under Smith v Globe Life based on whatever laws regulate their activities—even if the regulation is tangential. In other words, businesses argue that the exception is the rule under Smith, meaning that the Smith majority effectively took away consumers’ right to redress for many forms of deceptive business practices related to consumer products and services.

The inconvenient truth

Although other articles have been written about the flaws in the Smith v Globe Life decision and its evisceration of the MCPA, those articles have not
addressed a glaring statutory provision that undermines the reasoning of the *Smith* majority. That provision would have stared the majority in the face if it had considered section 3 of the act in deciding the case. And the majority’s reasoning and conclusion cannot be squared with that subdivision.

In 1994, the MCPA was amended to include subdivision (dd), which then read:

(dd) Representations by the manufacturer of a product or package that the product or package is any of the following:

(i) Except as provided in subparagraph (ii), recycled, recyclable, degradable, or is of a certain recycled content, in violation of guidelines regarding environmental guides for the use of environmental marketing claims published by the federal trade commission, 16 C.F.R. part 260, P 36363 (August 13, 1992).

(ii) For container holding devices regulated pursuant to Act No. 145 of the Public Acts of 1988, being sections 445.581 to 445.584 of the Michigan Compiled Laws, representations by a manufacturer that the container holding device is degradable contrary to the definition provided in that act.

The 1994 amendment dispels any purported doubt about whether general regulation of a business exempts that business from the MCPA.

In keeping with the legislature’s intent to allow consumers a private right of action when businesses violate other statutes, the legislature amended the MCPA to allow an aggrieved consumer to bring an action if a business makes a false representation that a product or package is recycled, recyclable, or degradable. The statute specifically refers to a federal regulation as well as a Michigan statute regulating, among other things, recycled, recyclable, or degradable materials. The drafters, therefore, made it unmistakably clear that a business may be liable under the act if it misstates the characteristics of such products, even though those businesses are already regulated by state and federal law. Environmental advertising claims—as stated in the amendment itself—are regulated by the Federal Trade Commission Act as well as the Michigan Natural Resources and Environmental Protection Act, MCL § 324.101 et seq. If the majority had considered subdivision (dd), therefore, it would have been forced to conclude that its reading of section 4 was wrong. Although the majority could argue that the amendment need not be considered because the action arose before the amendment, such an interpretive tactic would further expose the majority’s failure to read the statute as a whole, its disregard for the clear intent of the legislature as plainly expressed by the statutory language, and its rendering of statutory provisions meaningless.

Under the majority’s interpretation, subdivision (dd) is nugatory. Neither consumers nor the attorney general could take any action if a business violated that provision. That provision would be stillborn, because it contains the basis of the regulation—and hence exemption—within its text.

Although not acknowledged by the majority in *Smith*, the Michigan Supreme Court—even Justice Young—has consistently held that the primary goal when considering a statute is to “discern and give effect to the in-
tent of the Legislature."10 “The words of a statute provide the most reliable evidence of its intent . . . .”11 When the statutory language is clear, “[n]o further judicial construction is required or permitted.”12 A court must avoid a construction that would render any part of the statute nugatory.13 Likewise, a statute must be read as a whole and the words and phrases should be read in the context of the entire legislative scheme.14

Because the 1994 amendment pre-dated Smith by several years, the majority could not claim legislative acquiescence to its reading of the MCPA. And the state high court has repudiated that principal anyway.15 Still, the majority’s decision renders subdivision (dd) meaningless—an idle undertaking by the legislature to add more words to the statute for the sake of prolixity. The majority came up with its reading of the statute, even though it briefly acknowledged that it was required to “avoid rendering [a] term mere surplusage” when construing MCL § 500.2218 in connection with the plaintiff’s breach of contract claim.16 The majority clearly failed to apply that rule—or any of the other rules of statutory construction the state high court has required—to its reading of the MCPA.

Smith was not a one-off
The Michigan Supreme Court was given a chance to correct its mistake in 2007. However, the Court once more failed to perform proper analysis of the statutory language or to apply the standard rules of statutory construction.17 Instead, Justice Young, again writing for the majority, doubled down on the Smith reasoning. Although he included boilerplate reference to giving “effect to the Legislature’s intent by looking at the statutory text, giving meaning to every word, phrase, and clause in the statute and considering both their plain meaning and their context” in the standard of review, Justice Young again failed to consider the various statutory provisions, including the specific prohibited acts in section 3 such as subdivision (dd).18 He also made no effort to discern the intent of the legislature or read the statute as a whole. Instead, he reaffirmed the erroneous interpretation in Smith.

Will anything ever be done to undo Smith?
Over the years, various proposals have been suggested to negate the effect of Smith, such as deleting the exemption or tweaking the statutory language, and rewrite bills have been proposed in many of post-Smith legislative sessions.19 However, the Smith opinion shows how little anyone can do to prevent a court from usurping the role of the legislature—repealing a law by the stroke of a pen—and how little can be done if the high court oversteps its boundaries.20 The text of the statute is not that complicated.21 A simple review of the various statutory sections and a minimal attempt to read the statute as a whole would have shown that the majority’s view was not only incorrect, but contrary to the plain language of the statute and the intent of the legislature. Actual analysis of the statutory language in effect in 1999 readily shows that there is no peg on which the majority’s rationale can hang.

The Smith decision was issued 17 years ago. To date, nothing has been done to give consumers back the rights they gained through the legislative process. The statute has not been amended to undo the judicial overreach and the decision’s author is now the chief justice of the Michigan Supreme Court, who confirmed the judicial fiat in Liss. The Smith majority abandoned any pretense of following the established rules for construing the MCPA and relied on a self-serving, oracular reading of the statute unmoored from any legal principles or even the text of the statute. Such an unrestrained “interpretation” of the statute allowed the majority to freely reject the “common-sense reading” by the Michigan Court of Appeals without any analysis.22 The decision stands as a cautionary tale of how little can be done to thwart or undo a power grab.23 The bottom line is no level of careful drafting and no specific amendment can prevent the kind of judicial activism carried out in Smith.

Endnotes
1 MCL § 445.901 et seq. See also Noggles v Battle Creek Wrecking, Inc, 153 Mich App 363, 367; 395 NW2d 322 (1986).
3 MCL § 445.904(1)(a).
4 Smith, 460 Mich at 465. The majority ultimately held that the MCPA claims might be permitted based on MCL § 445.904(2) for violation of the insurance code, but that subdivision was subsequently repealed by 2000 Mich. Legis. Serv. P.A. 432 (H.B. 5332) (West).
6 As others have noted, the majority gave unreasonable meanings to “specifically authorized” and “transaction” and it failed to harmonize various sections of the statute. Professor Maveal addressed some of section 3’s original 29 prohibited acts in showing that the majority misconstrued “transaction.” 53 The Wayne L. Rev. 833 (2007).

7 MCL § 445.903.


9 MCL § 445.904(2) (allowing for consumer actions for violations of the banking code, Motor Carrier Act, Savings Bank Act, and Credit Union Act).


11 Id. (quotation marks and citation omitted).

12 Id.


14 Id.

15 Renny v Mich DOT, 478 Mich 490, 503, fn. 31; 734 NW2d 518 (2007) (opinion by J. Young) (“The dissent claims that the Legislature acquiesced in Bush’s erroneous interpretation of the public building exception. That this Court highly disfavors the doctrine of legislative acquiescence has been elsewhere stated…”).

16 Smith at 459.


18 Id. at 208.


20 Simply reading the entire statute does not guarantee that consumer rights will not be abridged. In Hines v Volkswagen of America, Inc, 265 Mich App 432; 695 NW2d 64, the Court of Appeals cobbled together an interpretation based on various sections of the statute in rolling back consumer rights under the New Motor Vehicle Warranties Act contrary to the express language of the statute and the clear intent of the legislature. Further, the Smith majority not only rewrote the MCPA, it also reinterpreted its own precedent in Attorney General v Diamond Mortgage Co, 414 Mich 603; 327 NW2d 805 (1982) to say the opposite of what it actually held. Indeed, it is not hard to imagine Justice Young reaching the same conclusion based on some of the proposed amendments. See Mich. S.B. 127 (2013).


22 Smith, 460 Mich at 464.

23 Perhaps, modification of MCL § 445.904 coupled with a statement of legislative intent or how the act must be construed could help prevent the courts from usurping the legislative function. See, e.g., Florida Leasco, LLC v Dept of Treasury, 250 Mich App 506, 509; 655 NW2d 302 (2002); MCL § 32.503; Cal. Civ. Code § 1760 (“This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.”) (California’s consumer protection statute).