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Michigan finally restored its consumer protection law. Don't gut it again. | Opinion

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The Michigan Consumer Protection Act (MCPA) became law in 1976. It gave the Michigan Attorney General and ordinary citizens powerful tools to challenge unfair and deceptive business practices.

Former Attorney General Frank Kelley used the law for decades to give Michigan consumers a fair shake. He sued cheating auto repair mechanics, price gouging drug companies, unscrupulous mortgage companies and a host of other businesses and obtained millions of dollars in refunds for damaged consumers. I had the good fortune of working for him on several of those cases.

How a good law was neutered

The law contained a very narrow exception. If questionable conduct challenged in a lawsuit was "specifically authorized" by a regulatory agency, then the law did not apply. For 23 years, this exception rarely came up. After all, regulators rarely "specifically authorize" price gouging or fraud.

That changed in 1999. In Smith v. Globe Life, the Michigan Supreme Court took a narrow exemption from the MCPA and converted it into a loophole. Instead of asking whether specific conduct or transactions were authorized by law, the court asked whether the general transaction was authorized. If it was, the court held, the business was immune from the MCPA. That interpretation was reinforced in 2007 by Liss v. Lewiston-Richards.

The consequences were enormous. Entire regulated or licensed industries were effectively placed beyond the reach of the Consumer Protection Act in many circumstances.

Consider a licensed contractor who intentionally lowballs a quote on your new roof, then doubles the price after removing the old roof. Being licensed to build or repair homes does not mean the state specifically authorized a contractor to deceive a customer. Yet under Smith and Liss, the threshold question often became whether the broader business transaction was authorized or regulated, not whether the alleged conduct itself was deceptive.

Home builders, car dealers, automakers, mortgage lenders, real estate agents, plumbers, doctors, grocery stores, casinos, pesticide companies and other regulated businesses received something approaching blanket immunity from the MCPA.

The Attorney General's office was severely hamstrung. As a result, national consumer advocates ranked Michigan's consumer protection regime as the 49th weakest in the country, tied for last place with Rhode Island.

Restoring the law's original intent — protecting consumers

In 2022, Attorney General Dana Nessel launched an investigation into pharmaceutical company Eli Lilly's pricing practices for insulin medication. Nessel did not sue Eli Lilly for price-gouging or allege that they violated the law, and the Michigan Supreme Court did not reach this issue. She merely attempted to investigate their pricing practices under the MCPA.

The company argued that the Michigan attorney general couldn't investigate because the U.S. FDA had generally authorized Lilly to sell insulin, but Nessel and the Michigan Supreme Court disagreed. More importantly, Michigan's highest court held that Smith— the case that had effectively gutted the MCPA — was wrongly decided. If a company wants to argue that it is immune from the law, the court held that it must demonstrate that the specific transaction or conduct in question was specifically authorized by regulators.

This ruling confirms that Michigan consumers may use the MCPA to challenge unfair and deceptive conduct and recover damages when they have been wronged in a host of regulated industries. A license to operate is not a license to deceive.

Be on the lookout for new “fixes”

The Eli Lilly decision may not be the end of the story. Some state lawmakers are already proposing legislation to gut Michigan’s consumer protection law — again — and take Michigan’s consumer protection laws back to 49th place.

Michigan consumers deserve more than last place among the states when it comes to consumer protection.

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