

Statement for the House Judiciary Committee Regarding House Bill 4915

**Some Practical Effects of Gutting Michigan's Consumer Protection Act
And Why We Need to Bring it Back**

Adam G. Taub

1. What Happened to the Consumer Protection Act?

Prior to *Smith v. Globe Life Insurance Co.* 460 Mich 446; 597 NW2d 28 (1999), Michigan had an effective Consumer Protection Act, much like the other 49 states. The Consumer Protection Act was a framework of basic values for businesses that really amounted to not much more than common sense. The Act defined certain practices as being “unfair, unconscionable or deceptive.” For example, advertising a product as “new” when it was really used, was considered deceptive. Advertising a product as “free” without disclosing that a purchase was necessary was considered unfair. Inducing someone to buy a product by falsely representing that their health was at risk was considered unconscionable. Basically, the Michigan Consumer Protection Act prohibited businesses from lying to get people to buy things.

From 1976 until 1999, the law was clear: an aggrieved consumer who had been hoodwinked could go to court with an attorney and get his or her money back. That was until the Michigan Supreme Court read the law differently than anyone had ever read it before. In *Smith v. Globe Life*, the Michigan Supreme Court decided, in effect, that the statute designed to protect consumers from the unscrupulous practices of dishonest businesses, *never really applied to businesses at all.* *Smith v. Globe Life*, killed consumer protection in the State of Michigan.

Regardless of whether or not you agree with the Supreme Court's novel interpretation of the Michigan Consumer Protection Act in *Smith v. Globe*, it is certain that the effect of that decision has been to render the MCPA completely useless. My testimony will focus on reasons why this body needs to pass HB 4915 and revive this law.

2. Basic Principles

As tempting as it may be to subscribe to the notion that economic regulation is the equivalent of Maoist communism, the free market cannot survive without its participants agreeing on some basic principles that can be meaningfully enforced. Chief among these values is honesty. Simply put, the participants in a successful economic system need to be confident that a) their trading partners are not cheating them or b) if they are, a mechanism exists to extract ill-gotten consideration from the charlatan. A successful economic system requires clear laws against fraud.

Of course, this is common sense. The basic principle underlying any free-market economy is the notion that individuals will make financial decisions they deem to be in the best interest of themselves and their families. The aggregate of millions of individual, self-interested decisions

drives the free market, arguably in the right direction. However, these decisions have to be *informed* decisions; otherwise it is impossible to figure out what is in one's best self interest. When a company goes out of its way by lying in order to convince people to make ludicrous decisions that are incredibly contrary to their own self-interest, no one wins but the thieves. Unless we have a consumer protection act that actually applies to consumer transactions.

When sellers lie with impunity about goods and services, the freedom to transact becomes meaningless. A successful free market economic system requires honest transactions and while the law shouldn't reward people for making stupid financial choices, it also should not allow crooks to keep the money they have pilfered through fraud. Fraud is a form of stealing.

Basic principles need to be agreed upon, established and enforced for an economic system to be successful. Caveat Emptor is not a solid foundation for an economy. On the other hand, Thou Shalt Not Steal is a good start.

3. When Consumer Protection Dies, Honest Businesses Cannot Compete

Since *Smith v Globe Life*, unscrupulous business owners in this state have become aware that they are unaccountable to consumers for unfair and dishonest acts and practices. As companies that run honest businesses see consumers being drawn away by false promises, it becomes clear that the only way to compete is by engaging in the same abhorrent behavior. Sooner or later, honest businesses will not be able to keep up. They either go belly up or start selling snake oil. In the short term, the consumer suffers, not having received the benefit he bargained for. In the long run, everyone suffers.

Take the home mortgage industry. Honesty in every facet of this industry was discarded for inflated appraisals, undisclosed adjustable rates, and hidden fees. We are now discovering that many mortgages were bundled into more than one portfolio. We have recently seen an entire industry succumb to dishonest practices which have crippled the entire global economy. Complete deregulation seemed like a great idea, initially when we all thought we were making millions. In retrospect, we had a whole bunch of people – all of us, homeowners, investors, shareholders, bank presidents -- making really bad, uninformed decisions. We all thought the money was really there, secured by tangible assets. If only we hadn't thrown away the basic set of principles which promoted honesty, disclosure, transparency.

What happened to the honest mortgage brokers who didn't make extravagant, false promises to their borrowers? They went belly up. What happened to the honest stock brokers who didn't deceive their investors? They lost all their business to the Bernie Madoffs of Wall Street. What would happen to a credit card company that didn't maximize profits by charging penalties created by lowering limits below existing balances? The share holders would not tolerate it.

Well-reasoned, non-intrusive laws that promote informed financial decisions and create a disincentive to fraud, cheating, and misrepresentation are necessary to allow honest businesses to compete and thrive. The Michigan Consumer Protection Act was one of those laws until the Michigan Supreme Court decided it did not apply to businesses.

4. Businesses Need to be Held Accountable for Dishonesty

The only way to prevent deception and trickery from becoming the standard *modus operandi* in consumer transactions is to hold a business accountable for inducing a sale through such means. No one would argue with this proposition. The argument against passage of HB 4915 is that reviving the MCPA would somehow impede commerce and cost jobs. First of all, there is no data to support this. The other 49 states have effective Consumer Protection Laws. Employers are not scrambling to Michigan to set up shop so they can cheat people with impunity.

The MCPA was a well-reasoned statute that promoted honesty -- before it was disemboweled with no help from any legislative body. On its face, the MCPA created a set of rules that decent, trustworthy businesses followed simply because this was the right thing to do. The MCPA provided a logical, proportionate response to a swindle: give the money back and pay *reasonable* costs and fees for having to go to court. This offered an incentive to the charlatan to promptly refund money to aggrieved consumers.

5. Consumers Need Meaningful Access to the Courts

As a consumer advocate, I receive approximately twenty calls per week from citizens of this State who have, in one way or another, been cheated by a licensed business. While a few of these calls involve relatively very small amounts of money and hurt feelings, many are from hard-working people who have been bilked shamelessly out of thousands of dollars.

Since the *Globe Life* decision, I have had to turn away almost every single consumer fraud case that I could not file outside the Michigan Court system. Without a strong MCPA, the doors to the court house are shut and locked to most individuals. Reviving the MCPA will provide a private right of action for consumers who have been ripped off and allow them to have adequate representation.

Taking a business to court is a nightmare for non-lawyers. A brief period in small claims court is followed by removal to district court, immediate requests for admission, and a motion for summary disposition. The flurry of legal documents is tempestuous. In most cases, consumers who phone me after they have tried to litigate without an attorney don't even know they've already lost the case.

The MCPA allows consumers to hire lawyers. It also creates an incentive for early resolution and a disincentive for excessive litigation.

6. The Biggest Deception

With no consumer protection in the State of Michigan, Thou Shalt Not Steal is no longer the law. Lying to consumers is the norm, and there is no way for any consumer in this State to get in front of a judge to get his or her money back. An economy of dishonesty is what we have here. The state of the law is Caveat Emptor. Let the Buyer Beware. If you get cheated, too bad. The doors of the courthouse are shut, locked and victims of fraud are no longer on the guest list.

And yet, this body continues to add more provisions to this useless bill, taking credit for protecting the public and failing to actually repair the damage done by the Supreme Court. This deception, the continued, futile addition to the MCPA misrepresents the state of affairs, implying falsely that the MCPA, given the Supreme Court's ruling in *Globe Life*, actually protects anyone.

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