PROVIDING GUIDANCE TO INSURERS AND CLIENTS ACROSS A DIVERSE LITIGATION LANDSCAPE

Michigan Supreme Court Revives Dead Letter Consumer Protection Act

By David R. Kinzer **August 13, 2026**

The Michigan Supreme Court, like the U.S. Supreme Court, saves its most important decisions for the end of its term, and 2026 was no exception with the release of *Att'y Gen. v Eli Lilly & Co.*, ___ Mich ___; ___ NW3d ___ (2026) (Docket No. 165961), one of the most consequential business-law decisions issued by the Court in years. The case ostensibly concerns an issue of major political significance in its own right: the cost of healthcare in the United States, with Michigan Attorney General Dana Nessel pursuing a potential lawsuit against pharmaceutical giant Eli Lilly and Company over the artificially high cost of insulin. However, the opinion's true subject was not the attorney general's allegations but the type of claim the allegations would support, a violation of the Michigan Consumer Protection Act (MCPA).

Enacted in 1976 as part of a larger national movement, the MCPA was among the most powerful consumer-protection statutes in the United States, prohibiting "[u]nfair, conscionable, or deceptive" practices in "trade or commerce," where "trade or commerce" was defined as any business "providing goods, property, or service primarily for personal, family, or household purposes," no matter whether the property was "tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902-3. But broad definitions typically require exclusions, the most important of which states 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." MCL 445.904(1)(a).

Initially, the Supreme Court interpreted this exclusion narrowly. In *Attorney General v Diamond Mtg Co*, 414 Mich 603; 327 NW2d 805 (1982), a mortgage company argued that it was de facto excepted from compliance with the MCPA because it was a licensed real estate broker and therefore engaging in conduct "specifically authorized under laws administered by a regulatory board." The Supreme Court disagreed, writing that although "the license generally authorizes [the mortgage company] to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct." *Id*. at 617.

SECREST WARDLE NOTES

By 2007, judicial decisions had rendered the Michigan Consumer Protection Act (MCPA) void as to any industry regulated or authorized by law. In *Att'y Gen. v Eli Lilly & Co.*, ___ Mich ___; ___ NW3d ___ (2026) (Docket No. 165961), the Michigan Supreme Court revoked much of that immunity, restoring the law's original power. Now previously shielded industries—including insurance companies, home builders, car dealers, and healthcare providers—are once again subject to the MCPA. The law prohibits unfair, unconscionable, and deceptive business practices, providing a variety of remedies, including the award of attorney's fees. The opinion heightens risk for businesses, demonstrating the need for creative and aggressive defense counsel.

Without ever formally overturning *Diamond Mtg*, the Supreme Court undermined it by introducing a new test for exceptions in *Smith v Globe Life Ins Co*, 460 Mich. 446, 597 N.W.2d 28 (1999) and *Liss v Lewiston-Richards, Inc*, 478 Mich. 203, 732 N.W.2d 514 (2007). These cases said that, to determine whether a "transaction or conduct" was "specifically authorized" by law and therefore exempt from the MCPA under MCL 445.904(1)(a), "the relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Liss* at 212. Thus, in *Smith*, the sale of life insurance was wholly excepted from the MCPA, even if the insurance broker engaged in unlawful conduct. Similarly, the home builder in *Liss* was excepted from the MCPA because he was a licensed home builder, even though he failed to deliver contractual promises and misrepresented what he intended to build.

The logic of *Smith* and *Liss* spread to numerous other industries: "car dealers, car makers, mortgage lenders and servicers, real estate agents, plumbers, doctors, grocery stores, casinos, and pesticide application services," were all found to be exempt from the MCPA. *Eli Lilly*, slip op. 14. Indeed, nearly every industry is subject to some form of regulation or "authorized by law" in some way. The exception quickly overtook the rule. By 2015, the MCPA was essentially a dead letter.

Now the Supreme Court has shifted courses once again, holding that *Liss* and *Smith* incorrectly interpreted MCL 445.904(1)(a). That statute states that the MCPA does not apply to "**a transaction or conduct** specifically authorized under laws," but *Smith* looked instead to "whether the **general transaction** is specifically authorized by law," adding the word "general" to turn a narrow exception into an ever broadening one. See *Eli Lilly*, slip op. 12-13 (emphasis added). The earlier decisions compounded the problem by quoting the phrase "specifically authorized" but ignoring it when interpreting the statute, focusing essentially on whether the defendant possessed a license, rather than the "specific act of alleged misconduct." *Id.*, slip op. 12.

Since the attorney general could not even issue subpoenas in this case unless the Supreme Court first reversed *Smith* and *Liss*, no fact discovery occurred, and any decisions about insulin pricing remains years in the future. But by subjecting the company to the MCPA for the first time in decades, the Supreme Court has already affected Eli Lilly, heightening litigating risk for drugmakers along with numerous other businesses.

Importantly, the MCPA provides for attorney's fees, dramatically changing the cost-benefit analysis for cases with extensive discovery and motion practice. But anxious executives and entrepreneurs should take solace in the fact that lawyers developed rigorous MCPA defenses in the 1980s and 1990s, which are ready to be repurposed for a new generation of dynamic defense counsel. See *De Bruyn Produce Co v Romero*, 202 Mich App 92; 508 NW2d 150 (1993) (housing provided as benefit of employment not subject to MCPA as outside "trade or commerce"); *Nelson v Ho*, 222 Mich App 74, 84; 564 NW2d 482 (1997) (doctor's failure to accurately represent medical operation concerned the performance of professional service and was better addressed as medical malpractice).

We welcome your questions - please contact:

Firm Contact
Senior Partner
Mark F. Masters
mmasters@secrestwardle.com or 248-539-2844

For questions pertaining to this article
David R. Kinzer
dkinzer@secrestwardle.com or 248-539-2811

Website LinkedIn Twitter YouTube Email

SECREST WARDLE

Troy | 248-851-9500
Grand Rapids | 616-285-0143

www.secrestwardle.com

Contributors

Firm Contact
Senior Partner
Mark F. Masters

Editors
Sandie Vertel
Susan Willcock

10916843