STATE OF MICHIGAN
IN THE SUPREME COURT

JORDAN CYR, et al,

Plaintiffs-Appellants,

v

FORD MOTOR COMPANY,

Defendant-Appellee.
_____/

Supreme Court No. 160927

Court of Appeals No. 345751

Wayne Circuit Court No. 17-006058-NZ

BRIEF OF *AMICUS CURIAE*
MICHIGAN ATTORNEY GENERAL DANA NESSEL
IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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STATEMENT OF QUESTION PRESENTED

1. Should this Court grant reconsideration, grant leave to appeal, and overrule *Smith v Globe Life Insurance Company*, 460 Mich 446 (1999) and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007), where *Smith* and *Liss* misinterpret an exemption in the Michigan Consumer Protection Act, resulting in an overly broad application of the exemption that is contrary to the plain language and intent of the Act?

   Plaintiffs-Appellants answer: Yes.

   Defendant-Appellant answers: No.

   Amicus Curiae answers: Yes.

INTEREST OF *AMICUS CURIAE*

Amicus Attorney General Dana Nessel's interest arises from two related responsibilities.

First, and as a general matter, Attorney General Nessel—the constitutionally established officer who serves as the chief law enforcement officer for the State—is charged with defending state laws and the state constitution. The Legislature has authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28; MCL 14.101.

Second, and specific to this case, the Attorney General has a responsibility to protect Michigan consumers under the Michigan Consumer Protection Act (MCPA). The MCPA specifically prescribes an enforcement role for the Attorney General to investigate and prosecute persons engaged in unfair business practices in violation of the Act. See MCL 445.905; 445.907; 445.910. Therefore, Attorney General Nessel has a significant interest in the proper interpretation and application of the MCPA.

Attorney General Nessel submits this brief to further these interests, speaking for consumers who will benefit from this Court hearing this case and correcting a longstanding misinterpretation of consumer-protection law.

INTRODUCTION

Nearly 40 years ago, former Attorney General Frank J. Kelley explained to this Court: "If every person or business which engages in an activity authorized by some statute or regulation were exempt from the Michigan Consumer Protection Act, . . . then the [MCPA] would be a cruel hoax on the many legislators and others who sought to give Michigan consumers protection in the marketplace." *Attorney Gen v Diamond Mortg Co*, 414 Mich 603, 616 (1982) (quotations omitted). Unfortunately, following this Court's decisions in *Smith v Globe Life Insurance Company*, 460 Mich 446 (1999), and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007), the very thing he feared has come to pass.

Smith and *Liss* interpret the MCPA's exemption for "[a] transaction or conduct specifically authorized under laws," MCL 445.904(1)(a), as applying whenever " 'the *general transaction* is specifically authorized by law, regardless of whether the *specific misconduct* alleged is prohibited.' " *Liss*, 478 Mich at 210 (quoting *Smith*, 460 Mich at 465) (emphasis added). Under this interpretation, which is contrary to the plain language of the exemption, the MCPA is a mere shell of what it was intended to be.

Now, this Court is presented with the opportunity to rectify *Smith* and *Liss* and restore the MCPA as an effective weapon in the consumer-protection arsenal. For the reasons that follow (and for the reasons that Plaintiffs and other *amici* well-articulate), Attorney General Nessel urges this Court to grant reconsideration, grant leave to appeal, and, ultimately, overrule *Smith* and *Liss*.

ARGUMENT

I. This Court should grant reconsideration and, subsequently, leave to appeal, to correct *Smith*'s and *Liss*'s erroneous interpretation of the exemption contained in Section 4(1)(a) of the MCPA.

In addition to interpreting Section 4(1)(a)'s exemption in a manner that is contrary to the plain text, purpose, and intent of the MCPA,[1] *Smith* and *Liss* have erected significant, unwarranted barriers to invoking the MCPA in the face of unfair or deceptive business practices. Subsequent caselaw applying *Smith* and *Liss* and a review of the potential impact of certain regulatory schemes—both of which are outlined below—demonstrate the extent of these barriers. *Smith* and *Liss* should be overruled to eradicate these barriers and bring this Court's interpretation of the Section 4(1)(a) exemption in line with the MCPA's plain text, purpose, and intent. This is especially important given the requirement that the remedial provisions of the MCPA be "construed liberally to broaden the consumers' remedy." *Dix v Am Bankers Life Assur Co of Florida*, 429 Mich 410, 417 (1987).

This case presents an opportune vehicle for this Court to grant leave and correct Michigan law, so that the Legislature's true vision for the MCPA may be implemented.

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[1] Attorney General Nessel agrees with the arguments that Plaintiffs and other *amici* have advanced on these topics and believes those arguments have been sufficiently addressed. As such, in the interest of brevity and judicial economy, Attorney General Nessel will not reiterate those arguments here, but writes to provide additional insight on the impropriety of *Smith* and *Liss* and their negative real-world impact.

A. The application of *Smith* and *Liss* in subsequent cases in Michigan demonstrates the substantial negative impact of those decisions on the area of consumer protection.

Subsequent cases applying *Smith* and *Liss* have shown the far-reaching consequences of those decisions on a consumer's ability (and the Attorney General's ability, on behalf of consumers) to obtain relief under the MCPA.

Take, for example, *Lucas v Awaad*, 299 Mich App 345 (2013). In that case, a group of parents brought an action under the MCPA against a doctor and his professional corporation, a billing company, and a hospital alleging that the defendants "engag[ed] in false, misleading and deceptive acts and/or omissions" in the "entrepreneurial, commercial, and business aspects of medical practice," ultimately resulting in the intentional misdiagnosis of pediatric patients with epilepsy for the purpose of increasing billing. *Id.* at 348–349, 353, 367–368. Citing *Smith* and *Liss*, the Court of Appeals found that, because "the practice of medicine is specifically authorized and regulated by law," the parents' MCPA claim was "barred by that statute's exception for transactions specifically authorized by law." *Lucas*, 299 Mich App at 369.

Consider also *Davis v Boydell Development Co*, 2019 WL 2605789, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket Nos. 344284, 344729, and 344731). (Exhibit A.)[2] Plaintiffs in *Davis* sued their landlords under the MCPA, alleging that the landlords "fraudulently enter[ed]

[2] *Davis*, while unpublished, is cited for illustrative purposes to demonstrate the adverse consequences of *Smith* and *Liss*.

into residential leases with plaintiffs without obtaining certificates of compliance that would permit them to do so." *Id.* at *1. The Court of Appeals concluded that, though the "specific misconduct alleged, [i.e., the] leasing [of] residential rental property without first obtaining certificates of compliance, [wa]s prohibited[,]" because "the general transaction" at issue, i.e., the leasing of residential property generally, was "specifically authorized" by local ordinances, under *Liss*, the Section 4(1)(a) exemption applied to bar plaintiffs' MCPA claims. *Id.* at *3 (quotations omitted).

Without *Smith* and *Liss*, the MCPA claims in *Lucas* and *Davis* may have survived. As such, these cases illustrate the significant barrier that *Smith* and *Liss* have erected—a barrier that permeates nearly every segment of the economy.

B. *Smith* and *Liss* create a void of consumer protection for entire areas where there are regulatory schemes.

In addition to the many examples found in caselaw, it is not hard to envision other circumstances in which *Smith* and *Liss* may prevent consumers from obtaining relief—such as situations where the regulatory scheme does not contain a consumer-protection component, or where the regulating entity is unwilling or unable to enforce the regulatory scheme.

1. *Smith* and *Liss* foreclose relief where a regulatory scheme does not contain a consumer-protection enforcement mechanism.

One circumstance where *Smith* and *Liss* present a substantial problem arises where an entity is subject to a regulatory scheme that does not contain a consumer-

protection enforcement component. Because there is an applicable regulatory scheme, these entities are likely engaging in "general transactions" that are "specifically authorized," and therefore, under *Smith* and *Liss*, the entities would be exempted from the MCPA. And because the regulatory scheme contains no consumer-protection component, consumers that are harmed by "specific misconduct" that occurs during the "specifically authorized general transactions" are unable to seek redress.

An example of this circumstance exists in the context of the Michigan Public Service Commission (MPSC). The MPSC is charged with regulating telecommunication providers. MCL 484.2201. But under the Michigan Telecommunications Act, MCL 484.2101 *et seq*, the MPSC does not have regulatory authority over pricing and terms. So where a telecommunication provider makes a deceptive offer to a consumer, and the consumer does not receive what is offered or is charged a higher price than what was offered, the MPSC does not have authority to prevent or punish this type of behavior. And because telecommunication providers operate within the MPSC's regulatory scheme, under *Smith* and *Liss*, they are engaged in "general transactions" that are "specifically authorized," and are therefore exempt from the MCPA. As such, consumers who are harmed when telecommunication providers make deceptive offers are left without sufficient legal recourse.

Another example of this situation arises under the regulatory scheme enforced by the U.S. Food and Drug Administration (FDA). The FDA regulates,

among other entities, drug manufacturers. 21 USC 301 *et seq*. But the FDA expressly disclaims its ability to regulate drug pricing, stating that it "has no legal authority to investigate or control the prices set by manufacturers, distributors and retailers." (Exhibit B, FDA Q&A, p 7.) Still, even with this disclaimer, it is reasonable to expect that a pharmaceutical company—when faced with a claim that it is violating the MCPA by charging Michiganders a grossly excessive price for an important prescription medication (see MCL 445.903(1)(z))—would attempt to hide behind *Smith* and *Liss* by asserting that it is exempt from the MCPA under Section 4(1)(a) because the pharmaceutical industry is heavily regulated by the FDA.

Ultimately, the *Smith* and *Liss* interpretation of Section 4(1)(a)'s exemption shields entire industries from liability under the MCPA simply because those industries are subject to a regulatory scheme—a result unintended by the Michigan legislature as evidenced by the plain language of the Act and its overarching purpose.

2. *Smith* and *Liss* foreclose relief where a regulating entity is unwilling or unable to enforce its regulatory scheme.

Smith and *Liss* also present a barrier to a consumer's ability to obtain relief in situations where an agency charged with enforcing the regulatory scheme is unwilling or unable to do so, and the regulatory scheme does not otherwise provide for a private cause of action or Attorney General enforcement. Like the circumstance described above, where a regulated entity is engaging in "general transactions" that are "specifically authorized" under the regulatory scheme,

meaning it therefore would be exempted from the MCPA under *Smith* and *Liss*, the consumer is deprived of a remedy when the regulatory scheme is not enforced.

For instance, pet shops in Michigan are subject to Michigan Department of Agriculture and Rural Development (MDARD) regulation and licensing. MCL 287.333. Since 2009, however, MDARD has suspended the licensing of pet shops, (Exhibit C, MDARD Regulation Overview, p 1), and the regulatory scheme does not provide a private cause of action. Still, because the regulatory scheme exists, a pet shop could claim that it is engaged in "general transactions" that are "specifically authorized" under the MDARD regulatory and licensing scheme, and therefore exempt from the MCPA. Consequently, the pet shop evades liability under both the regulatory scheme (through lack of enforcement) and under the MCPA (under *Smith* and *Liss*), and consumers are left helpless.

C. *Smith* and *Liss* foreclose a consumer's ability to obtain restitution for unfair or deceptive business practices.

Smith and *Liss* also present a problem in the damages context. That is, even when an avenue for relief is available under other state or federal regulatory schemes, in many cases the relief offered is prospective only. When this is the case, under *Smith* and *Liss*, a consumer may be unable to recoup restitution for unfair business practices.

For example, the Michigan Department of Licensing and Regulatory Affairs Corporations, Securities, and Commercial Licensing Bureau (LARA) is tasked with implementing the regulatory scheme related to the licensing of certain occupations,

businesses, and services. (Exhibit D, LARA Complaint Homepage.) Under *Smith* and *Liss*, entities that are licensed through LARA are engaged in "general transactions" that are "specifically authorized," and therefore exempt from the MCPA. However, while LARA can protect consumers by "bring[ing] administrative actions against [a] person or business entity to enforce compliance with . . . applicable laws and regulations," in most cases it does not have the authority to "order that monies be refunded, contracts be canceled, damages be awarded, etc." (Exhibit E, LARA Complaint Instructions, pp 1–2.) And because the regulated entity is exempt from the MCPA under *Smith* and *Liss*, consumers cannot seek restitution under that Act.

Thus, while consumers may have the opportunity to obtain prospective relief under certain regulatory schemes, if the regulatory scheme does not contain a restitution component, *Smith* and *Liss* prevent consumers from recovering monetary damages under the MCPA when they are financially harmed as a result of the improper business practices of a regulated entity.

CONCLUSION AND RELIEF REQUESTED

Smith and *Liss* transformed what should be a narrow exemption under the MCPA into a broad shield for regulated entities—resulting in the protection of businesses over consumers. This case provides this Court with the opportunity to change course and give teeth to the MCPA once again. For the above reasons, and for the reasons Plaintiffs and other *amici* advance, this Court should grant reconsideration, grant Plaintiffs' application for leave to appeal, overrule *Smith* and *Liss*, and align this Court's interpretation with the plain text, purpose, and intent of the MCPA.

Respectfully submitted,

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