STATE OF MICHIGAN
IN THE SUPREME COURT

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, *ex rel* The People of the State of Michigan,	Supreme Court No.
Plaintiffs-Appellant,	Court of Appeals No. 362272
v	Ingham Circuit Court No. 2022-000058-CZ
ELI LILLY AND COMPANY,	
Defendant-Appellee.	

BYPASS APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75439)
Assistant Solicitor General

Darrin F. Fowler (P53464)
Michael S. Hill (P73084)
Carl J. Hammaker (P81203)
Assistant Attorneys General
Attorneys for Plaintiff-Appellant
Corporate Oversight Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
FowlerD1@michigan.gov
HillM19@michigan.gov
HammakerC@michigan.gov

Dated: September 1, 2022

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

On July 20, 2022, the Ingham County Circuit Court issued a final order granting Defendant-Appellee Eli Lilly and Company's (Lilly) motion for summary disposition and dismissing the declaratory judgment action brought by Plaintiff-Appellant Dana Nessel as Attorney General for the People of the State of Michigan (Attorney General). The Attorney General filed a claim of appeal in the Court of Appeals on July 21, 2022, i.e., within 21 days of that decision. See MCR 7.203(A). The Attorney General now files this bypass application for leave with this Court. See MCR 7.305(C)(1).

STATEMENT OF QUESTIONS PRESENTED

The Michigan Consumer Protection Act (MCPA) contains an exemption making it inapplicable to transactions or conduct specifically authorized under laws administered by regulatory boards or officers acting under statutory authority of this State or the United States. Although Eli Lilly has general authorization from both a State and Federal agency to manufacture and sell insulin medications, there are no laws speaking to the list prices Lilly chooses to charge or to the representations it makes regarding such prices.

1. Where Eli Lilly's insulin prices and related representations are not specifically authorized by any law nor regulated by any agency, does the MCPA apply to its pricing and representations about pricing?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: Did not answer.

2. Wrongly decided opinions should be overturned when doing so has practical workability, and reliance upon the precedent does not dictate a different course. Two wrongly decided opinions from this Court have unjustifiably deprived consumers of protection from unfair trade practices in a wide range of industries simply by virtue of the existence of a general regulatory framework, even if it does not provide remedies to consumers. Where no justifiable reliance in persisting with unfair trade practices can be asserted, should such erroneous precedent be overturned?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

STATUTES INVOLVED

MCL 445.902(g)

(g) "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. "Trade or commerce" does not include the purchase or sale of a franchise, as defined in section 2 of the franchise investment law, 1974 PA 269, MCL 445.1502, but does include a pyramid promotional scheme as defined in section 2 of the pyramid promotional scheme act, MCL 445.2582.

MCL 445.903(1)

445.903.amended Unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce; rules; applicability of subsection (1)(hh).

Sec. 3.

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(a) Causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

(b) Using deceptive representations or deceptive designations of geographic origin in connection with goods or services.

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.

(d) Representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand.

(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(f) Disparaging the goods, services, business, or reputation of another by false or misleading representation of fact.

(g) Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.

(h) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services.

(i) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.

(j) Representing that a part, replacement, or repair service is needed when it is not.

(k) Representing to a party to whom goods or services are supplied that the goods or services are being supplied in response to a request made by or on behalf of the party, when they are not.

(l) Misrepresenting that because of some defect in a consumer's home the health, safety, or lives of the consumer or his or her family are in danger if the product or services are not purchased, when in fact the defect does not exist or the product or services would not remove the danger.

(m) Causing a probability of confusion or of misunderstanding with respect to the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction.

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

(o) Causing a probability of confusion or of misunderstanding as to the terms or conditions of credit if credit is extended in a transaction.

(p) Disclaiming or limiting the implied warranty of merchantability and fitness for use, unless a disclaimer is clearly and conspicuously disclosed.

(q) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

(r) Representing that a consumer will receive goods or services free or without charge, or using words of similar import in the representation, without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions, terms, or prerequisites to the use or retention of the goods or services advertised.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

(u) Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest.

(v) Taking or arranging for the consumer to sign an acknowledgment, certificate, or other writing affirming acceptance, delivery, compliance with a requirement of law, or other performance, if the merchant knows or has reason to know that the statement is not true.

(w) Representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a transaction, if the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(x) Taking advantage of the consumer's inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability.

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

(z) Charging the consumer a price that is grossly in excess of the price at which similar property or services are sold.

(aa) Causing coercion and duress as the result of the time and nature of a sales presentation.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

(dd) Subject to subdivision (ee), representing as the manufacturer of a product or package that the product or package is 1 or more of the following:

(i) Except as provided in subparagraph (ii), recycled, recyclable, degradable, or is of a certain recycled content, in violation of guides for the use of environmental marketing claims, 16 CFR part 260.

(ii) For container holding devices regulated under part 163 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.16301 to 324.16303, degradable contrary to the definition provided in that act.

(ee) Representing that a product or package is degradable, biodegradable, or photodegradable unless it can be substantiated by evidence that the product or package will completely decompose into elements found in nature within a reasonably short period of time after consumers use the product and dispose of the product or the package in a landfill or composting facility, as appropriate.

(ff) Offering a consumer a prize if the consumer is required to submit to a sales presentation to claim the prize, unless a written disclosure is given to the consumer at the time the consumer is notified of the prize and the written disclosure meets all of the following requirements:

(i) Is written or printed in a bold type that is not smaller than 10-point.

(ii) Fully describes the prize, including its cash value, won by the consumer.

(iii) Contains all the terms and conditions for claiming the prize, including a statement that the consumer is required to submit to a sales presentation.

(iv) Fully describes the product, real estate, investment, service, membership, or other item that is or will be offered for sale, including the price of the least expensive item and the most expensive item.

(gg) Violating 1971 PA 227, MCL 445.111 to 445.117, in connection with a home solicitation sale or telephone solicitation, including, but not limited to, having an independent courier service or other third party pick up a consumer's payment on a home solicitation sale during the period the consumer is entitled to cancel the sale.

(hh) Except as provided in subsection (3), requiring a consumer to disclose his or her Social Security number as a condition to selling or leasing goods or providing a service to the consumer, unless any of the following apply:

(i) The selling, leasing, providing, terms of payment, or transaction includes an application for or an extension of credit to the consumer.

(ii) The disclosure is required or authorized by applicable state or federal statute, rule, or regulation.

(iii) The disclosure is requested by a person to obtain a consumer report for a permissible purpose described in section 604 of the fair credit reporting act, 15 USC 1681b.

(iv) The disclosure is requested by a landlord, lessor, or property manager to obtain a background check of the individual in conjunction with the rent or leasing of real property.

(v) The disclosure is requested from an individual to effect, administer or enforce a specific telephonic or other electronic consumer transaction that is not made in person but is requested or authorized by the individual if it is to be used solely to confirm the identity of the individual through a fraud prevention service database. The consumer good or service must still be provided to the consumer on verification of his or her identity if he or she refuses to provide his or her Social Security number but provides other information or documentation that can be used by the person to verify his or her identity. The person may inform the consumer that verification through other means than use of the Social Security number may cause a delay in providing the service or good to the consumer.

(ii) If a credit card or debit card is used for payment in a consumer transaction, issuing or delivering a receipt to the consumer that displays any part of the expiration date of the card or more than the last 4 digits of the consumer's account number. This subdivision does not apply if the only receipt issued in a consumer transaction is a credit card or debit card receipt on which the account number or expiration date is handwritten, mechanically imprinted, or photocopied. This subdivision applies to any consumer transaction that occurs on or after March 1, 2005, except that if a credit or debit card receipt is printed in a consumer transaction by an electronic device, this subdivision applies to any consumer transaction that occurs using that device only after 1 of the following dates, as applicable:

(i) If the electronic device is placed in service after March 1, 2005, July 1, 2005 or the date the device is placed in service, whichever is later.

(ii) If the electronic device is in service on or before March 1, 2005, July 1, 2006.

(jj) Violating section 11 of the identity theft protection act, 2004 PA 452, MCL 445.71.

(kk) Advertising or conducting a live musical performance or production in this state through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group. This subdivision does not apply if any of the following are met:

(i) The performing group is the authorized registrant and owner of a federal service mark for that group registered in the United States Patent and Trademark Office.

(ii) At least 1 member of the performing group was a member of the recording group and has a legal right to use the recording group's name, by virtue of use or operation under the recording group's name without having abandoned the name or affiliation with the recording group.

(iii) The live musical performance or production is identified in all advertising and promotion as a salute or tribute and the name of the vocal or instrumental group performing is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public.

(iv) The advertising does not relate to a live musical performance or production taking place in this state.

(v) The performance or production is expressly authorized by the recording group.

(ll) Violating section 3e, 3f, 3g, 3h, 3i, 3k, 3l, 3m, or 3o.

MCL 445.904(1) & (2)

(1) This act does not apply to either of the following:

(a) 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.

(b) An act done by the publisher, owner, agent, or employee of a newspaper, periodical, directory, radio or television station, or other communications medium in the publication or dissemination of an advertisement unless the publisher, owner, agent, or employee knows or, under the circumstances, reasonably should know of the false, misleading, or deceptive character of the advertisement or has a direct financial interest in the sale or distribution of the advertised goods, property, or service.

(2) Except for the purposes of an action filed by a person under section 11, this act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by any of the following:

(a) The banking code of 1999, 1999 PA 276, MCL 487.11101 to 487.15105.

(b) 1939 PA 3, MCL 460.1 to 460.11.

(c) The motor carrier act, 1933 PA 254, MCL 475.1 to 479.43.

(d) The savings bank act, 1996 PA 354, MCL 487.3101 to 487.3804.

(e) The credit union act, 2003 PA 215, MCL 490.101 to 490.601.

(3) This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093, if either of the following is met:

(a) The method, act, or practice occurred on or after March 28, 2001.

(b) The method, act, or practice occurred before March 28, 2001. However, this subdivision does not apply to or limit a cause of action filed with a court concerning a method, act, or practice if the cause of action was filed in a court of competent jurisdiction on or before June 5, 2014.

(4) The burden of proving an exemption from this act is upon the person claiming the exemption.

INTRODUCTION

For twenty-three years, the Michigan Consumer Protection Act effectively served as a bulwark against unfair and deceptive business practices in nearly every field affecting Michigan consumers. Only transactions or conduct "specifically authorized" by some other regulatory scheme was exempt from MCPA review. All that changed following this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), extended by *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007). Through these decisions—which effectively set aside this Court's earlier holding in *Attorney General v Diamond Mortgage Company*, 414 Mich 603 (1982)—the Court broadened this limited statutory exception by erroneously inserting the word "general" into the standard, creating a blanket defense available to regulated industries, regardless of whether the regulatory scheme addressed any unfair or deceptive conduct.

Smith and *Liss* interpret the MCPA's section 4 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). The word "general" is not in the MCPA's section 4 exemption. This judicial re-write is contrary to the MCPA's plain language and has gutted the MCPA's protections. This jurisprudential shift had major consequences for the applicability of the MCPA to regulated industries, even when such regulations do not prohibit or remedy unfair, deceptive, or unconscionable conduct. For years, consumers have been left without recourse.

Here, the Attorney General seeks to commence an investigation into the pricing of a prescription medication used to treat diabetes, which affects nearly a million Michiganders. But Lilly relies on *Smith* and *Liss* to effectively bar this investigation, even though this reliance is not based on the text of the MCPA itself.

If Lilly's position is correct, then the MCPA does not protect consumers from unfair, deceptive, or unconscionable conduct by the manufacturer or seller of any prescription medication. Never. No matter how egregious the deceit, nor exploitive the price. The *Smith* and *Liss* decisions have unjustifiably transformed a narrowly stated exception within the MCPA into a broad shield potentially available whenever a State or Federal regulatory scheme relating to the underlying transaction can be identified—regardless of whether that regulatory scheme does anything to protect consumers from deceptions, gouging, unfairness, or other improprieties. This Court's review is necessary. MCR 7.305(B)(2), (3).

And since the Court of Appeals is bound to follow these precedents, there is no meaningful value waiting for that Court's review of the arguments presented here—especially when the harms experienced by consumers in a wide range of otherwise regulated areas accrue every day. Meanwhile, Michigan diabetics daily face the dilemma of choosing between lifesaving medication, food, and other necessities to maintain a quality life with no hope that the MCPA can help or protect them. The ongoing and substantial harms to diabetics across the State cannot wait for the inevitable affirmance from the Court of Appeals and thus review is warranted now. MCR 7.305(B)(4)(a). Only this Court can remedy its own error.

STATEMENT OF FACTS AND PROCEEDINGS

A. The Attorney General's Complaint and proposed investigation implicate diabetes and the insulin pricing problem.

According to the Centers for Disease Control, over 34 million Americans have diabetes and face its devastating consequences. In Michigan, approximately 912,794 people have diabetes and over 2,701,000 are confronting prediabetes. [1] On January 25, 2022, the Attorney General made two separate but related filings in the Ingham County Circuit Court. The primary filing was a Petition for Civil Investigative Subpoenas. (Appnt Appx pp 003-035.) Through the Petition, the Attorney General presented evidence in support of a proposed investigation of Eli Lilly under the Michigan Consumer Protection Act (MCPA). Such filings are anticipated by MCL 445.907. The proposed investigation related to Eli Lilly's sale and marketing of insulin medications, which are used to treat diabetes.

The other filing was the Attorney General's Complaint for Declaratory Judgment. (Appnt Appx pp 036-044.) Through the Complaint, the Attorney General sought a declaratory judgment that her investigation of Eli Lilly may proceed, and is not barred by the exemption applying to "[a] transaction or conduct

---

[1] Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *National Diabetes Statistics Report 2020*, https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf (accessed Aug 31, 2022), p 2. In Michigan, approximately 912,794 people have diabetes and over 2,701,000 are confronting prediabetes. American Diabetes Association, The Burden of Diabetes in Michigan, Oct 2021, https://diabetes.org/sites/default/files/2021-11/ADV_2021_State_Fact_sheets_Michigan_rev.pdf (accessed Aug 31, 2022). The complaint cited the 2020 statistics.

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). The Attorney General asserted this declaratory judgment is needed because two wrongly decided opinions of this Court have created a likelihood that Lilly would raise this exemption in any subsequent litigation arising from such investigation. (Appnt Appx p 042.)

Eli Lilly is one of three pharmaceutical companies making up nearly the entire U.S. insulin market.[2] The insulin medications it manufactures include Basaglar, Humalog, and its authorized generic Lispro; which are insulin "analogs" that more closely replicate normal insulin patterns in the body and, due to their convenience, resulted in a great number of patients using these analogs.[3]

Unfortunately, cost is a significant barrier for patients to access these critical medications and, over the past two decades, the prices for analog insulin products in the United States have skyrocketed. According to a study from the RAND Corporation, insulin prices are more than eight times higher in the United States than in 32 high-income comparison nations combined.[4]

---

[2] *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, June 2018, https://care.diabetesjournals.org/content/41/6/1299 (accessed Aug 31, 2022).

[3] Johnson, *Insulin Products and the Cost of Diabetes Treatment*, Congressional Research Service (Nov 19, 2018), available at https://fas.org/sgp/crs/misc/IF11026.pdf (accessed Aug 31, 2022).

[4] Andrew W. Mulcahy, Daniel Schwam, & Nathaniel Edenfield, *Comparing Insulin Prices in the United States to Other Countries Results from a Price Index Analysis*, RAND Corporation (Nov 2020) available at

The skyrocketing prices have garnered the attention of federal lawmakers. In 2019, following its investigation of over 100,000 documents provided by the three major insulin manufacturers, the United States Senate Finance Committee issued a written report detailing the insulin pricing problem and factors contributing to it. While noting the role pharmacy benefit managers (PBMs) have played, the Committee concluded "pharmaceutical manufacturers have complete control over setting the list price (the Wholesale Acquisition cost) (WAC)) for their products."[5]

Thus, the prices Lilly charges for Humalog, Lispro, and Basaglar are determined by Lilly. So, too, are the representations Lilly makes about the reasons for the pricing and discounts it offers in connection with the sale of these medications. (Appnt Appx p 040.) As of the Petition filing date, the list prices for these medications in the United States were as follows:

a. Humalog U100 (5-pack of KwikPens): $530.40

b. Humalog U100 (10 mL vial): $274.70;

c. Humalog Mix 50/50 KwikPens: $568.00;

d. Insulin Lispro (5-pack of KwikPens): $159.12;

e. Insulin Lispro (10 mL vial): $82.41;

f. Basaglar (5-pack of KwikPens): $326.36.

---

https://www.rand.org/content/dam/rand/pubs/research_reports/RRA700/RRA788-1/RAND_RRA788-1.pdf> (accessed Aug 31, 2022).

[5] Charles E. Grassley & Ron Wyden, *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug*, United States Senate Finance Committee Staff Report (January 2021), p. 12, available at https://www.finance.senate.gov/download/grassley-wyden-insulin-report (accessed Aug 31, 2022), p 5.

(Appnt Appx pp 027-028.)

As acknowledged at a website Lilly uses to tell the public about Humalog pricing, determining how much an average diabetic will pay each month is difficult since "Insulin needs vary significantly from person to person, some take only 5 units per meal while others take over 100 units per meal." [6] The website explains that the "list price of a 5-pack of 3 mL Humalog U-100 KwikPens (15 mL or 1,500 units) is $530.40." So, as an example (albeit one relating to a rare diabetic at the high end of Lilly's spectrum), a consumer using 100 units per meal will need 9000 units per month (300 units per day times thirty days). This would require purchase of six packages of the Humalog 5-packs.

In August 2019, the Attorney General conducted a telephone survey comparing the price of Eli Lilly products Humalog and Basaglar offered at pharmacies, located within just a few miles of each other, at four different border crossing points between Michigan and the Canadian province of Ontario. (Appnt Appx 025-027.) The price differentials were significant. For example, Humalog was 855% more expensive to buy in Michigan than across the border. (*Id.*) Similarly, Basaglar, a long-acting insulin often used in conjunction with Humalog, was 471% more expensive to purchase in the American pharmacies than their Canadian counterparts. (*Id.*)

[6] This information is still available at https://www.lillypricinginfo.com/humalog. The Attorney General preserved this information and presented it to the Circuit Court through an affidavit attached to her reply in support of motion for summary disposition. (Appnt Appx pp 102-112).

The Attorney General repeated the survey in February 2021, and found Michiganders continued to be charged grossly excessive prices compared to Canadian consumers. (Appnt Appx p 026.)

Through the Petition, the Attorney General asserted there is probable cause to believe Lilly has engaged—and continues to engage—in unfair trade practices related to its sales in Michigan of the insulin medications Humalog, Lispro, and Basaglar. (Appnt Appx pp 039-040.) Specifically, regarding all three medications, the Attorney General presented probable cause to believe Eli Lilly has charged prices grossly in excess of the price at which similar medications have been, and are being, sold. See MCL 445.903(1)(z). Besides the gross disparity between the Lilly prices for the same medications to Michigan and Canadian consumers, the Attorney General observed the gross disparity in the pricing for Humalog and Lispro, which are actually the same medication being sold under different names. (Appnt Appx p 028.) And, with respect to Lispro, the Attorney General presented probable cause to believe Eli Lilly's representations about the reasons for offering this medication at a discounted price are misleading. (Appnt Appx p 040.) See MCL 445.903(1)(i). This latter assertion was supported by the information contained in paragraphs 43-50 of the Petition, and includes an observation in a bi-partisan report by United States Senators Elizabeth Warren and Blumenthal that (referring to Lilly's Lispro) "[i]ts authorized generic, rather than expanding access to low cost insulin, appears

instead to be a public relations move intended to ease scrutiny on the rising price of insulin."[7]

B. The Regulatory Landscape.

Through the Federal agency known as the Food and Drug Administration (FDA), the United States has sought to ensure the safety of medications sold in this country. Eli Lilly's manufacturing and distribution of Humalog, Lispro, and Basaglar has thus been done following the approvals anticipated by 21 USC 355. (Appnt Appx p 040-041.)

There is nothing within the FDA's authority under this statute or the related universe of Federal regulations giving the FDA any authority to regulate Eli Lilly's pricing of Humalog, Lispro, and Basaglar. Nor do the Federal statutes and regulations administered by the FDA give it any authority to regulate the representations Eli Lilly makes about these prices and any discounts it offers on them. Indeed, the FDA expressly disclaims any such authority over drug prices. On its website, the FDA expressly states that it "has no legal authority to investigate or control the prices set by manufacturers, distributors and retailers."[8] It further tells consumers to "consider contacting the Federal Trade Commission[,]"

---

[7] See U.S. Senator Elizabeth Warren & U.S. Senator Richard Blumenthal, *Inaccessible Insulin: The Broken Promise of Eli Lilly's Authorized Generic* (Dec 2019) https://www.fdanews.com/ext/resources/files/2019/12-16-19-InaccessibleInsulinreport.pdf?1576536304 (accessed Sep 1, 2022).

[8] See "What can the FDA do about the cost of drugs?", *Frequently Asked Questions about CDER*, U.S. Food and Drug Administration (current as of Oct 28, 2019) https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/frequently-asked-questions-about-cder#16 (accessed Sep 1, 2022).

which "enforces a variety of federal antitrust and consumer protection laws."[9] (Appnt Appx p 041.)

Similarly, as the State of Michigan is also concerned about the safe manufacturing and distribution of medications throughout this State, it licenses entities for such activities through the Michigan Board of Pharmacy. Eli Lilly holds a manufacturer's license issued by the Michigan Board of Pharmacy, and four licenses for the wholesale distribution of its medications in Michigan. These licenses are issued under the Public Health Code, MCL 333.17701 et seq. But like the FDA, there is nothing within the Board of Pharmacy's authority under this statute or the related universe of State administrative rules giving the Board of Pharmacy any authority to regulate Eli Lilly's pricing of Humalog, Lispro, and Basaglar. Nor do the statutes and rules administered by the Board of Pharmacy give it any authority to regulate the representations Eli Lilly makes about these prices and any discounts it offers on them. (Appnt Appx p 042).

C. Procedural History

On January 26, 2022, the Ingham County Circuit Court entered an order finding there is probable cause to believe Lilly is violating the MCPA, and authorizing the Attorney General to issues subpoenas in furtherance of the proposed investigation. (Appnt Appx pp 045-046.) The Attorney General entered into a stipulation, agreeing to not issue investigative subpoenas to Lilly pending resolution of the declaratory judgment action.

[9] *Id.*

Meanwhile, Lilly moved for summary dismissal of the Complaint, raising as its principal defense that its transactions and conduct fall within the MCPA's exemption based on the *Smith* and *Liss* decisions. The Attorney General filed a cross-motion for summary disposition, and on July 20, 2022, the Ingham County Circuit Court found in favor of Lilly, ruling that Lilly is exempt from the MCPA under *Smith* and *Liss* and dismissing the Attorney General's action. The Attorney General makes this application while concurrently pursuing her appeal of right in the Court of Appeals.

STANDARD OF REVIEW

This appeal involves a collision between the proper construction of a statute, and precedent compelling an outcome contrary to that construction. The primary issue on appeal is one of statutory interpretation. "Questions of statutory interpretation are questions of law, which will be reviewed de novo." *Ameritech v PSC (In re MCI)*, 460 Mich 396, 413 (1999) (citation omitted).

ARGUMENT

I. De novo application of the MCPA to this case warrants reversal.

The *Smith* and *Liss* decisions change outcomes otherwise demanded by the MCPA's plain language. The instant case provides a useful illustration.

The harm *Smith* and *Liss* brought upon the MCPA is widely recognized. The impact was highlighted in a 2003 article in the Michigan Bar Journal.[10] Then, *Liss's* additional destructive effect was featured in a publication by the Consumer Protection section of the State Bar.[11] Law review articles have detailed the errors in *Smith* and *Liss*,[12] and the impact has received national recognition as being out of step with other states, not because of the statutory language, but due to the errant interpretation of such language. See National Consumer Law Center, A 50-State Report of UDAP Statutes (February 2009), p. 13, 26 ("UDAP protections in Michigan and Rhode Island have been gutted by court decisions that interpret the statute as being applicable to almost no consumer transactions.").[13]

The Attorney General thus begins by doing what the *Smith* and *Liss* Courts failed to do: by faithfully applying the rules of statutory interpretation.

---

[10] Victor, *The Michigan Consumer Protection Act: What's left after Smith v Globe*, Michigan Bar Journal, Sep 2003, available at <http://www.michbar.org/file/barjournal/article/documents/pdf4article619.pdf> (accessed Sep 1, 2022).

[11] Victor, *Liss v Lewiston-Richards, Inc – The Supreme Court Puts What Might be the Final Nail in the Coffin of the Michigan Consumer Protection Act*, State Bar of Michigan, Consumer Law Section Newsletter, August 2007, available at < https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3b217bd2-fb65-46ff-86c0-ea1a7b303b13/UploadedImages/pdfs/newsletters/aug07.pdf> (accessed Sep 1, 2022).

[12] See Maveal, *Michigan Consumer Protection Act Gutted by Supreme Court "Globe" Alization*, 53 Wayne L Rev 833 (2006). See also O'Neal, *Exempting the Protection Out of Michigan's Consumer Protection Act: A Call for Returning Consumer Protection to the Act*, 84 U Det Mercy L Rev 237 (2007).

[13] https://www.nclc.org/images/pdf/udap/report_50_states.pdf (accessed Sep 1, 2022)

A. The rules of statutory construction require this Court to apply the statute's text as written.

"[T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature." *Bush v Shabahang*, 484 Mich 156, 166 (2009). The most reliable evidence of legislative intent is the plain language of the statute. *S Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 502 Mich 349, 360–361 (2018). "As far as possible, effect should be given to every phrase, clause, and word in the statute." *Bush*, 484 Mich at 167 (citations omitted). Any interpretation that would render any part of the statute surplusage or nugatory must be avoided. *S Dearborn*, 502 Mich at 361. "Where the language of the statute is clear and unambiguous, the Court *must* follow it." *Robinson v City of Detroit*, 462 Mich 439, 459 (2000) (emphasis supplied; citation omitted). "When the words of a statute are unambiguous, judicial inquiry is complete." *Walters v Nadell*, 481 Mich 377, 382 (2008).

This Court reads statutory language "as a whole," or more specifically, in a manner that ensures the provision works in harmony with the statute by recognizing that "[i]ndividual words and phrases, while important, should be read in the context of the entire legislative scheme." *Bush*, 484 Mich at 167 (citations omitted). See also *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 60–61 (2014) (warning against viewing a word or phrase with "a magnifying glass to the exclusion of its relevant context").

And when interpreting remedial statutes, it calls for courts to "liberally construe[]" them "to suppress the evil and advance the remedy." *Eide v Kelsey-*

Hayes Co, 431 Mich 26, 35 (1988). The MCPA was enacted to prohibit unfair or deceptive practices in trade or commerce, and to "provide an enlarged remedy for consumers who are mulcted by deceptive business practices." *Dix v Am Bankers Life Assur Co of Fla*, 429 Mich 410, 417 (1987). It should be liberally construed to achieve that purpose. *Id.* at 417–418 ("[T]he Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons."). Inexplicably, the *Smith* and *Liss* majorities never cited this principle, nor did they apply its interpretative direction to ensure the MCPA was wholly construed to preserve the legislative intent of protecting consumers. It is axiomatic that fulfillment of this directive requires any exceptions to the MCPA's application to be narrowly construed.

B. Read as a whole, the MCPA applies to Lilly's insulin sales.

It would be unnecessary to determine whether Lilly's insulin sales fall within an express exception to the MCPA without first evaluating whether such transactions generally fall within this law's scope. The MCPA makes unlawful any "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). The term "trade or commerce" as used in the Act is broadly defined in section 2 as encompassing "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes. . . ." MCL 445.902(1)(g). That Lilly is engaging in trade or commerce when it distributes the insulin medications implicated in this investigation is

beyond dispute—for Michiganders, there is no purpose more personal than obtaining that which is needed to preserve one's survival and good health. Keeping in mind the interpretative obligation to apply the MCPA broadly to maximize the protection of consumers, a preliminary conclusion that the provision of pharmaceuticals falls within the sweep of MCPA section 2 is appropriate.

The question then becomes whether Lilly may be using "unfair, unconscionable, or deceptive methods, acts, or practices" while engaging in its business of selling insulin medications. MCL 445.903(1). Here, the Ingham County Circuit Court has already entered an order finding there is probable cause to believe Lilly is engaged in such misconduct.

C. By its plain text, the section 4(1) exemption does not apply.

Lilly relies on an exemption to the MCPA as its escape hatch. Lilly's essential premise is that the Michigan Board of Pharmacy licensure, and general FDA regulation of its manufacturing and sale of insulin medications, operate to invoke the exemption under MCPA subsection 4(1)(a). And it is Lilly's position in this regard that brings the disconnect between the statutory language and the *Smith* and *Liss* decisions into sharp focus.

The fundamental problem is that the *Smith* and *Liss* Courts violated the principles of statutory construction by re-writing the text of MCL 445.904(1) to accomplish something different than the Legislative purpose. That this is exactly what happened is clear from a side-by-side reading of the statute's actual text and the construction the *Smith* and *Liss* Courts gave to it:

The statute states: "This act does not apply to either of the following: (a) 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).]	But under *Smith* and *Liss*, "the relevant inquiry 'is whether the ***general*** transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.' " [*Liss*, 478 Mich at 206 (emphasis added) (quoting *Smith*, 460 Mich at 465).]

The *Smith* and *Liss* Courts thus engrafted the word "general" into the statute to modify the kind of "transaction" the statute refers to. This judicial draftsmanship has a profoundly transformative effect on the reach and effectiveness of the MCPA.

Consider first the statute's plain language without the "general" modifier. To determine whether a "transaction" was "specifically authorized" by State or Federal law, one ought to take a narrow approach to identifying the transaction by ensuring that it is specifically, rather than generally, authorized. So, when Lilly sells a Humalog pack to a Michigan pharmacy at its list price of $530.40 that will then be absorbed by the consumer purchasing it, the appropriate analysis is that Lilly was generally authorized to manufacture and sell Humalog, but nothing in the State or Federal regulatory schemes specifically authorized *the pricing* attached to that transaction. And where a consumer does not enter into the transaction because of the high price (such as a consumer who needs, but cannot afford, six such packages

each month), focus would turn to whether Lilly's pricing conduct is specifically authorized—which it is not. Similarly, with respect to the representations Lilly makes regarding the reasons for its pricing of Lispro at discounted prices, the appropriate conclusion would be that Lilly is generally authorized to sell Lispro, but no State or Federal regulation specifically authorizes the statements it makes about that product's pricing.

Appending the modifier "general" to "transaction" is itself a curiosity. The plain understanding of the word "transaction" is that of a single instance, not a general class. Since the term "transaction" is not defined by the MCPA, reference to dictionaries is appropriate. See *People v Wood*, 506 Mich 114, 122 (2020). Black's defines "transaction" as "1. The *act or* ***an instance*** of conducting business or other dealings." Black's Law Dictionary (8th ed.) (emphasis added). Lay dictionaries are in accord. See *Merriam-Webster* ("1a "something transacted, *especially*: an exchange or transfer of goods, services, or funds"; 2a "an act, process, or *instance of transacting*") (second emphasis added)[14]; Dictionary.com ("1. The act of transacting or the fact of being transacted. 2. An *instance* or process of transacting something") (emphasis added). [15] Thus, appending the modifier "general" to the word "transaction"—a word that connotes a single instance—makes little sense to begin with. Not only that, but imposing *any* modifier through a judicial opinion amounts to an act of legislation, not of interpretation.

[14] https://www.merriam-webster.com/dictionary/transaction (accessed Sep 1, 2022).

[15] https://www.dictionary.com/browse/transaction (accessed Sep 1, 2022).

By turning the exemption's "transaction" into a "general transaction," the *Smith* and *Liss* Courts flipped its narrow scope into a broad range. Although they recited the term "specifically authorized" in their re-framing to a "general transaction," the practical effect of the test announced was to render the word "specifically" surplusage. A determination that the "general transaction" is authorized by law thus became sufficient to defeat an MCPA claim by construing transactions so broadly that other conduct, such as price-setting or pre-transaction representations and post-transaction mischief, became encompassed by the concept, rather than allowing the lower courts to undertake the legislatively intended test of determining whether particular transactions or conduct were specifically authorized by some other statute or regulatory scheme. In short, "general" is the opposite of "specific[]." Its insertion into the MCPA has frustrated its evident purposes.

In a 1982 decision, this Court initially recognized the proper understanding, though the heart of that holding has been removed. In *Attorney General v Diamond Mortgage Company*, 414 Mich 603 (1982), the defendant real estate broker argued that it was exempt from all MCPA scrutiny, because of its license to engage in the real estate brokerage business. *Id.* at 607–608. The trial court agreed with Diamond and dismissed the action. *Id.* at 609. The Court of Appeals affirmed. *Id.* at 610.

This Court, rightfully, reversed. *Id.* at 617. The Attorney General argued that "a license to engage in an activity is not a basis for concluding that one is

'*specifically authorized*' to employ deceptive practices in that activity." 414 Mich at 616. Quoting the Attorney General in full, the Court agreed:

> If every person or business which engages in an activity authorized by some statute or regulation were exempt from the Michigan Consumer Protection Act, pursuant to § 4(1), then the Michigan Consumer Protection Act, would be a cruel hoax on the many legislators . . . and others who sought to give Michigan consumers protection in the marketplace. A consumer could sue an unlicensed optician for deception, but not a licensed optometrist. A consumer could sue a grocery store, but not a licensed car dealer or auto repair facility. A licensed hearing-aid dealer would be exempt from suit, but not the corner baker. [*Id.* at 616–617.]

Responding to Diamond's contention that such a construction would render the exemption meaningless, the Court held that "[w]hile the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the [MCPA], nor transactions that result from that conduct." *Id.* at 617. "While . . . no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels [to specifically authorized transactions or conduct]. *Id.* Because "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business," Diamond was not exempt from the MCPA. *Id.*

Notably, Lilly's arguments mirror those rejected by the Court in *Diamond Mortgage*. Lilly argues that because it is authorized to sell its medications under State and Federal law, it is necessarily exempt from the MCPA. Under the *Diamond Mortgage* Court's interpretation of MCPA subsection 4(1), Lilly would not be exempt from potential MCPA liability regarding its pricing of Basaglar,

Humalog, and Lispro. The FDA's approval of these medications means they meet the regulatory criteria and standards to be sold and safely prescribed to patients by providers, but it does not specifically authorize the exorbitant price Lilly charges for these medications, or any representations made regarding the pricing of authorized generic medications. Similarly, the Michigan Board of Pharmacy's licensure of Lilly is aimed at assuring safe practices, but not at affecting the prices. This is because the Michigan Board of Pharmacy and FDA do not regulate and so do not "specifically authorize" Eli Lilly's mechanisms, methods, or formulas for determining its list prices for its insulin medications.

Years after *Diamond Mortgage*, while the *Smith* Court included the word "specifically" in its framing of the relevant test, the practical effect of the reformulated construction it announced can be observed in that word's disappearance later in the *Liss* decision. *Smith* characterized *Diamond Mortgage* peculiarly, stating that "*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, *not the alleged misconduct,* is 'specifically authorized.'" 460 Mich at 464 (emphasis added); see also *Liss*, 478 Mich at 209. This cast is peculiar because one could reasonably suspect that no State or Federal regulatory board or officer is in the business of specifically authorizing misconduct.

As Lilly described the *Liss* decision to the circuit court: "the statutory inquiry 'do[es] not focus on the actor' itself, but rather asks whether the 'transaction or conduct' in question is authorized by law." (Appnt Appx p 084.) Thus, Lilly's statutory analysis purports to "compel[] the conclusion here that legal authorization

for the 'transaction' in which the alleged wrongdoing occurs is sufficient to invoke subsection 4(1)." (Appnt Appx p 086.)

The beneficial impact from Lilly's perspective then is that it can charge whatever it wants for Humalog, even if that price is grossly excessive within the meaning of the MCPA, because the *Smith* and *Liss* Courts have said that all Lilly needs to do is show it is generally authorized to manufacture and sell Humalog. And, similarly, Lilly can take the position it is free under the MCPA to make any misrepresentations it wants about the reasons for the Lispro discount price since it is authorized to make and sell that drug.

D. The *Smith* and *Liss* decisions expanded MCPA subsection 4(1)(a)'s impact beyond the intent that is plain from its text.

The statutory text at issue here serves an important purpose, but it is one that is both more narrow and more coherent than the function *Smith* and *Liss* ascribe to it. Section 4(1)(a) guards against situations where a person engaged in trade or commerce is called upon to answer to the Attorney General or to a private plaintiff while doing something that another governmental agency has specifically authorized.

This role of subsection 4(1) was well illustrated in *American Home Products Corp v Johnson & Johnson*, 672 F Supp 135 (SD NY 1987), which involved protracted litigation between what the district judge referred to as two titans in the pharmaceutical world—the manufacturer of Anacin (American Home Products) and the makers of Tylenol (Johnson & Johnson and McNeil Labs). *Id.* at 136. The

latter had brought a counter-complaint against the former alleging that the Anacin labels prior to 1986 were deficient because the dangers of Reye Syndrome were not adequately addressed, and that the label from 1986 forward was improper since it included the FDA-approved warning, but also described the medication as safe. *Id.* Construing the exemption provision in New York's unfair competition laws, which are analogous to MCL 445.904(1)(a), the Court rejected these claims and observed that American Home Products had complied with the FDA labeling requirements—a process that included FDA review of the labeling: "when the FDA inspected the Anacin package which carried the mandatory 1986 warning, as well as the phrase "Safe, Fast Pain Relief," the FDA report stated that AHP was in full compliance." *Id.* at 141. Thus, in asking the Court to apply New York's law against deceptive practices against American Home Products, McNeil was doing so despite the FDA's specific approval of the challenged label.

The Court observed that the Federal Trade Commission had already made clear that the FTC Act would not be applied against the conduct authorized by the FDA as it recognized the FDA "has primary jurisdiction over all matters related to the labeling of OTC drugs." *Id.* at 144, citing 36 Fed Reg 18,539 (1971). The Court went on to elaborate how consumer protection laws throughout the country (including Michigan's) contain similar exceptions. *Id.* The Court then observed "[t]he rationale underlying the exemptive provisions of all of these statutes is the need for uniformity in the regulation of advertising and labeling and a deference to the expertise of the responsible regulatory agency." *Id.*

Thus, *American Home Products* recognized that a pharmaceutical company, whose conduct is specifically authorized by the FDA, should not proceed at the peril of liability under state consumer protection and deceptive practices laws. Were the Attorney General here advancing allegations about Lilly's labelling of Basaglar, Humalog, or Lispro, then considerations of the role of MCPA subsection 4(1) would be appropriate. Instead, the Attorney General seeks to investigate pricing conduct (and pricing representations) that are not reviewed by any State or Federal agency, much less specifically authorized by any such agency. Thus, the purpose of MCPA subsection 4(1)(a) that is apparent from its plain language is not implicated in the present context.

E. The text of MCPA subsection 4(2) further supports the Attorney General's plain language construction of subsection 4(1).

Further support for the narrower construction of subsection 4(1)(a) can be found by looking at section 4 as a whole. See *Bush*, 484 Mich at 167 ("Individual words and phrases, while important, should be read in the context of the entire legislative scheme.") (citations omitted). A strange aspect of the *Smith* decision is that the Court considered both subsections 4(1) and (2), but construed them in such a way as to create a conflict between them.

The *Smith* Court began by advancing its broad construction of subsection 4(1)(a). 460 Mich at 464. By itself, this interpretation would have led to a conclusion that the claim in that case was barred because insurance transactions are specifically authorized. But then the *Smith* Court examined subsection 4(2) as

providing an exception to the exemption that somehow allowed the claim. The Court struggled to attach meaning to both provisions because it had to try to reconcile a conflict of its own creation. *Id.* at 467. ("Giving effect to both § 4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to § 11 of the MCPA regardless of whether the insurer's activities are 'specifically authorized.'"). The *Smith* Court's analysis leads to the conclusion that transactions or conduct affecting banks, credit unions, insurers, and motor carriers can be specifically authorized by a regulating agency and still be the basis for a private cause of action under the MCPA.

The *Smith* Court's construction invites the reader to imagine that subsection (2) begins with some formulation like "notwithstanding the limitations in subsection (1)." But no such clause actually exists and giving subsection 4(1)(a) its appropriately narrow construction would have negated the conflict the Court was trying to resolve.

There is nothing in the plain language of these exemptions suggesting the interplay that the *Smith* rationale suggests. Instead, these are distinct exemptions, set forth in distinct statutory subsections. The subsection 4(1)(a) exemption requires the court to first determine whether the transaction or conduct at issue is specifically authorized by laws administered by a State or Federal agency. If so, then the exception applies—regardless of whether the regulated entity is one of those administered under the various public acts identified in subsection 4(2). All

specifically authorized transactions or conduct are thus given equal dignity under this exception—or, at least they were until the *Smith* decision.

Subsection 4(2) then operates as a distinct, additional exemption. And it is not a complete exception—it is instead a limitation on the Attorney General's ability to bring MCPA claims related to banks, credit unions, insurers, and motor carriers. MCPA claims can still be brought against such entities, but only by private plaintiffs under MCL 445.911.

Further, the fact that private plaintiffs clearly can bring actions against some regulated entities under subsection 4(2) belies the logic from *Liss* that subsection 4(1)(a) was somehow intended to except regulated entities from the MCPA's sweep generally. And the reverse implication of the plain text of subsection 4(2) is that the Attorney General may bring actions against entities regulated under other statutes except as enumerated in that subsection, subject to the limitation in subsection 4(1).

II. The wrongly decided *Smith* and *Liss* opinions should be overruled because stare decisis does not mandate that harmful mistakes be ignored and perpetuated.

Smith and *Liss* were wrongly decided and should be overturned. Only this Court can revisit these decisions. See *Robinson v City of Detroit*, 462 Mich 439, 463 (2000). It should do so here. The Attorney General's challenge here is not altogether novel—one Justice has already expressed an interest in revisiting this Court's construction. *Cyr v Ford Motor Co*, 507 Mich 1029 (2021) (Welch, J., concurring with denial of leave) ("I write separately because I am persuaded, with the input of the amici curiae in this case, that this Court should examine whether

our previous decisions in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999) and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007), properly interpreted the safe-harbor provision in the Michigan Consumer Protection Act, MCL 445.901 *et seq*. I look forward to the opportunity to review this issue in a future matter.").

Although affirming precedent is "the preferred course," an improper construction does not change the plain meaning of statutes, and the concept of stare decisis does not demand automatic allegiance to recognizable mistakes. *People v Tanner*, 496 Mich 199, 250 (2014) (citation omitted). Before the Court overrules a decision that it determines has been wrongly decided, however, "'it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.'" *People v Graves*, 458 Mich 476, 481 (1999), quoting *McEvoy v City of Sault Ste Marie*, 136 Mich 172, 178 (1904). *Robinson v Detroit,* the lead case applying principles of stare decisis, guides this analysis. See *Hamed v Wayne Cnty*, 490 Mich 1, 34 (2011).

Robinson evaluates precedent according to a four-factor framework that asks (1) "whether the earlier decision was wrongly decided," (2) "whether the decision defies 'practical workability,'" (3) "whether reliance interests would work an undue hardship" if the decision were overturned, and (4) "whether changes in the law or facts no longer justify the questioned decision." 462 Mich at 464. After making the threshold determination that a decision was wrongly decided, the remaining three factors "balance the need to correct error against the desire for stability and reliability in the law." *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 235 (2011)

(Kelly, J., concurring). Where the need to correct error outweighs the desire for stability, precedent should be overturned. See *People v Feezel*, 486 Mich 184, 212–213 (2010).

Correcting the erroneous construction of section 4 set forth by *Smith* and *Liss* is appropriate because the rule undermines the entire MCPA, blurs its applicability to misconduct by regulated trades and businesses, and thus lacks the practical workability required by *Robinson* to retain an erroneous decision. Furthermore, neither the third nor fourth *Robinson* factors weigh in favor of keeping *Smith* and *Liss* because overturning these decisions would not upset any cognizable reliance interests and because the state of the law and facts have never justified those erroneous decisions.

A. *Smith* and *Liss* were wrongly decided because their construction of MCL 445.904 departed from the statute's plain meaning.

Where a prior decision uses an inappropriate method of statutory interpretation to reach an otherwise untenable result, that decision was wrongly decided. See, e.g., *Hamed*, 490 Mich at 24-25 ("Because *Champion* requires a result contrary to prior and subsequent caselaw and contrary to the language of the CRA, it is clear that *Champion* is not consistent with Michigan law. Rather, . . . *Champion* stands as an isolated aberration that relies not on the plain language of the act, but purely on policy considerations."); *McCormick v Carrier*, 487 Mich 180, 209 (2010) ("Therefore, we hold that the *Kreiner* majority's interpretation of this prong . . . is not based in the statute's text and is incorrect."); *Robinson*, 462 Mich at

460 (describing the prior decision as resting on "a judicial theory of legislative befuddlement" by failing to "adhere[] to the principle that the Legislature, having acted, is held to know what it has done," and determining that "the Court had no authority to do this.").

As the above de novo analysis of MCPA section 4 demonstrates, *Smith* and *Liss* were wrongly decided.[16] Nevertheless, the Michigan Supreme Court's erroneous analysis in these decisions warrants exploration to elucidate precisely how this Court went astray despite the rules of statutory construction demanding a different approach. Furthermore, Lilly's contrary assertions—that the Attorney General's analysis creates a surplusage problem and that the Legislature ratified these erroneous decisions—fail to hold any water.

1. The Court's missteps on the path from *Diamond Mortgage* through *Smith* to *Liss*.

The *Smith* and *Liss* Courts' interpretation of MCPA subsection 4(1)(a) purports to build on the Michigan Supreme Court's earlier construction of the same provision in *Attorney General v Diamond Mortgage Company*, 414 Mich 603 (1982). To the contrary, *Smith* and *Liss* rest on a misunderstanding of *Diamond Mortgage* and functionally overturns its central premise: that licensure is not specific authority for all conduct and transactions of a licensee's business under the MCPA. *Id.* at 617. The construction adopted by *Smith* and *Liss* bears little relation to the actual terms of the statute and severely restricts the MCPA's capacity to perform its

[16] *See* Section I, *supra*.

most essential function—protecting consumers against unfair, deceptive, and unconscionable conduct. It did all this in direct contravention of the principle that remedial statutes deserve liberal construction in support of their legislative goals. Because *Smith* and *Liss* was a direct contravention of *Diamond Mortgage*, there is substantial support for applying a decreased presumption in favor of keeping *Smith* and *Liss* as established precedent. See *Petersen v Magna Corp*, 484 Mich 300, 319 (2009).

a. *Attorney General v Diamond Mortgage Company*

In *Diamond Mortgage*, the defendant real estate broker argued that it was exempt from the MCPA because of its license to engage in the real estate brokerage business. *Id.* at 607–608. The trial court agreed with Diamond and dismissed the action. *Id.* at 609. The Court of Appeals affirmed. *Id.* at 610.

This Court, rightfully, reversed. *Id.* at 617. The Attorney General argued that "a license to engage in an activity is not a basis for concluding that one is '*specifically authorized*' to employ deceptive practices in that activity." 414 Mich at 616. Quoting the Attorney General in full, the Court agreed:

> If every person or business which engages in an activity authorized by some statute or regulation were exempt from the Michigan Consumer Protection Act, pursuant to § 4(1), then the Michigan Consumer Protection Act, would be a cruel hoax on the many legislators . . . and others who sought to give Michigan consumers protection in the marketplace. A consumer could sue an unlicensed optician for deception, but not a licensed optometrist. A consumer could sue a grocery store, but not a licensed car dealer or auto repair facility. A licensed hearing-aid dealer would be exempt from suit, but not the corner baker. [*Id.* at 616–617.]

Responding to Diamond's contention that such a construction would render the exemption meaningless, the Court held that "[w]hile the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the [MCPA], nor transactions that result from that conduct." *Id.* at 617. "While . . . no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels [to specifically authorized transactions or conduct]. *Id.* Because "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business," Diamond was not exempt from the MCPA. *Id.*

Notably, Lilly's arguments mirror those rejected by this Court in *Diamond Mortgage*. Lilly argues that because it is authorized to sell its medications under State and Federal law, it is necessarily exempt from the MCPA. Under the *Diamond Mortgage* Court's interpretation of MCPA subsection 4(1), Lilly would not be exempt from potential MCPA liability regarding its pricing of Basaglar, Humalog, and Lispro. The FDA's approval of these medications means they meet the regulatory criteria and standards to be sold and safely prescribed to patients by providers, but it does not specifically authorize the exorbitant price Lilly charges for these medications or any representations made regarding the pricing of authorized generic medications. Similarly, the Michigan Board of Pharmacy's licensure of Lilly is aimed at assuring safe practices, but not at affecting the prices. This is because the Michigan Board of Pharmacy and FDA do not regulate and so do not

"specifically authorize" Eli Lilly's mechanisms, methods, or formulas for determining its list prices for its insulin medications.

b. *Smith v Globe Life Insurance Company*

In *Smith*, the Court was again confronted with the issue of whether a regulated entity was subject to the MCPA. 460 Mich at 462–463. At issue were a private plaintiff's claims that an insurance company made certain misrepresentations in violation of the MCPA. *Id.* at 451. The trial court dismissed the complaint, concluding that the MCPA did not apply to regulated activity. *Id.* at 453, citing *Kekel v Allstate Ins Co*, 144 Mich App 379, 375 (1985) (dismissing a private plaintiff's claim against an insurance company because the defendant's conduct was subject to the Uniform Trade Practices Act of the Insurance Code, MCL 500.2043)). The Court of Appeals reversed, concluding that the logic of *Diamond Mortgage* properly "ascertains and gives effect to the Legislature's intent and plain language" by exempting from MCPA oversight 'a transaction or conduct that is "specifically authorized,'" but not "a transaction or conduct that is subject to regulation." *Smith v Globe Life Ins Co*, 233 Mich App 264, 281–282 (1997).[17] A more expansive reading of the exemption, the court opined, would conflict with *Diamond Mortgage*'s " 'common-sense reading' of the statute's language that when the Legislature says 'authorized,' it does not mean 'illegal acts.'" *Id.* at 281.

[17] The Court of Appeals would ultimately allow plaintiffs claim to proceed under § 4(2) because the § 4(1)(a) exemption does not apply to private plaintiffs. *Smith*, 233 Mich App at 285-86; *see also infra*, Section II.A.2.

This Court reversed. *Smith*, 460 Mich at 468. The Court began by quoting *Diamond Mortgage* at length, acknowledging that *Diamond Mortgage* was the controlling precedent. *Id.* at 464. Yet, the Court then characterized *Diamond Mortgage* as instructing "that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" *Id.* Accordingly, the defendant "was not exempt from the MCPA because the transaction at issue, mortgage writing, was not 'specifically authorized' under the defendant's real estate broker's license." *Id.*

It is this fiction—that *Diamond Mortgage* turned on mortgage writing as the underlying conduct—that underlies *Smith*'s misapplication of the earlier holding. From the outset, the *Diamond Mortgage* Court had explained that the Attorney General's concerns related to confusing forms that blurred the brokerage and mortgage activities. 414 Mich at 607. And, in any event, a real estate broker's license included the negotiation of mortgages within its scope. *Id.* at 616 ("One of the activities contemplated by the act was that licensees would negotiate the 'mortgage of real estate.'") (quoting MCL 451.202 (repealed by 1980 PA 299)).

But by substituting mortgage writing as the relevant transaction as opposed to the misconduct to which the *Diamond Mortgage* Court was actually referring to, the *Smith* Court was able to articulate a conclusion that does not flow from a fair reading of *Diamond Mortgage*:

> Contrary to the "common-sense reading" of [MCPA subsection 4(1)(a)] by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically

> authorized by law, regardless of whether the specific misconduct alleged is prohibited." [*Id.* at 466.]

Inexplicably, the Court broadened the exception's application in sharp contrast to the *Diamond Mortgage* Court's narrow application. It did not, however, explicitly overrule *Diamond Mortgage*, purporting instead to distinguish it, incorrectly saying that the defendant's activities "were not subject to any regulation under the real estate broker's license of the defendant and thus such conduct was not reviewable by the applicable licensing or regulatory authority." *Id.* at 464. This notion, that insurance companies like Globe Life were already subject to an "extensive statutory and regulatory scheme" under state law, *id.* at 464-65 (citation omitted), apparently underpins the *Smith* Court's rationale. Yet, the Court failed to identify any specific statute or regulation that addressed the *Smith* defendant's alleged improper conduct of misrepresenting the benefits, coverages, and exceptions in its life insurance policies.

Of course, the Court did not need to identify a specific regulation addressing such conduct because it held that if the "general transaction" is specifically authorized by law, then the legality of the specific conduct complained of is irrelevant. This theory of construction suffers from an internal contradiction: *Smith* cannot both be consistent with *Diamond Mortgage* and reach a different result. Had the *Diamond* Court applied *Smith*'s construction, the exemption would have covered defendant's alleged conduct. Instead, the *Smith* Court's "distinction" from *Diamond Mortgage* emptied it of meaning, maintaining the decision's purported foundation in case law. In practice, the Court overruled *Diamond Mortgage* without

saying so based on a faulty understanding of the statute—an error the Court would exacerbate in *Liss*.

c. *Liss v Lewiston-Richards Inc*

In *Liss*, private plaintiffs brought MCPA claims against a residential home builder. 478 Mich at 208. The defendant home builder asserted that it was exempt from the MCPA and moved for summary disposition, which the circuit court denied. *Id.* This Court granted the defendant's bypass application to consider the scope of the MCPA's section 4 exemptions, ultimately reversing the circuit court's order, applying *Smith*. *Id.* at 208, 215.

As it did in *Smith*, the *Liss* Court predicated its analysis not on the text of the statute but by recasting the text of prior decisions: *Diamond Mortgage* and *Smith*. First, the *Liss* Court altered *Diamond*'s holding that "a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business" to appear narrower than it was by substituting the term "licensee's business" for the phrase "defendant's mortgage writing business." *Id.* at 209. This is the same faulty premise upon which the Smith decision was constructed, and members of this Court noticed. *See id.* at 220 n 2 (Kelly, J., dissenting) ("*Diamond Mortgage* did not turn on whether the broker's license of the defendants allowed them to engage in mortgage writing. The decision turned on whether a statute specifically authorized the conduct at issue. The result in *Diamond Mortgage* would have been the same regardless of whether the broker's license allowed the defendants to engage in mortgage writing.").

Next, the *Liss* Court reproduced *Smith*'s unfaithful characterization of *Diamond Mortgage* as well as *Smith*'s articulation of the relevant inquiry: "'whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'" *Id.* at 210, quoting *Smith*, 460 Mich at 466. Affirming the applicability of this "*Smith* test," the Court subsequently held that meeting the exemption's criteria required that "a general transaction" be "explicitly sanctioned." *Id.* at 212–213. Ultimately, the Court concluded that because the licensed residential home builder's "general transaction" of building a residential home was "specifically authorized," the MCPA could never be enforced against him while engaging in any activity related to building residential homes, notwithstanding the alleged illegality of the defendant's alleged conduct. *Id.* at 215.

In her dissent, Justice Kelly recognized and succinctly summarized the conflict between *Smith* and *Diamond Mortgage*'s respective treatment of MCPA subsection 4(1):

> It is apparent to me that the decisions in *Diamond Mortgage* and *Smith* cannot be squared. *Diamond Mortgage* asked whether the transaction or conduct alleged to be in violation of the MCPA is "specifically authorized" by another statute, and it created a narrow exception. *Diamond Mortgage*, 414 Mich at 617. *Smith* asked whether the general transactions of the industry are "specifically authorized," and it created a broad exemption exempting the entire insurance industry. *Smith*, 460 Mich. at 465. Because the two interpretations are inconsistent, this Court should determine which was intended by the Legislature. [*Liss*, 478 Mich at 220 (Kelly, J., dissenting).]

Although fifteen years have now passed since *Liss,* this Court has yet to reconcile these holdings. Any reconciliation, however, should be in favor of overruling *Smith* and *Liss* and firmly cementing *Diamond Mortgage* as the

established precedent interpreting subsection 4(1). *Petersen*, 484 Mich at 319 ("there is substantial support for applying a decreased presumption in favor of precedent when that precedent itself represents a recent departure from prior established caselaw.").

In this case, the conflict between *Smith*, *Liss*, and *Diamond Mortgage* is readily apparent and ripe for further review as the applicability of the MCPA has dire consequences for Michigan diabetics. While the general transaction of selling insulin medications is generally authorized by Federal law when the FDA approves a medication under its authority under the Food, Drug, and Cosmetics Act; no state or Federal law "specifically authorizes" or regulates a drug manufacturer such as Eli Lilly regarding the pricing of any FDA approved medications. Under the Court's *Diamond Mortgage* interpretation, MCPA subsection 4(1) would not apply to Lilly's pricing of Basaglar, Humalog, and Lispro because the conduct associated with pricing these medications is not "specifically authorized" under Federal or Michigan law—a result that makes sense under the statute's plain language.

The MCPA is severely undercut by *Smith* and *Liss*, which foreclose substantial relief to Michigan consumers from unfair, deceptive, or unconscionable conduct when a regulatory scheme does not contain a consumer-protection enforcement mechanism. In this case, the stakes regarding the Attorney General's ability to use the MCPA's remedial tools for Michigan consumers have never been higher. The fundamental problem is that the *Smith* and *Liss* Courts violated the principles of statutory construction by re-writing the text of MCL 445.904(1) to

accomplish something different than the legislative purpose. The plain language of the statute is unambiguous such that there is no need for judicial craftsmanship of a test to understand how the exemption provisions are to function. Where a transaction or conduct is specifically authorized by State or Federal law, the MCPA cannot apply. Where State and Federal law do not specifically authorize the transaction or conduct at issue, the MCPA may yet be enforced.

Both *Smith* and *Liss* were wrongly decided, and this Court should recognize as much.

2. Lilly's application of the canons of construction does not withstand scrutiny.

Although the plain meaning of the section 4 exemption is clear, which typically completes the judicial inquiry, *Walters*, 481 Mich at 382, engaging with other canons of construction serves to address and correct the errors made by the *Smith* and *Liss* Courts. See, e.g., *Wis Pub Intervenor v Mortier*, 501 US 597, 611 n 4 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."); *Harris v Garner*, 216 F.3d 970, 977 (11th Cir. 2000) (exploring legislative history "even though the plain meaning of the statutory language . . . makes it irrelevant . . . to correct what we believe is a misreading or misapplication of that legislative history."). Doing so here is especially relevant because Lilly's reliance in the trial court on the surplusage canon is untenable.[18]

[18] In its circuit court briefing, Lilly also argued that a review of legislative history "dispels any contention that the Legislature has quietly acquiesced to an erroneous judicial interpretation of the MCPA. In reality, the legislature has independently and actively confirmed how the law should operate." (Appnt Appx pp 086-089.). But this argument lacks a single ounce of merit as this doctrine of "legislative

"As a general rule, '[the Court] must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *People v Pinkney*, 501 Mich 259, 282 (2018), quoting *People v Miller*, 498 Mich 13, 25 (2015). Lilly argued in the trial court that the Attorney General's proposed interpretation "collapsed" the meaning of "transaction or conduct" into "an identical element." (Appnt Appx p 086.) On the contrary, Lilly's contention that "legal authorization for the 'transaction' in which the alleged wrongdoing occurs is sufficient to invoke subsection 4(1)" without regard for the legality of specific conduct related to an authorized transaction renders the term "conduct" surplusage.

The terms "conduct" and "transaction" must command different meanings otherwise the construction of the statute violates the rule against surplusage. *Pinkney*, 501 Mich at 282. *Smith* and *Liss* violate this rule by triggering a broad exemption from the MCPA any time a species of transaction is subject to some general regulatory scheme, without regard for the manner by which that transaction is conducted or whether there is specific authorization in the regulatory scheme for the particular transaction or conduct at issue. On one hand, "transaction" is defined as "an exchange or transfer of goods, services, or funds," and on the other, "conduct" is defined as "the act, manner, or process of carrying on."

---

acquiescence has been repeatedly repudiated by [the Supreme Court] because it is an exceptionally poor indicator of legislative intent." *McCahan v Brennan*, 492 Mich 730, 749 (2012). Indeed, it is a "'highly disfavored doctrine of statutory construction.'" *Robinson*, 462 Mich at 465 n 25 (quoting *Donajkowski v Alpena Power Co*, 460 Mich 243 (1999)).

Merriam-Webster's Collegiate Dictionary (11th ed). A proper construction of the statute would acknowledge that though a particular transaction—the sale of insulin, for example—may be authorized by a regulatory scheme, the issue of how that transaction is conducted—e.g., by what means, at what price, or for what reason—is a separate one that may not find an answer in a broadly applicable regulatory scheme.

Of particular note, the MCPA also recognizes this very distinction, making unlawful any "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). It does not make unlawful any "unfair, unconscionable, or deceptive trade or commerce." Rather, it defines the different ways in which "the conduct of trade or commerce" may be unfair, unconscionable, or deceptive. In eliminating the MCPA's capacity to regulate conduct otherwise under its purview anytime a generally applicable regulatory scheme authorizes some transaction, *Smith* and *Liss* render section 4's use of the term "conduct" nugatory.

By focusing on the so-called "general transaction," Lilly is able to assert that its other conduct need not even be considered. The broad concept of the "general transaction" from *Smith* and *Liss* carries with it far more danger of subsuming the "conduct" inquiry under MCPA section 4(1) than would exist if courts were to apply the proper narrow test to consider whether a transaction was specifically

authorized, and then—if it were not—moving on to determine whether the alleged misconduct was nevertheless specifically authorized by law.[19]

B. Practical workability would be restored by reversing *Smith* and *Liss*.

When determining whether a decision defies practical workability, the Michigan Supreme Court has considered whether the rule breeds "potential for arbitrary and discriminatory enforcement," *Feezel*, 486 Mich at 213, "misread[s] and misconstrue[s] the statute" in a manner that undermines "the entire legislative scheme," *Rowland v Washtenaw Cnty Road Comm'n*, 477 Mich 197, 215 (2007), and makes the law "more confusing and less decipherable to the ordinary citizen." *Paige v City of Sterling Heights*, 476 Mich 495, 511 (2006).[20] The rule supplied by *Smith* and extended by *Liss* is unworkable because it guts the MCPA's capacity to enforce the Legislature's declared policy of curtailing unfair, misleading, and deceitful business practices based on an unintuitive misreading of both the statute and caselaw.

In *Paige v City of Sterling Heights*, the Michigan Supreme Court overturned *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), which interpreted the

---

[19] Furthermore, the Attorney General's de novo analysis additionally avoids other surplusage problems. For example, as discussed above, the *Smith* and *Liss* Court's focus on whether the "general transaction" is authorized renders the term "specific" surplusage by expanding the scope of the exemption to encompass other conduct related only adjacently to the specifically authorized transaction.

[20] "[T]he near universal acceptance of this rule around the country is a strong indication of its workability." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 443 (2007) (Kelly, J., dissenting); see Section I.C.

phrase "the proximate cause" in the Worker's Disability Compensation Act, MCL 418.375(2), as "a proximate cause' that is a substantial factor in causing the event." 476 Mich at 499. Instead, the Court construed the phrase as meaning "the sole proximate cause," holding that *Hagerman* was wrongly decided because it departed from the plain meaning of the statute and, applying *Robinson*, should be overturned. *Id.* at 510. With regard to practical workability, the Court wrote:

> *Hagerman* defies practical workability because a person reading the statute surely would not know that he or she cannot rely on what the statute plainly says. That is, a reader and follower of the statute would, because of *Hagerman's* rewrite, not be behaving in accord with the law. Such a regime is unworkable in a rational polity. [*Id.* at 510.]

The Court further noted that the "'practical workability' problem" was not simply a question of whether a court of law can "render some decision." *Id.* at 511. Indeed, "no opinion of this Court is 'unworkable' in that sense." *Id.* Rather, "the law is made a mockery" and "less workable" when "it is made more confusing and less decipherable to the ordinary citizen." *Id.*

Here, the rule from *Smith* and *Liss* is admittedly easy to apply: if section 4(1)(a) exempts from MCPA coverage any entity subject to a generally applicable regulatory scheme, and the entity at issue is subject to some generally applicable regulatory scheme, then the entity must be exempt from MCPA coverage. Certainly, this syllogistic reasoning has appeal for its simplicity; to apply the exemption, courts need only look for the existence of some regulatory scheme rather than meticulously searching for an authority that specifically authorizes certain transactions or conduct. But a misconceived legal rule such as this one should not be retained simply because it is easier for courts to apply than if the statute were

properly construed. Indeed, through the eyes of an ordinary citizen lacking in legal training, this legal syllogism is actually more confusing and less decipherable than the rule applied by *Diamond Mortgage*, which properly applies the MCPA's section 4 exemption.

Consumers expect that the Consumer Protection Act has the authority to do as it says: protect consumers. Instead, *Smith* and *Liss* tell consumers that, due to a legal technicality, their government's hands are tied and left powerless because the regulatory scheme that permitted an entity to do business failed to specifically proscribe unfair, misleading, and deceitful business conduct. This is precisely the reason that the Legislature designed certain statutes to be generally applicable. In this instance, the MCPA makes it unnecessary for the Legislature to include a consumer protection provision in each and every regulatory scheme it decides to enact. See *Dix*, 429 Mich at 417–418 ("[T]he Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons."). Rather, it can look to the MCPA and decide as a policy matter whether exempting specific transactions and conduct is necessary for the industry to function.

The *Smith* and *Liss* decisions transformed the exemption provision, creating wide-ranging consequences beyond shielding the manufacturers and sellers of prescription medications from the MCPA. The weakened MCPA now ignores any context where an entity is subject to a regulatory scheme that does not contain a consumer protection enforcement component. In such contexts, consumers that are

harmed by "specific misconduct" occurring during "specifically authorized general transactions" are unable to seek redress. This dynamic renders *Smith* and *Liss* practically unworkable because they undermine the entirety of the MCPA; arbitrarily exempting an industry from MCPA review anytime the Legislature happens to regulate some aspect of that industry not related to consumer protection. See *Rowland*, 477 Mich at 215; *Feezel*, 486 Mich at 213.

Another example of this effect 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. 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.

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, and the regulatory scheme does not provide a private cause of action. (Appnt Appx p 072.) 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. There are no legitimate reliance interests weighing in favor of preserving these incorrect precedents.

The Michigan Supreme Court weighs reliance interests most heavily when determining whether to overturn wrongly decided cases. *Robinson*, 462 Mich at 466. The Court considers whether overruling the prior decisions would work an undue hardship on reliance interests. *Id.* The Court asks whether the prior decisions had "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical

real-world dislocations." *Id.* In short, it asks whether "to overrule them, even if they were wrongfully decided, would produce chaos." *Id.* at 466 n 26. *Smith* and *Liss* are not so embedded, accepted, or fundamental to society's expectations that overruling them would produce significant dislocations, let alone chaos.

A measure of "practical real-world dislocations" is whether the rule caused anyone to "alter their conduct in any way." *Tanner*, 496 Mich at 252, quoting *People v Petit*, 466 Mich 624, 635 (2002). Indeed, reliance has been defined as the sort of knowledge "that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Robinson*, 462 Mich at 467. In statutory law, a citizen's reliance interest is as strong as the words of the statute are clear. *Id.* Where a court misreads or misconstrues a statute, it "confound[s] those legitimate citizen expectations" and "disrupt[s] the reliance interests." *Id.* This disruption is not resolved simply because "later courts repeat the error," and perpetuating a prior court's error does more harm to the integrity of the judicial process than overturning the decision would. *Id.* at 467–468. Similarly, that overturning a case would require lawyers to "relearn the law" has never raised "a 'reliance' interest sufficient to preclude a plainly flawed reading of the law from being corrected." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 760 (2002).

In *Champion v Nationwide Security*, for example, the Michigan Supreme Court considered the scope of public employer liability in the context of the Michigan Civil Rights Act, MCL 37.2101 *et seq*. 450 Mich 702, 704-05 (1996). The Court declined to apply Michigan's common law agency principles and instead held

the public employer strictly liable for an employee's sexual offense by recognizing an exception to respondeat superior. *Id.* at 713–714. Fifteen years later, this Court determined that *Champion* was wrongly decided because it prioritized ill-conceived policy reasons and consequently failed to follow the statute's plain language instruction to adhere to Michigan's common law, which did not recognize the exception. *Hamed v Wayne Cnty*, 490 Mich 1, 22-23 (2011); see also *Zsigo v Hurly Med Ctr*, 475 Mich 215, 227 (2006) (expressly declining to broadly adopt the exception into common law so as not to subject employers to strict liability).

The Court then overturned *Champion*, in part because doing so would not unduly harm any legitimate reliance interests, which it evaluated at three levels: the employers and employees, society, and through the lens of the rule's "practical consequences." *Id.* at 30. First, neither employers nor employees altered their conduct in reliance on an expectation that employers were strictly liable for an employee's "unforeseeable criminal acts." *Id.* at 27–28. Next, overturning *Champion* "would not create any real-world dislocations" because society relies reasonably on the language of the law itself, not a Court's misreading of a statute and departure from its plain language. *Id.* at 28. Finally, looking to *Champion*'s "adverse practical consequences," the Court noted that the *Champion* rule applying strict liability "effectively abolish[ed] the doctrine of respondeat superior" because, under *Champion*, it would "always be 'foreseeable' that employees who possess some authority by virtue of the employment relationship will abuse the power" and commit criminal acts against another employee. *Id.* at 27–29. "In short, the

exception would swallow the rule." *Id.* at 29. Overturning *Champion*, the Court concluded that "permitting liability against defendants under these circumstances would impose too great a burden on public-service providers and on society in general, which is clearly contrary to the Legislature's intent." *Id.* at 30.

Smith and *Liss* are not so embedded, accepted, or fundamental to society's expectations that overruling them would produce significant dislocations, let alone chaos. This is true for at least three reasons.

First, *Smith* and *Liss*'s departure from the plain language of the MCPA has disrupted the citizens' reliance interest in having statutes that "mean what they say." See *Rowland*, 477 Mich at 217–219.

Second, looking to "practical consequences," just as *Champion* provided an exception that "swallowed" the rule and undermined legislative intent, *Smith* and *Liss* transformed a narrowly drawn exemption into a blanket shield from liability for any business engaging in a generally regulated industry. The Legislature did not intend to create this blanket shield, and overruling *Smith* and *Liss*—like overruling *Champion* did—would bring the law back into accord with the Legislature's intent. See *Dix*, 429 Mich at 417–418 (instructing that the MCPA be "construed liberally" not to protect industry, but "to broaden the consumers' remedy").

Third, an international corporation like Lilly, whose business practices are presumably optimized for national compliance, should not be relying on *Smith* and *Liss*, which render Michigan as one of only two states in the Union to construe its

consumer protection act exemptions so broadly. See National Consumer Law Center, A 50-State Report of UDAP Statutes (February 2009), p. 13, 26 (referring to Michigan and Rhode Island as the "Terrible Two" states whose statutes were left as "empty shells" that "cover virtually nothing" after they were "gutted" by court rulings).[21] Nor is there evidence that Lilly conducts its business in Michigan differently because of *Smith* and *Liss*.

Relatedly, this Court has considered "whether other jurisdictions have decided similar issues in a different manner" when deciding whether to overrule precedent. *Petersen* 484 Mich at 320. Michigan's consumer protection regime sticks out like a sore thumb—not because of a considered legislative choice, but because of an erroneous obfuscation of the Legislature's considered choice. Michigan's construction of the MCPA has made it an outlier, weighing in favor of overturning *Smith* and *Liss*.

The typical approach to consumer protection exemptions taken by jurisdictions around the country[22]—and the approach more reasonably relied upon by national businesses—is exemplified by *Skinner v Steele*, a Tennessee Supreme Court decision construing highly similar text in its consumer protection law. 730 SW2d 335 (Tenn 1987). According to the *Skinner* Court, the exemption provision functions to protect businesses from lawsuits when they engage in practices "that would otherwise be a violation of the Act, but which [are] allowed under other

[21] https://www.nclc.org/images/pdf/udap/report_50_states.pdf (accessed Sep 1, 2022)

[22] The Michigan Supreme Court has employed other frameworks for stare decisis analysis besides *Robinson*.

statutes or regulations." *Id.* at 337. The purpose of the provision, then, is "to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency." *Id.* After all, the Court noted, "[v]irtually every activity is regulated to some degree." *Id.*

Nevertheless, to whatever extent that potential future defendants may have "altered their conduct" in reliance on *Smith*'s broad construction of the MCPA section 4 exemption, the Court has refused to recognize the reliance interests of those that "have been violating laws on the basis of the assumption that it could not be challenged." *Lansing Schools*, 487 Mich at 370; see also *People v Breidenbach*, 489 Mich 1, 16 (2011) ("Indeed, it cannot fairly be said that citizens contemplate criminal activity in reliance on the particular procedural rule implicated in this case.").

In short, there are no reliance interests that weigh in favor of keeping this ill-begotten construction of the MCPA because citizens rely on the statute, not case law, and to the extent businesses engage in deceptive or unfair business practices in reliance on *Smith* and *Liss*, courts do not recognize that as a valid reliance interest. Furthermore, the interests of society are better served by overturning *Smith* and *Liss* because returning the MCPA to its pre-*Smith* scope would function not to cause chaos, but to improve consumer welfare and social order by preventing a broader swath of the Michigan economy from engaging in unfair or deceptive practices.

The principle of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process." *Robinson*, 462 Mich at 463. Here, overturning *Smith* and *Liss* does more to further the policy objectives of stare decisis than following the principal would as "an inexorable command." *Id.* This is because restoring the plain language of the MCPA to its appropriate construction is the outcome demanded by both *Dix* and *Diamond Mortgage*, which also stand as (long-ignored) precedent.

D. Intervening changes in the law are not a prerequisite for reversal because *Smith* and *Liss* were never justified.

The fourth *Robinson* factor asks "whether changes in the law and facts no longer justify" the precedent at issue. *Paige*, 476 Mich at 513.[23] However, the Court need not consider this factor when the precedent at issue "was never justified." *Id.* Certainly, "it is, emphatically, the province and duty of the judicial department, to say what the law is." *Makowski v Governor*, 495 Mich 465, 471 (2014), quoting *Marbury v Madison*, 5 US 137, 177 (1803). But where the Court has disregarded its duty to interpret statutes in a manner that gives effect to legislative intent, the Court has made changes to the law that it "had the power, but not the authority" to make. *Paige*, 476 Mich at 513. *Smith* and *Liss*, like the decision at issue in *Paige*, were "not justified from [their] inception." *Id.* Accordingly, *Smith*

[23] This factor typically applies when significant changes in the law have occurred since the precedent at issue was decided—the adoption of the Michigan Rules of Evidence, for example. *Breidenbach*, 489 Mich at 17-18 ("[T]he policy justifications for *Helzer* are largely undercut by the application of the rules of evidence and various legal doctrines in a trial setting.).

and *Liss* should be overturned so that the MCPA exemption analysis can be "return[ed] to the language of the statute." *Id.*

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Attorney General respectfully request this Court grant this application for leave to appeal before the Court of Appeals hears the Attorney General's appeal as of right. The Court of Appeals is bound to follow *Smith* and *Liss* requiring it to affirm the circuit court's dismissal of the Attorney General's complaint for declaratory judgment. Only this Court can filter the mud created by *Smith* and *Liss* on the applicability of the Michigan Consumer Protection Act to regulated industries; and, specifically to this case, the Attorney General's ability to investigate and, if warranted, pursue relief under the Michigan Consumer Protection Act on behalf of Michigan diabetics for access to lifesaving medication.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General

B. Eric Restuccia (P49550)
Deputy Solicitor General

Christopher M. Allen (P75439)
Assistant Solicitor General

/s/ Darrin F. Fowler
Darrin F. Fowler (P53464)
Michael S. Hill (P73084)
Carl J. Hammaker (P81203)
Assistant Attorneys General
Attorneys for Plaintiff-Appellant
Corporate Oversight Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
FowlerD1@michigan.gov
HillM19@michigan.gov
HammakerC@michigan.gov

Dated: September 1, 2022

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 12,816 words.

/s/ Darrin F. Fowler
Darrin F. Fowler (P53464)
Michael S. Hill (P73084)
Carl J. Hammaker (P81203)
Assistant Attorneys General
Attorneys for Plaintiff-Appellant
Corporate Oversight Division
P.O. Box 30736
Lansing, MI 48909
(517) 335-7632
FowlerD1@michigan.gov
HillM19@michigan.gov
HammakerC@michigan.gov

Dated: September 1, 2022