Legislative Analysis

Mary Ann Cleary, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

MCPA INSURANCE EXEMPTIONS

House Bill 5558 as enacted
Public Act 251 of 2014
Sponsor: Rep. Tom Leonard

House Committee: Judiciary
Senate Committee: Insurance

Complete to 7-2-14

A SUMMARY OF HOUSE BILL 5558 AS ENACTED

The Michigan Consumer Protection Act contains provisions that prevent consumers from using the act to bring a private cause of action (a lawsuit) against an insurance company for committing unfair, unconscionable, or deceptive methods, acts, or practices in violation of Chapter 20 of the Insurance Code.

House Bill 5558 amends the Michigan Consumer Protection Act to specify that this prohibition applies to methods, acts, and practices occurring before, on, or after March 28, 2001. The bill states that its provisions are retroactive to and effective as of March 28, 2001, and that it is curative and intended to prevent any misinterpretation that that may result from the decision of the Michigan Supreme Court in *Converse* v *Auto Club Group Ins Co*, No. 142917, October 26, 2012.

(The bill specifically says it is intended to prevent any misinterpretation that the MCPA applies to or creates a cause of action for an unfair, unconscionable, or deceptive method, act, or practice occurring before March 28, 2001, that is made unlawful by Chapter 20 of the Insurance Code.)

However, the bill ***would not*** apply to or limit a cause of action filed with a court concerning a method, act, or practice that occurred before March 28, 2001, ***if*** the cause of action had been filed in a court of competent jurisdiction on or before June 5, 2014. (June 5, 2014, is the date that House Bill 5558 was amended on the House floor to allow cases currently in the pipeline, so to speak, to go forward to completion.)

Lastly, the bill makes technical corrections to citations to the Michigan Public Service Commission Act and the Credit Union Act.

MCL 445.904

BACKGROUND INFORMATION:

The issue the bill addresses is whether a consumer may sue an insurance company under the Michigan Consumer Protection Act (MCPA) for damages resulting from unfair,

unconscionable, or deceptive methods, acts, or practices in violation of Chapter 20 of the Insurance Code that occurred on or before March 28, 2001; or if legal actions based on such a claim can only be made under pertinent provisions of the Insurance Code.

The March 28, 2001, date cited in the statute is the effective date of legislation (Public Act 432 of 2000) that put the current prohibition against such lawsuits into the MCPA. So, the question that has arisen is: did PA 432 intend to apply only prospectively or was it intended to apply as well to cases prior to its effective date (as an amendment aimed at just clarifying and restating the proper relationship between the Insurance Code and the MCPA)?

Recent court decisions have addressed this (as described later), including a 2012 order by the Michigan Supreme Court that appeared to say that a plaintiff can seek to recover damages resulting from methods, acts, or practices violative of the MCPA based on conduct by a [insurance company] defendant occurring [before] March 28, 2001, as long as the action was timely filed.

The current bill has been introduced in response to (and to counteract) those decisions.

Briefly put, when the MCPA was enacted in 1976, it put in place a provision that says that the act does not apply to "a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." [Section 4(1)(a)]

It also contained provisions, in Section 4(2)(a), stating that *except for the purposes of an action filed by a person under Section 11*, the act did not apply to unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by any of a number of regulatory statutes. One of the cited statutes is Chapter 20 of the Insurance Code. Chapter 20 deals with unfair and prohibited trade practices and frauds and contains within it the Uniform Trade Practices Act.

Section 11 of the MCPA allows private individuals to bring a private cause of action, including obtaining a declaratory judgment that a method, act, or practice is unlawful under the MCPA; obtaining injunctive relief; seeking actual damages or $250, whichever is greater, and reasonable attorney fees; and bringing a class action for damages caused by unlawful methods, acts, or practices.

In 1999, the Michigan Supreme Court upheld a person's right under Section 4(2)(a) to bring a cause of action under Section 11 of the MCPA against an insurance company for deceptive practices made unlawful by Chapter 20 of the Insurance Code. [*Smith* v *Globe*, 460 Mich 446 (1999)] In response to the *Smith* decision, the Legislature enacted Public Act 432 of 2000, which eliminated the reference to Chapter 20 of the Insurance Code from Section 4(2)(a) and, instead, specifically stated that the MCPA does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice made unlawful by Chapter 20 of the Insurance Code.

Public Act 432 took effect March 28, 2001. Subsequently, in *Converse* v *Auto Club Group Insurance Company*, the Michigan Court of Appeals stated that with "regard to claims accruing before March 28, 2001, private actions against an insurer were permitted pursuant to MCL 445.911 of the MCPA" (that is, Section 11) "arising out of misconduct made unlawful by chapter 20 of the insurance code." [Docket No. 293303 (2011)]

The ability to pursue claims arising from an insurance company's actions that occurred before March 28, 2001, when PA 432 took effect, was echoed in an order issued by the state Supreme Court on October 26, 2012, as noted earlier. In the order, generally speaking, the state Supreme Court determined that a plaintiff can seek to recover damages resulting from methods, acts, or practices violative of the MCPA based on conduct by a insurance company defendant occurring before March 28, 2001, as long as it was timely filed. [*Converse* v *Auto Club Group Ins Co*, Docket No. 142917 (October 26, 2012)]

House Bill 5558, as enrolled, has the effect of counteracting the holdings of the Michigan Court of Appeals and Supreme Court, and the bill specifically says it is curative in nature. Thus, since the bill is retroactive, it is clear that consumers may not bring an action against an insurer under Section 11 of the MCPA for practices branded unfair by Chapter 20 if the conduct of the insurer happened before, on, or after March 28, 2001 when PA 432 became law. However, a narrow exception is provided for lawsuits currently being litigated (specifically, those actions filed on or before June 5, 2014, which was the date the exception language was added by a House floor amendment).

Brief arguments in support of the bill

Simply stated, supporters say that the bill definitively and with absolute clarity amends the MCPA to do what it was meant to do when it was created in 1976. Supporters maintain that the original intent of the act was to make the Insurance Code the proper statute for the regulation of the trade practices of insurance companies and other participants in the insurance industry. They say there is no need for duplicative remedies in the MCPA. Those aggrieved by actions on the part of insurance companies have ample protections under Chapter 20 of the Insurance Code. State insurance regulators are up to the task of responding to and resolving consumer complaints, as well as taking administrative actions against insurers who violate the Code.

Supporters say that when Public Act 432 of 2000 put the current prohibition against lawsuits for claims against insurance companies into the MCPA, it was not intended to apply only prospectively but was intended to apply in all instances regardless of their date of occurrence; it was intended to restore the appropriate relationship between the MCPA and the Insurance Code.

Brief arguments in opposition to the bill

Opponents of the bill say that an analysis of the beginnings of the MCPA support the view that the act was intended only to exempt actions by insurers that are "permitted"

under laws administered by state and federal government officials or boards. This was to protect professional conduct permitted under those other laws and regulatory structures from interference by lawsuits brought under the MCPA. However, say critics of this bill, unfair, misleading, dishonest, and deceptive conduct on the part of an insurance company or insurance professional does not constitute permissible conduct, and was therefore never intended to be exempt from direct consumer lawsuits – which is why Section 11 of the MCPA originally allowed such lawsuits.

Opponents say that it is not true that consumers aggrieved in the past, present, or future have other effective avenues for remedies. They say the remedies under Chapter 20 are largely administrative, meaning that in response to consumer complaints, the Department of Insurance and Financial Services will investigate and levy minimal fines or license sanctions, or issue cease and desist orders, and so on. Reportedly, courts have consistently held that there is no private cause of action under Chapter 20 of the Insurance Code (Uniform Trade Practice Act), meaning that an aggrieved consumer cannot initiate a lawsuit directly against the insurance company or insurance professional.

Opponents also point to the harmful impact of this proposed legislation on injured individuals. Public Act 432 of 2000 has already stopped lawsuits initiated under the MCPA against insurance companies for deceptive trade practices occurring after March 28, 2001. The court cases that gave rise to House Bill 5558 involved persons who had suffered catastrophic injuries and who have been denied needed long-term medical and/or assistive services. The floor amendment allowing claims filed by June 5, 2014, to go forward greatly aids some of these individuals, but closes the door to others suffering similar wrongs at the hands of insurance customers who had been eligible to file claims under Section 11 of the MCPA but who had not yet done so; these would have been a finite number of claimants.

FISCAL IMPACT:

The bill would have no significant fiscal impact on the state or local units of government.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.