Legislative Analysis

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MCPA INSURANCE EXEMPTIONS

House Bill 5558 without amendment
Sponsor: Rep. Tom Leonard
Committee: Judiciary

Complete to 5-28-14

A SUMMARY OF HOUSE BILL 5558 AS REPORTED FROM COMMITTEE 5-22-14

A consumer is currently prevented from bringing a private cause of act under the Michigan Consumer Protection Act against an insurance company for committing unfair, unconscionable, or deceptive methods, acts, or practices in violation of Chapter 20 of the Insurance Code. The bill would amend the Michigan Consumer Protection Act to specify that this prohibition applies to methods, acts. and practices occurring before, on, or after March 28, 2001.

House Bill 5558 also states that the bill would be retroactive and effective March 28, 2001, and that it is curative and intended to prevent any misinterpretation that the Consumer Protection Act 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, that may result from the decision of the Michigan Supreme Court in *Converse* v *Auto Club Group Ins Co*, No. 142917, October 26, 2012.

Lastly, the bill would make 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 Consumers 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.

The date cited was 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 whether the intent of PA 432 was to apply only prospectively or was to apply as well to cases prior to its effective date (as an amendment aimed at 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 appearing 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 it was timely filed.

The current bill has been introduced in response to 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 was 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; actual damages or $250, whichever is greater; reasonable attorney fees; and bringing a class action for damages caused by unlawful methods, acts, or practices.

In 1999, the state Supreme Court upheld a person's right under Section 4(2)(a) to bring a cause of action under Section 11 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 *Smith*, 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 act 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. 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 by the state Supreme Court on October 26, 2012. In *Converse*, generally speaking, as noted earlier, the state Supreme Court issued an order appearing 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 it was timely filed.

House Bill 5558 would have the effect of counteracting the holdings of the Michigan Court of Appeals and Supreme Court that consumers may 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 March 28, 2001 when PA 432 became law. The bill would be retroactive and would nullify any lawsuits currently being litigated.

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 by 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 that put the current prohibition against lawsuits 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 actions under the MCPA from interfering with regulatory statutes and professional conduct permitted under those laws and regulatory structures. However, unfair, misleading, dishonest, and deceptive conduct on the part of an insurance company or insurance professionals does not constitute permissible conduct, they say, and was therefore never intended to be exempted from consumer lawsuits – which is why Section 11 of the MCPA originally allowed such lawsuits.

Opponents say that it is no true that consumers aggrieved in the past 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).

Opponents also point to the harmful impact of this proposed legislation. 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 ones affected by House Bill 5558 are cases brought by people who claim they were denied benefits, or who suffered damages, through deceptive practices by insurers prior to March

28, 2001; and even then, only those who have already filed claims in a timely manner as prescribed by law. The court cases that gave rise to this legislation involved persons who suffered catastrophic injuries and who have needed long-term medical and/or assistive services. There is a finite number of claimants.

FISCAL IMPACT:

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

POSITIONS:

The following entities testified in support of, or indicated support for, the bill on 5-8 or 5-22-14:

Michigan Department of Insurance and Financial Services (DIFS)
Michigan Insurance Coalition
AAA Michigan
Michigan Defense Trial Counsel
Michigan Association of Health Plans
Property Casualty Insurers Association of America (PCI)
Life Insurance Association of Michigan
Insurance Institute of Michigan
Farmers Insurance
Michigan Chamber of Commerce
Citizens Insurance Company
National Association of Mutual Insurance Companies
Auto-Owners Insurance
Farm Bureau
Michigan Retailers Association
National Federation of Independent Businesses (NFIB)
American Insurance Association (AIA)
Life Insurance Association of Michigan
Michigan Association of Insurance Agents

A representative of the Michigan Association for Justice (MAJ) testified in opposition to the bill. (5-22-14)

The Brain Injury Provider Council indicated opposition to the bill. (5-22-14)

The Brain Injury Association indicated opposition to the bill. (5-22-14)

The Coalition Protecting Auto No-Fault/CPAN indicated opposition to the bill. (5-22-14)

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■ 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.