

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH
JUDICIAL CIRCUIT
INGHAM COUNTY

KELLEY *ex rel.* MICHIGAN,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, *et al.*,
Defendants.

Case No. 96-84281-CZ

Hon. Lawrence M. Glazer

**PLAINTIFF'S REPLY BRIEF TO DEFENDANTS'
BRIEF OPPOSING PLAINTIFF'S MOTION TO
DISMISS AFFIRMATIVE DEFENSES REGARDING
THE CONSUMER
PROTECTION ACT**

Introduction

M.C.L. 445.905; M.S.A. 19.418(5) authorizes the Attorney General to seek an injunction and civil penalties against persons who have engaged in or are engaging in violations of the Consumer Protection Act.

By engaging in the conduct described in the Plaintiff's Complaint, Defendants have violated and continue to violate M.C.L. 445.903; M.S.A. 19.418(3).

Under the Michigan Consumer Protection Act, M.C.L. 445.901 *et seq.*, the Attorney General, if there is probable cause to believe that a prohibited method, act, or practice has occurred, has authority to file an action in circuit court "in accordance with principles of equity to restrain the defendant by temporary or permanent injunction from engaging in the method, act, or practice." M.C.L. 445.905; M.S.A. 19.418(5).

ARGUMENT

Contrary to the malicious defamation at page 2 of Defendants' Brief that "The AG misquotes MCL 445.905(2)...," the Attorney General accurately quoted the referenced statutory provision at page 7 of his Brief when he stated:

"M.C.L. 445.905(2); M.S.A. 19.418(5)(2) provides in pertinent part:

Unless waived by the court on good

cause shown not less than 10 days before the commencement of an action under this section the attorney general shall notify the person of his intended action and give the person an opportunity to *cease and desist* from the alleged unlawful method, act, or practice *or to confer with the attorney general* in person, by counsel, or by other representative as to the proposed action before the proposed filing date. (Emphasis supplied.)

Defendants' emphasis on the "mandatory" nature of the notice provisions of M.C.L. 445.905(2); M.S.A. 19.418(5)(2) is misplaced. Even a casual examination of the provision makes it clear that the notice provision is not mandatory because the first phrase of the sentence states that the Court has the authority to waive the notice requirement. Accordingly, notice is not always required or mandatory. The statute clearly contemplated that there would be circumstances where "good cause" would make the giving of notice unnecessary, useless or, in other words, futile.

The case at bar presents such "good cause." Plaintiff, as its alternative relief, asks only that the Court recognize that "good cause" exists for not requiring the giving of unnecessary, useless or futile notice and, in accord with specific statutory provision, asks the Court to waive the notice provisions of M.C.L. 445.905(2); M.S.A. 19.418(5)(2).

Plaintiff submits that the statute places no time limitation on the Court's authority to waive the notice provision. There is no statutory provision or case law precedent to support Defendants' unfounded assertion that the Court can waive the notice provisions "only *before* an action's initiation."

Good cause for not issuing a notice of intended action exists in this case because the issuance of such a notice would be futile. The futility of notice is demonstrated by statements of the Defendants as set forth at ¶ 196 of Plaintiff's Complaint. Defendants have not suggested otherwise to this Court. They have not, for example, suggested that they would like to meet with the Attorney General to pursue settlement or otherwise discuss the allegations of Plaintiff.¹

Since 1994, similar civil actions under the

¹ Plaintiff is ready and willing to pursue such discussions if Defendants or any single Defendant wishes to do so.

consumer protection acts of ten other states have been filed against The Tobacco Companies, The Tobacco Consultant, The Tobacco Trade Associations, and similarly situated Wholesalers and Distributors of Tobacco Products without any of these companies refraining from engaging in the method, act, or practice described.

The attitude of Defendants in the case at bar is analogous to the attitude of the zoning board of appeals examined by the Michigan Supreme Court where it was said:

...With this attitude on the part of the board of appeals on zoning, being so clearly manifest, it would have been a vain and useless act for the plaintiff to have sought redress before that board. This being the case, his (plaintiff's) failure to seek relief from the board of zoning appeals is excused. *Trojan v. Taylor Township*, 352 Mich. 636, 639; 91 N.W.2d 9 (1958) quoting with approval the Hon. Victor J. Baum, a Wayne county circuit judge.

See also *Sterling Serv. V. State Police*, 20 Mich. App. 502, 511; 91 N.W.2d 9 (1969) where the Court of Appeals quoted *Trojan v. Taylor Township*, 352 Mich. 636, 638, 639; 91 N.W.2d 9 (1958) as follows:

'To this rule requiring the plaintiff to exhaust his administrative remedies, there are a number of exceptions, one clear exception is that the law will not require a citizen to undertake a vain and useless act. The law does not require useless expenditures of effort.'

Michigan law does not require and this Court should not require the performance of a futile act. *Generou v. Kalamazoo Regional Psychiatric Hospital*, 192 Mich. App. 295, 305; 480 N.W.2d 638 (1991) where it was said, "the law will not require the doing of a futile act. *Adkins v. Dep't of Civil Service*, 140 Mich. App. 202, 213; 362 N.W.2d 919 91985)." This is particularly true when the statute authorizes the Court to waive notice provisions for good cause shown. Unlike the cases cited by Defendants, Defendants will have their day in Court and they have been fully informed of the allegations against them. Plaintiff has not sought a temporary restraining order as was the case in *Acorn Building Components, Inc. v. UAW Local 2194*, 164 Mich. App. 358; 416 N.W.2d 442 (1987). As Defendants have noted, it is appropriate for this Court to "look to what is reasonable in light of the purpose of the disputed section" (*Keith v. Chrysler Corp.*, 390

Mich. 458, 475; 213 N.W.2d 1147 (1973)) in determining whether "good cause" exists for this Court to waive the notice provisions in light of the case at bar are to provide an opportunity for Defendants to discontinue their unlawful violations of the Michigan Consumer Protection Act. Defendants actions speak louder than their hollow words. Additional notice to Defendants only serves to thwart the efficient administration of justice. Plaintiff submits that "good cause" exists for this Court to waive the notice provisions of M.C.L. 445.905(2); M.S.A. 19.418(5)(2).

Accordingly, it is appropriate for this Court to dismiss the above-referenced affirmative defenses claiming that Plaintiff's Complaint is barred under the Consumer Protection Act for a failure to give a 10 day notice of intended legal action under the Act.

In the alternative, Plaintiff submits that it is appropriate for this Court, pursuant to M.C.L. 445.905(2); M.S.A. 19.418(5)(2) and for good cause shown, to enter its order waiving the 10 days notice set forth at M.C.L. 445.905(2); M.S.A. 19.418(5)(2).

In addition to the reasons set forth above, Defendants have had more than adequate notice of the intended legal action and not a single Defendant has ceased and desisted from the unlawful methods, acts, or practices alleged in Plaintiff's Complaint and not a single Defendant has requested to confer with the attorney general.

Accordingly, it is appropriate and reasonable for this Court to waive the notice requirements set forth at M.C.L. 445.905(2); M.S.A. 19.418(5)(2).

RELIEF

WHEREFORE, Plaintiff prays that this Court, pursuant to the provisions of M.C.R. 2.116(9) dismiss the following affirmative defenses because said Defendants have failed to state a valid defense to the claim asserted against them:

Local Defendants (53)
Lorillard Tobacco Company (23)
Lorillard, Inc. (23)
R.J. Reynolds (48)
CTR (52)
Philip Morris (49)
Brown & Williamson (45)

In the alternative, Plaintiff prays that this Court, pursuant to M.C.L. 445.905(2); M.S.A. 19.418(5)(2), waive the notice requirements set forth at M.C.L. 445.905(2); M.S.A. 19.418(5)(2) and then dismiss the following affirmative defenses:

Local Defendants (53)
Lorillard Tobacco Company (23)
Lorillard, Inc. (23)
R.J. Reynolds (48)
CTR (52)
Philip Morris (49)
Brown & Williamson (45)

Plaintiff further prays that this Court grant such additional relief as justice and equity require.

Respectfully submitted,

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