

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH MUNEM, DONALD MILLER, and  
DAVID KLEMM,

UNPUBLISHED  
January 25, 2002

Plaintiffs-Appellants,

v

BEST BUY COMPANY,

No. 224366  
Macomb Circuit Court  
LC No. 99-001608-CP

Defendant-Appellee.

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Before: Neff, P.J., and Wilder and Cooper, JJ.

WILDER, J. (*concurring in part, dissenting in part*)

I agree with the majority's finding that summary disposition was properly granted on plaintiff Munem's claim for unjust enrichment. I also agree with the majority's conclusion that all of plaintiffs' allegations under the MCPA must meet the requirement of particularized pleading stated in MCR 2.112(B)(1), and that the trial court did not demand a more rigorous pleading standard than required under this court rule. Therefore, I join in these aspects of the majority's opinion. I do not agree, however, that plaintiffs have pleaded claims under the MCPA sufficiently to withstand summary disposition under MCR 2.116(C)(8). As to this aspect of the opinion, I respectfully dissent.

I

MCPA Claims of Plaintiff Joe Munem

Plaintiff Joe Munem (hereafter Munem) alleged the following in the first amended complaint:

16. In February 1998, Joe Munem read a Best Buy advertising circular which prominently promoted computer software products supposedly subject to rebates. Among the products advertised as subject to rebate were Turbo Tax and Norton Utilities.

17. As a result of the advertising circular, Joe Munem traveled to the Best Buy store on Hall Road in Utica, Macomb County, Michigan.

18. While in the Utica store, Munem noticed a promotion for software products including "Norton Utilities," which was one of the products in the

advertising circular. Best Buy's in store promotion was different than the rebate in the advertising circular. This promotion was a "Buy Two Get One Free" mail-in rebate offer. Other Norton products were subject to this promotion.

19. Best Buy's in store promotion did not clearly and conspicuously disclose that the rebate offer had already expired.

20. Munem purchased two Norton software products, including "Utilities," which Best Buy promoted as subject to a "Buy Two Get One Free mail-in rebate offer.

21. When Munem purchased the Norton products, he fully expected that they were subject to a valid rebate and he intended to claim the rebate.

22. After Munem returned home and installed the "Utilities" software in his computer, Munem learned that the rebate had expired.

23. Munem also discovered that a sticker in the package prominently promoting the rebate contained information in small type indicating that the offer had expired on January 3, 1998 – six weeks before his purchase.

24. Munem had not noticed this language prior to making his purchase or prior to installing the software in his computer.

25. The language on the sticker indicating the expiration date was not conspicuous, and the sticker did not disclose the expiration date with equal prominence that it stated the rebate offer; and , by its terms, the sticker was misleading.

Munem's allegations do not plead fraud with specificity. First, although Munem's pleadings acknowledged a distinction between the rebate advertised in the circular and the "Buy Two Get One Free" in-store rebate, first amended complaint, paragraph 18, Munem's pleadings do not clearly describe whether the expired rebate alleged in paragraph 22, and the expired rebate (which was displayed on the sticker on the product package) alleged in paragraph 23, are the *same* expired rebate or two *different* expired rebates. Second, Munem does not allege that the "Buy Two Get One Free" rebate offer, the only rebate offer clearly identified in the pleadings as a *Best Buy* rebate offer, was either expired when he purchased the product, or submitted to Best Buy and not honored. These pleading deficiencies clearly render Munem's claims appropriate for dismissal under MCR 2.116(C)(8) and MCR 2.112(B)(1), and I would affirm the lower court's finding that the complaint "fails to allege specific facts, which if proven, demonstrate any misrepresentation on the part of the defendant."

## II

### MCPA Claims of Plaintiff Don Miller

Plaintiff Don Miller (hereafter Miller) alleged the following in the first amended complaint:

26. In April, 1999, Don Miller read a Best Buy advertising circular which prominently promoted computer software products allegedly subject to rebates. Among the products advertised as subject to rebates were “USA 99: Streets & Destinations.” The advertising circular stated: “\$19.99-\$10 Rebate=\$9.99,” and it also stated: “Free Coffee Grinder by mail with purchase of this title. \$15.99 value with \$2.95 shipping.”

27. As a result of the advertising circular, Don Miller traveled to the Best Buy store on Hall Road in Utica, Macomb County, Michigan.

28. On April 14, 1999, Miller purchased the “USA 99 Streets & Destinations” advertised in the circular.

29. When Miller purchased the “USA 99 Streets & Destinations,” he fully expected that it was subject to a valid rebate and he intended to claim the rebate.

30. After Miller returned home, he peeled off a “rebate” sticker that was on the front of the product; and, at that time, he discovered that the rebate has expired.

31. The “rebate” sticker on the package contained information in small type indicating that the offer had expired on March 31, 1999-two weeks before his purchase; however, Miller did not notice this small type either at the time of the purchase or after he had peeled the “rebate” sticker off the package.

32. The language on the sticker indicating the expiration date was not conspicuous, and the sticker did not disclose the expiration date with equal prominence that it stated the rebate offer; and, in fact, by its terms, the sticker was misleading.

Miller also fails to plead fraud with specificity. Similar to the deficient allegations made by Munem, Miller does not allege that the Best Buy advertising circular and the package sticker promoted the same rebate. Additionally, Miller does not allege either that he attempted to redeem the rebate advertised in the Best Buy circular and that it was not honored, or that the Best Buy circular rebate had expired. Accordingly, Miller’s claims were appropriately dismissed pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1).

### III

#### MCPA Claims of Plaintiff Dave Klemm

Plaintiff Dave Klemm (hereafter Klemm) alleged the following in the first amended complaint:

33. In November or December, 1998, Dave Klemm read a Best Buy advertising circular which prominently promoted computer products allegedly subject to rebates. Among the products advertised as subject to rebates was a set of Maxell 3 ½” computer disks for \$0.99-\$29.99 subject to a \$29.00 rebate.

34. As a result of the advertising circular, Klemm traveled to the Best Buy store in Clinton Township, Macomb County, Michigan.

35. Klemm purchased the Maxell computer disks advertised in the circular.

36. When Klemm purchased the set of Maxell computer disks, he fully expected that the purchase was subject to a valid rebate and he intended to claim the rebate.

37. After Klemm returned home, Klemm applied for the rebate.

38. Klemm was later advised, in writing, that the rebate would not be honored.

39. Best Buy did not conspicuously disclose any information which would have informed Klemm that the rebate offer was not valid.

While Klemm asserts that he purchased the product advertised in the circular, he fails to allege that the rebate he applied for was a Best Buy rebate. Further, he does not describe to whom he applied to redeem the alleged rebate, who advised him that the alleged rebate would not be honored, and the reasons provided as to why the alleged rebate would not be honored.

The absence of specificity is especially pronounced in Klemm's allegations in the first amended complaint. As such, the trial court correctly dismissed these claims pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1).

#### IV

#### Conclusion

The result reached by the majority, in effect, communicates to Michigan retailers that it is misleading to simultaneously offer multiple rebates of differing benefit, that it is misleading to offer rebates in competition with rebates offered by manufacturers of the products sold by the retailer, and that similarly, competitive rebates offered by a retailer which expire at a different time than that of the manufacturer's rebate are fraudulent communications under the MCPA. The MCPA does not compel or sanction such a conclusion. I would find, instead, that the allegations in this case were woefully insufficient, and that savvy Michigan consumers are more than able to comprehend the myriad of competitive and cost-saving options represented by the rebates at issue here. Accordingly, I would affirm.

/s/ Kurtis T. Wilder