

Services

Consumer Fraud
Litigation

Litigation &
Alternative Dispute
Resolution

Governor Parson Signs Statute Affecting MMPA and Punitive Damages

Missouri Governor Parson recently signed S.B. 591 into law. The new statute makes substantial changes both to the Missouri Merchandising Practices Act (MMPA) and to awards of punitive damages. These statutory changes apply to all cases filed after the effective date, August 28, 2020. Expect to see a surge of new cases in the days leading up to that date.

MMPA

A. Substantive proof requirements

S.B. 591 amends § 407.020 to exclude MMPA claims involving the purchase of a new residence, if the buyer has accepted an express warranty and the sales contract contains an appropriate disclaimer. Instead, the buyer must resort to a breach of warranty claim.

The bill amends § 407.025 to increase the requirements for pleading or proving an MMPA cause of action. Plaintiff must plead and prove that s/he acted as a reasonable consumer and that alleged unlawful practices would cause a reasonable person to incur damages. Plaintiff must also present objective evidence to allow damages to be calculated with a reasonable degree of certainty. A class action requires the same proof, including individual proof of damages. The court may dismiss a petition when it does not appear that the allegedly unlawful practice would mislead a reasonable consumer.

This amendment should put an end to some of the more frivolous MMPA claims. Several years ago, Husch Blackwell defended the owner of a gas station in a class action alleging that the defendant defrauded the plaintiff because she paid for premium gasoline but received some regular instead. Missouri law allows gas stations to use a single hose for multiple grades of gasoline, but

requires a “wet hose” at all times – *i.e.*, the hose will contain a couple of quarts of whatever grade the previous customer purchased. How would plaintiff know what grade of gasoline the prior customer bought without deliberately seeking out that information? That is not the act of a reasonable customer.

B. Exclusion of medical malpractice claims

Creative plaintiffs on occasion have tried to characterize a medical malpractice claim as an MMPA claim. S.B. 591 puts an end to these efforts by explicitly excluding any claims that could be brought under chapter 538, relating to medical malpractice.

C. Attorneys’ fees

S.B. 591 amends § 407.025 to require that an award of attorneys’ fees must bear a reasonable relation to the amount of the judgment in a damage case. If the relief sought is equitable, the fee must be based on the amount of time reasonably expended in prosecuting the claim.

This is potentially a game changer. Many consumer protection class actions are settled for essentially meaningless changes in advertising or labeling or worthless coupons in exchange for large attorneys’ fees – an unsurprising result given that the real purpose of most consumer fraud class actions is to generate a fee.

Punitive damages

A. Proof required

S.B. 591 adds a new section 510.261 to the statute books. Under § 510.261.1, plaintiff must prove that defendant “intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others.” Reckless conduct does not make it. The standard of proof is clear and convincing evidence.

B. Damages required

Section 510.261.2 prohibits an award of punitive damages if the trier of fact awards merely nominal damages. Exceptions to that rule are privacy rights, property rights and constitutional rights; in those cases, nominal damages will support a punitive award.

If applied to common law claims, these provisions may violate the constitutional right to jury trial. The Supreme Court has held that caps on punitive damages in common law claims are unconstitutional. *Lewellen v. Franklin*, 441 S.W.3d 135 (Mo. banc 2014). Caps on damages in statutory claims are permissible. *Estate of Overbey v. Chad Franklin Nat’l Auto Sales North, LLC*,

361 S.W.3d 364 (Mo. banc. 2014). If a cap violates the right to jury trial, a flat ban would seem likely to violate it as well.

We do not believe that the distinction between statutory and common laws is either sensible or will long endure. The source of the common law in Missouri is a statute, 1.010, R.S.Mo. If the legislature decided to repeal that statute and replace it with the Napoleonic Code, nothing in the Constitution would prevent it from doing so.

The legislature has already exploited that loophole in the context of medical malpractice claims. To avoid the ban on damage caps, the legislature amended § 1.010 to adopt the common law except as it related to medical malpractice and replaced it with a statutory cause of action. § 538.210, R.S.Mo.

S.B. 591 also prohibits basing the amount of a punitive award on harm to non-parties. This codifies the Supreme Court's constitutional holding in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

Finally, S.B. 591 makes clear that the new limits on punitive damages apply to claims for aggravated circumstances in wrongful death cases. This overrules *Poage v. Crane Co.*, 523 S.W. 3d 496 (Mo. App. 2017).

C. Vicarious liability

Section 510.261.3 sharply limits vicarious liability for punitive damages. Punitive damages will lie against an employer or other principal for an agent's actions in only four circumstances:

The principal authorized the "doing and manner" of the act.

The agent was unfit and the principal acted recklessly in employing or retaining the agent.

The agent was employed in a managerial capacity and acted within the scope of employment.

The principal ratified the agent's act.

In connection with the second of these elements, if the employer admits liability for the acts of the agent, discovery shall be limited to employment records or information related to the agent's qualifications.

D. Pleading

A party may not seek punitive damages in an initial pleading. After discovery, a party may amend to seek punitive damages only with leave of court under a motion, supported with evidence, establishing a reasonable basis for a punitive award. The party opposing punitive damages may submit evidence in opposition. Discovery into defendant's financial condition is not permitted until the trial court has allowed an amendment seeking punitive damages.

If Missouri trial courts enforce this statute as written, the likely result is a substantial reduction in the number of claims for punitive damages submitted to the jury. Under the clear and convincing evidence standard, judges must weigh the plaintiff's evidence against the defendant's evidence. Under that standard, a party has a submissible case of punitive damages only when the evidence "instantly tilts the scales in the affirmative when weighed against evidence in opposition." *Peters v. General Motors Corp.*, 200 S.W.3d 1, 25 (Mo. App. 2006).

These limitations on punitive damages should apply to all cases filed after August 28, 2020, regardless of when the cause of action accrued. The Supreme Court has held that no one has a vested right to punitive damages until entry of judgment. *Vaughan v. Taft Broadcasting Co.*, 708 S.W. 2d 656, 660 (Mo. banc 1986).

Medical malpractice

S.B. 591 amends § 538.210 to allow punitive damages in medical malpractice cases only when plaintiff proves, by clear and convincing evidence, that the medical provider "intentionally caused damage to the plaintiff or demonstrated malicious misconduct." Evidence of conscious disregard for the safety of others does **not** satisfy those requirements.

Contact us

If you would like additional information about S.B. 591, please contact Mark G. Arnold or your Husch Blackwell attorney.