

SENATE SUBSTITUTE
FOR
SENATE COMMITTEE SUBSTITUTE
FOR
SENATE BILL NO. 832

AN ACT

To repeal sections 407.020, 407.025, and 537.762, RSMo, and to enact in lieu thereof seven new sections relating to civil actions, with an existing penalty provision.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI,
AS FOLLOWS:

1 Section A. Sections 407.020, 407.025, and 537.762, RSMo,
2 are repealed and seven new sections enacted in lieu thereof, to
3 be known as sections 407.012, 407.020, 407.025, 407.027, 537.761,
4 537.762, and 537.763, to read as follows:

5 407.012. 1. In a civil action brought under section
6 407.025, absent a state statute to the contrary, the courts shall
7 be guided by the policies of the Federal Trade Commission and
8 interpretations given by the Federal Trade Commission and the
9 federal courts to Section 5(a)(1) of the Federal Trade Commission
10 Act, 15 U.S.C. Section 45(a)(1), as amended.

11 2. Section 407.025 shall not apply to actions or
12 transactions otherwise permitted, approved, or regulated by the
13 Federal Trade Commission or any other regulatory agency acting
14 under statutory authority of this state or the United States.

15 407.020. 1. The act, use or employment by any person of
16 any deception, fraud, false pretense, false promise,

1 misrepresentation, unfair practice or the concealment,
2 suppression, or omission of any material fact in connection with
3 the sale or advertisement of any merchandise in trade or commerce
4 or the solicitation of any funds for any charitable purpose, as
5 defined in section 407.453, in or from the state of Missouri, is
6 declared to be an unlawful practice. The use by any person, in
7 connection with the sale or advertisement of any merchandise in
8 trade or commerce or the solicitation of any funds for any
9 charitable purpose, as defined in section 407.453, in or from the
10 state of Missouri of the fact that the attorney general has
11 approved any filing required by this chapter as the approval,
12 sanction or endorsement of any activity, project or action of
13 such person, is declared to be an unlawful practice. Any act,
14 use or employment declared unlawful by this subsection violates
15 this subsection whether committed before, during or after the
16 sale, advertisement or solicitation.

17 2. Nothing contained in this section shall apply to:

18 (1) The owner or publisher of any newspaper, magazine,
19 publication or printed matter wherein such advertisement appears,
20 or the owner or operator of a radio or television station which
21 disseminates such advertisement when the owner, publisher or
22 operator has no knowledge of the intent, design or purpose of the
23 advertiser; [or]

24 (2) Any institution, company, or entity that is subject to
25 chartering, licensing, or regulation by the director of the
26 department of insurance, financial institutions and professional
27 registration under chapter 354 or chapters 374 to 385, the
28 director of the division of credit unions under chapter 370, or

1 director of the division of finance under chapters 361 to 369, or
2 chapter 371, unless such directors specifically authorize the
3 attorney general to implement the powers of this chapter or such
4 powers are provided to either the attorney general or a private
5 citizen by statute; or

6 (3) Any advertisement, merchandise, or transaction in which
7 the merchandise consists of a new residence in a transaction in
8 which the buyer is offered in the sale contract an express
9 warranty by the builder or through a third party warranty company
10 paid for by the builder and the sale contract contains
11 substantially the following disclaimer in all capital letters
12 with characters of at least ten point type:

13 THIS CONTRACT, MERCHANDISE, AND PROPERTY CONVEYED UNDER THIS
14 CONTRACT AND THE TRANSACTION BETWEEN THE SELLER AND BUYER IS
15 EXCLUDED FROM COVERAGE UNDER THE MERCHANDISING PRACTICES ACT,
16 SECTIONS 407.010 TO 407.130.

17
18 As used in this subdivision, the term "residence" shall mean a
19 single-family house, duplex, triplex, quadruplex, or a unit in a
20 multiunit residential structure in which title to each individual
21 unit is transferred to the owner under a condominium or
22 cooperative system, and shall include common areas and common
23 elements as defined in subdivision (4) of section 448.1-103.

24 3. Any person who willfully and knowingly engages in any
25 act, use, employment or practice declared to be unlawful by this
26 section with the intent to defraud shall be guilty of a class E
27 felony.

28 4. It shall be the duty of each prosecuting attorney and

1 circuit attorney in their respective jurisdictions to commence
2 any criminal actions under this section, and the attorney general
3 shall have concurrent original jurisdiction to commence such
4 criminal actions throughout the state where such violations have
5 occurred.

6 5. It shall be an unlawful practice for any long-term care
7 facility, as defined in section 192.2300, except a facility which
8 is a residential care facility or an assisted living facility, as
9 defined in section 198.006, which makes, either orally or in
10 writing, representation to residents, prospective residents,
11 their families or representatives regarding the quality of care
12 provided, or systems or methods utilized for assurance or
13 maintenance of standards of care to refuse to provide copies of
14 documents which reflect the facility's evaluation of the quality
15 of care, except that the facility may remove information that
16 would allow identification of any resident. If the facility is
17 requested to provide any copies, a reasonable amount, as
18 established by departmental rule, may be charged.

19 6. Any long-term care facility, as defined in section
20 192.2300, which commits an unlawful practice under this section
21 shall be liable for damages in a civil action of up to one
22 thousand dollars for each violation, and attorney's fees and
23 costs incurred by a prevailing plaintiff, as allowed by the
24 circuit court.

25 407.025. 1. Any person who purchases or leases merchandise
26 primarily for personal, family or household purposes and thereby
27 suffers an ascertainable loss of money or property, real or
28 personal, as a result of the use or employment by another person

1 of a method, act or practice declared unlawful by section
2 407.020, may bring a private civil action in either the circuit
3 court of the county in which the seller or lessor resides or in
4 which the transaction complained of took place, to recover actual
5 damages. A person seeking to recover damages shall demonstrate
6 that he or she acted reasonably in light of all the
7 circumstances, prove that the method, act, or practice declared
8 unlawful by section 407.020 cause him or her to enter into the
9 transaction that resulted in his or her damages, and establish
10 individual damages with sufficiently definitive and objective
11 evidence to allow the loss to be calculated with a reasonable
12 degree of certainty. The damages shall be measured by the
13 person's out-of-pocket loss. The court may, in its discretion,
14 award punitive damages [and]. The court may, in its discretion,
15 award to the prevailing party attorney's fees, based on the
16 amount of time reasonably expended, and may provide such
17 equitable relief as it deems necessary or proper to protect the
18 prevailing party from the methods, acts, or practices declared
19 unlawful by section 407.020. No claim may be brought under this
20 section to recover damages for personal injury or death. A cause
21 of action under this section accrues on the date of the purchase
22 or lease described in the first sentence of this section.

23 2. Persons entitled to bring an action pursuant to
24 subsection 1 of this section may, if the unlawful method, act or
25 practice has caused similar injury to numerous other persons,
26 institute an action as representative or representatives of a
27 class against one or more defendants as representatives of a
28 class, and the petition shall allege such facts as will show that

1 these persons or the named defendants specifically named and
2 served with process have been fairly chosen and adequately and
3 fairly represent the whole class, to recover damages as provided
4 for in subsection 1 of this section. The plaintiff shall be
5 required to prove such allegations, unless all of the members of
6 the class have entered their appearance, and it shall not be
7 sufficient to prove such facts by the admission or admissions of
8 the defendants who have entered their appearance. In any action
9 brought pursuant to this section, the court may in its discretion
10 [order, in addition to damages, injunction or other equitable
11 relief and] enjoin the methods, acts, or practices declared
12 unlawful by section 407.020. The court may also determine a
13 proposed award of reasonable attorney's fees for the counsel to
14 the class. Attorney's fees, if awarded, shall bear a reasonable
15 relationship to the amount of the judgment.

16 3. An action may be maintained as a class action in a
17 manner consistent with Rule 23 of the Federal Rules of Civil
18 Procedure and Missouri rule of civil procedure 52.08 to the
19 extent such state rule is not inconsistent with the federal rule
20 if:

21 (1) The class is so numerous that joinder of all members is
22 impracticable;

23 (2) There are questions of law or fact common to the class;

24 (3) The claims or defenses of the representative parties
25 are typical of the claims or defenses of the class; and

26 (4) The representative parties will fairly and adequately
27 protect the interests of the class; and, in addition

28 (5) The prosecution of separate action by or against

1 individual members of the class would create a risk of:

2 (a) Inconsistent or varying adjudications with respect to
3 individual members of the class which would establish
4 incompatible standards of conduct for the party opposing the
5 class; or

6 (b) Adjudications with respect to individual members of the
7 class which would as a practical matter be dispositive of the
8 interests of the other members not parties to the adjudications
9 or substantially impair or impede their ability to protect their
10 interests; or

11 (6) The party opposing the class has acted or refused to
12 act on grounds generally applicable to the class, thereby making
13 appropriate final injunctive relief or corresponding declaratory
14 relief with respect to the class as a whole; or

15 (7) The court finds that the questions of law or fact
16 common to the members of the class predominate over any questions
17 affecting only individual members, and that a class action is
18 superior to other available methods for the fair and efficient
19 adjudication of the controversy. The matters pertinent to the
20 findings include:

21 (a) The interest of members of the class in individually
22 controlling the prosecution or defense of separate actions;

23 (b) The extent and nature of any litigation concerning the
24 controversy already commenced by or against members of the class;

25 (c) The desirability or undesirability of concentrating the
26 litigation of the claims in the particular forum;

27 (d) The difficulties likely to be encountered in the
28 management of a class action.

1 4. (1) As soon as practicable after the commencement of an
2 action brought as a class action, the court shall determine by
3 order whether it is to be so maintained. An order pursuant to
4 this subdivision may be conditional, and may be altered or
5 amended before the decision on the merits. An order permitting a
6 class action shall specify how the class claims and any issues
7 affecting only individual members, raised by the claims or
8 defenses asserted in the pleadings, will be tried in a
9 manageable, time efficient manner.

10 (2) In any class action maintained pursuant to subdivision
11 (7) of subsection 3 of this section, the court shall direct to
12 the members of the class the best notice practicable under the
13 circumstances, including individual notice to all members who can
14 be identified through reasonable effort. The notice shall advise
15 each member that:

16 (a) The court will exclude such member from the class if
17 such member so requests by a specified date;

18 (b) The judgment, whether favorable or not, will include
19 all members who do not request exclusion; and

20 (c) Any member who does request exclusion may, if such
21 member desires, enter an appearance through such member's
22 counsel.

23 (3) The judgment in an action maintained as a class action
24 pursuant to subdivision (5) of subsection 3 of this section or
25 subdivision (6) of subsection 3 of this section, whether or not
26 favorable to the class, shall include and describe those whom the
27 court finds to be members of the class. The judgment in an
28 action maintained as a class action pursuant to subdivision (7)

1 of subsection 3 of this section, whether or not favorable to the
2 class, shall include and specify or describe those to whom the
3 notice provided in subdivision (2) of this subsection was
4 directed, and who have requested exclusion, and whom the court
5 finds to be members of the class.

6 (4) When appropriate, in a case that otherwise meets the
7 class action requirements of subsection 3 of this section, an
8 action may be brought or maintained as a class action with
9 respect to particular issues, or a class may be divided into
10 subclasses and each subclass treated as a class, and the
11 provisions of this section shall then be construed and applied
12 accordingly.

13 5. In the conduct of actions to which this section applies,
14 the court may make appropriate orders:

15 (1) Determining the course of proceedings or prescribing
16 measures to prevent undue repetition or complication in the
17 presentation of evidence or argument;

18 (2) Requiring, for the protection of the members of the
19 class or otherwise for the fair conduct of the action, that
20 notice be given in such manner as the court may direct to some or
21 all of the members of any step in the action, or of the proposed
22 extent of the judgment, or of the opportunity of members to
23 signify whether they consider the representation fair and
24 adequate, to intervene and present claims or defenses, or
25 otherwise to come into the action;

26 (3) Imposing conditions on the representative parties or on
27 intervenors;

28 (4) Requiring that the pleadings be amended to eliminate

1 therefrom allegations as to representation of absent persons, and
2 that the action proceed accordingly;

3 (5) Dealing with similar procedural matters.

4 6. A class action shall not be dismissed or compromised
5 without the approval of the court, and notice of the proposed
6 dismissal or compromise shall be given to all members of the
7 class in such manner as the court directs.

8 7. Upon commencement of any action brought pursuant to
9 subsection 1 of this section, the plaintiff or plaintiffs shall
10 inform the clerk of the court in which such action is brought, on
11 forms to be provided by such clerk, that the action is brought
12 pursuant to this section. The clerk of the court shall forthwith
13 inform the attorney general of the commencement of such action,
14 together with a copy of the complaint or other initial pleading,
15 and, upon entry of any judgment or decree in the action, the
16 clerk shall mail a copy of such judgment or decree to the
17 attorney general.

18 8. Any permanent injunction, judgment or order of the court
19 made pursuant to section 407.100 shall be prima facie evidence in
20 an action brought pursuant to this section that the respondent
21 used or employed a method, act or practice declared unlawful by
22 section 407.020.

23 9. In order to recover damages in a class action that has
24 been certified under this section, each class member shall be
25 required to prove that his or her damages were proximately caused
26 by the method, act, or practice declared unlawful by section
27 407.020, and that the method, act, or practice caused the class
28 member to enter into the transaction that resulted in his or her

1 damages. The court shall not infer that damages proven to have
2 been suffered by one or more class members were suffered by all
3 class members.

4 10. In a class action that has been certified under this
5 section, prior to an entry of a judgment against a defendant, the
6 court shall require each member of the class claiming to be
7 entitled to monetary relief to submit a statement in a form
8 prescribed by the court requesting a specific dollar amount and
9 providing information regarding the nature of his or her loss,
10 injury, claim, or damages. No award of damages under this
11 section shall be made without objective proof that the person or
12 persons seeking damages suffered actual damages. No judgment
13 shall be entered until the trier of fact has determined the
14 amount of money, if any, owed to each member based upon his or
15 her individual proof. The amount of judgment shall not exceed
16 the sum of money owed to each class member. The judgment shall
17 identify each member of the class and his or her individual
18 monetary award.

19 407.027. The provisions of sections 407.012, 407.020, and
20 407.025 as enacted by this act shall only apply to causes of
21 action that accrue on or after the effective date of this act.

22 537.761. 1. In a products liability action in which a
23 plaintiff alleges a design defect, the burden is on the plaintiff
24 to prove by a preponderance of the evidence that:

25 (1) There was a safer alternative design; and

26 (2) The defect was a proximate and producing cause of the
27 personal injury, property damage, or death for which the
28 plaintiff seeks recovery.

1 2. As used in this section, "safer alternative design"
2 means a product design other than the one actually used that in
3 reasonable probability:

4 (1) Would have prevented or significantly reduced the risk
5 of the plaintiff's personal injury, property damage, or death
6 without substantially impairing the product's utility; and

7 (2) Was economically and technologically feasible at the
8 time the product left the control of the manufacturer or seller
9 by the application of existing or reasonably achievable
10 scientific knowledge.

11 537.762. 1. A defendant whose liability is based solely on
12 his status as a seller in the stream of commerce may be dismissed
13 from a products liability claim as provided in this section.

14 2. This section shall apply to any products liability claim
15 in which another defendant, including the manufacturer, is
16 properly before the court and from whom total recovery may be had
17 for plaintiff's claim.

18 3. A defendant may move for dismissal under this section
19 within the time for filing an answer or other responsive pleading
20 unless permitted by the court at a later time for good cause
21 shown. The motion shall be accompanied by an affidavit which
22 shall be made under oath and shall state that the defendant is
23 aware of no facts or circumstances upon which a verdict might be
24 reached against him, other than his status as a seller in the
25 stream of commerce.

26 4. The parties shall have sixty days in which to conduct
27 discovery on the issues raised in the motion and affidavit. The
28 court for good cause shown, may extend the time for discovery,

1 and may enter a protective order pursuant to the rules of civil
2 procedure regarding the scope of discovery on other issues.

3 5. Any party may move for a hearing on a motion to dismiss
4 under this section. If the requirements of subsections 2 and 3
5 of this section are met, and no party comes forward at such a
6 hearing with evidence of facts which would render the defendant
7 seeking dismissal under this section liable on some basis other
8 than his status as a seller in the stream of commerce, the court
9 shall dismiss without prejudice the claim as to that defendant.

10 6. [No order of dismissal under this section shall operate
11 to divest a court of venue or jurisdiction otherwise proper at
12 the time the action was commenced. A defendant dismissed
13 pursuant to this section shall be considered to remain a party to
14 such action only for such purposes.

15 7.] An order of dismissal under this section shall be
16 interlocutory until final disposition of plaintiff's claim by
17 settlement or judgment and may be set aside for good cause shown
18 at anytime prior to such disposition.

19 537.763. The provisions of sections 537.761 and 537.762 as
20 enacted by this act shall only apply to causes of action that
21 accrue on or after the effective date of this act.

22 Section B. If any provision of sections 407.012, 407.020,
23 407.025, 407.027, 537.761, 537.762, and 537.763 or the
24 application thereof to anyone or to any circumstance is held
25 invalid, the remainder of those sections and the application of
26 such provisions to others or other circumstances shall not be
27 affected thereby.