

SECOND REGULAR SESSION

SENATE BILL NO. 793

100TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR KOENIG.

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ADRIANE D. CROUSE, Secretary.

4117S.01I

AN ACT

To repeal sections 407.020 and 407.025, RSMo, and to enact in lieu thereof two 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:

Section A. Sections 407.020 and 407.025, RSMo, are repealed and two new
2 sections enacted in lieu thereof, to be known as sections 407.020 and 407.025, to
3 read as follows:

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

15 2. **In construing the provisions of subsection 1 of this section,**
16 **courts shall be guided by the policies of the Federal Trade Commission**
17 **and interpretations given by the Federal Trade Commission and the**
18 **federal courts to Section 5(a)(1) of the Federal Trade Commission Act,**

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

19 **15 U.S.C. Section 45(a)(1), as amended.**

20 **3.** Nothing contained in this section shall apply to:

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

26 (2) Any institution, company, or entity that is subject to chartering,
27 licensing, or regulation by the director of the department of commerce and
28 insurance under chapter 354 or chapters 374 to 385, the director of the division
29 of credit unions under chapter 370, or director of the division of finance under
30 chapters 361 to 369, or chapter 371, unless such directors specifically authorize
31 the attorney general to implement the powers of this chapter or such powers are
32 provided to either the attorney general or a private citizen by statute;

33 **(3) Any advertisement, merchandise, or transaction in which the**
34 **merchandise consists of a new residence in a transaction in which the**
35 **buyer is offered in the sale contract an express warranty by the builder**
36 **or through a third party warranty company paid for by the builder and**
37 **the sale contract contains substantially the following disclaimer in all**
38 **capital letters with characters of at least ten-point type: "THIS**
39 **CONTRACT, MERCHANDISE AND PROPERTY CONVEYED UNDER**
40 **THIS CONTRACT AND THE TRANSACTION BETWEEN THE SELLER**
41 **AND BUYER IS EXCLUDED FROM COVERAGE UNDER THE**
42 **MERCHANDISING PRACTICES ACT, SECTIONS 407.010 TO 407.130,**
43 **RSMo.". As used in this section, the term "residence" shall mean a**
44 **single-family house, duplex, triplex, quadraplex, or a unit in a multiunit**
45 **residential structure in which title to each individual unit is**
46 **transferred to the owner under a condominium or cooperative system**
47 **and shall include common areas and common elements as defined in**
48 **subdivision (4) of section 448.1-103; or**

49 **(4) Any action or transaction authorized under laws**
50 **administered by any regulatory body of this state or the United States.**

51 [3.] **4.** Any person who willfully and knowingly engages in any act, use,
52 employment or practice declared to be unlawful by this section with the intent to
53 defraud shall be guilty of a class E felony.

54 [4.] **5.** It shall be the duty of each prosecuting attorney and circuit

55 attorney in their respective jurisdictions to commence any criminal actions under
56 this section, and the attorney general shall have concurrent original jurisdiction
57 to commence such criminal actions throughout the state where such violations
58 have occurred.

59 [5.] 6. It shall be an unlawful practice for any long-term care facility, as
60 defined in section 192.2300, except a facility which is a residential care facility
61 or an assisted living facility, as defined in section 198.006, which makes, either
62 orally or in writing, representation to residents, prospective residents, their
63 families or representatives regarding the quality of care provided, or systems or
64 methods utilized for assurance or maintenance of standards of care to refuse to
65 provide copies of documents which reflect the facility's evaluation of the quality
66 of care, except that the facility may remove information that would allow
67 identification of any resident. If the facility is requested to provide any copies,
68 a reasonable amount, as established by departmental rule, may be charged.

69 [6.] 7. Any long-term care facility, as defined in section 192.2300, which
70 commits an unlawful practice under this section shall be liable for damages in a
71 civil action of up to one thousand dollars for each violation, and attorney's fees
72 and costs incurred by a prevailing plaintiff, as allowed by the circuit court.

407.025. 1. Any person who purchases or leases merchandise primarily
2 for personal, family or household purposes and thereby suffers an ascertainable
3 loss of money or property, real or personal, as a result of the use or employment
4 by another person of a method, act or practice declared unlawful by section
5 407.020, may bring a private civil action in either the circuit court of the county
6 in which the seller or lessor resides or in which the transaction complained of
7 took place, to recover actual damages. The court may, in its discretion, award
8 punitive damages and may award to the prevailing party attorney's fees, based
9 on the amount of time reasonably expended, and may provide such equitable
10 relief as it deems necessary or proper.

11 2. Persons entitled to bring an action pursuant to subsection 1 of this
12 section may, if the unlawful method, act or practice has caused similar injury to
13 numerous other persons, institute an action as representative or representatives
14 of a class against one or more defendants as representatives of a class, and the
15 petition shall allege such facts as will show that these persons or the named
16 defendants specifically named and served with process have been fairly chosen
17 and adequately and fairly represent the whole class, to recover damages as
18 provided for in subsection 1 of this section. The plaintiff shall be required to

19 prove such allegations, unless all of the members of the class have entered their
20 appearance, and it shall not be sufficient to prove such facts by the admission or
21 admissions of the defendants who have entered their appearance. In any action
22 brought pursuant to this section, the court may in its discretion order, in addition
23 to damages, injunction or other equitable relief and reasonable attorney's
24 fees. **Attorney's fees, if awarded, shall bear a reasonable relationship**
25 **to the amount of the judgment.**

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

30 (1) The class is so numerous that joinder of all members is impracticable;
31 (2) There are questions of law or fact common to the class;
32 (3) The claims or defenses of the representative parties are typical of the
33 claims or defenses of the class; and

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

36 (5) The prosecution of separate action by or against individual members
37 of the class would create a risk of:

38 (a) Inconsistent or varying adjudications with respect to individual
39 members of the class which would establish incompatible standards of conduct for
40 the party opposing the class; or

41 (b) Adjudications with respect to individual members of the class which
42 would as a practical matter be dispositive of the interests of the other members
43 not parties to the adjudications or substantially impair or impede their ability to
44 protect their interests; or

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

48 (7) The court finds that the questions of law or fact common to the
49 members of the class predominate over any questions affecting only individual
50 members, and that a class action is superior to other available methods for the
51 fair and efficient adjudication of the controversy. The matters pertinent to the
52 findings include:

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

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

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

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

61 4. (1) As soon as practicable after the commencement of an action brought
62 as a class action, the court shall determine by order whether it is to be so
63 maintained. An order pursuant to this subdivision may be conditional, and may
64 be altered or amended before the decision on the merits.

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

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

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

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

76 (3) The judgment in an action maintained as a class action pursuant to
77 subdivision (5) of subsection 3 of this section or subdivision (6) of subsection 3 of
78 this section, whether or not favorable to the class, shall include and describe
79 those whom the court finds to be members of the class. The judgment in an
80 action maintained as a class action pursuant to subdivision (7) of subsection 3 of
81 this section, whether or not favorable to the class, shall include and specify or
82 describe those to whom the notice provided in subdivision (2) of this subsection
83 was directed, and who have requested exclusion, and whom the court finds to be
84 members of the class.

85 (4) When appropriate an action may be brought or maintained as a class
86 action with respect to particular issues, or a class may be divided into subclasses
87 and each subclass treated as a class, and the provisions of this section shall then
88 be construed and applied accordingly.

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

91 (1) Determining the course of proceedings or prescribing measures to
92 prevent undue repetition or complication in the presentation of evidence or
93 argument;

94 (2) Requiring, for the protection of the members of the class or otherwise
95 for the fair conduct of the action, that notice be given in such manner as the court
96 may direct to some or all of the members of any step in the action, or of the
97 proposed extent of the judgment, or of the opportunity of members to signify
98 whether they consider the representation fair and adequate, to intervene and
99 present claims or defenses, or otherwise to come into the action;

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

101 (4) Requiring that the pleadings be amended to eliminate therefrom
102 allegations as to representation of absent persons, and that the action proceed
103 accordingly;

104 (5) Dealing with similar procedural matters.

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

108 7. Upon commencement of any action brought pursuant to subsection 1
109 of this section, the plaintiff or plaintiffs shall inform the clerk of the court in
110 which such action is brought, on forms to be provided by such clerk, that the
111 action is brought pursuant to this section. The clerk of the court shall forthwith
112 inform the attorney general of the commencement of such action, together with
113 a copy of the complaint or other initial pleading, and, upon entry of any judgment
114 or decree in the action, the clerk shall mail a copy of such judgment or decree to
115 the attorney general.

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

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