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The New MMPA Standard: One Step Forward or Two Steps Back?

*Jacob Adamson**

ABSTRACT

In the summer of 2020, Missouri legislators passed a law that drastically reduced consumer protections in Missouri.¹ SB-591 amended – and effectively gutted – the protections of the Missouri Merchandising Practices Act (MMPA). The MMPA was the primary method of relief for Missouri consumers who have fallen victim to fraudulent behavior. The freshly gutted MMPA has distinct parallels to the inadequacies of common law fraud. Wronged consumers now face higher burdens of proof, minimal awards, and an uphill battle to seek redress when they have been wronged. This article examines the law’s progression from inadequate remedies under common law fraud to the new version of Missouri’s consumer protection regime. Under the new version of Missouri’s consumer protection law, Missouri consumers now face similar inadequacies during a time when merchants are more sophisticated than ever. This article further speculates on the impacts SB-591 may have on both consumers and businesses.

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1. S.B. No. 591, 2020 Mo Legis. Serv. 26 (West) (codified as amended at MO. REV. STAT. § 407.020 (2020)).

I. INTRODUCTION TO CONSUMER PROTECTIONS

The most recent amendment to Missouri's consumer protection statute, the Missouri Merchandising Practices Act, is a regression to the limited protections of common law fraud.² The most recent amendment removes guarantees of redress stemming from punitive damages and a "broad" consumer protection statute.³ Consumers can now expect merchants to continue with the psychological manipulation that has been going on for decades.⁴ Consumers can expect some merchant behavior to go unchecked because their damages are not ascertainable.⁵ Even when consumers feel sufficiently deceived to bring suit, inadequate damage awards may render litigation a risky and unrewarding venture.⁶

A. History of Consumer Protections

Before the development of consumer protection in the 20th century, consumers could only bring actions against merchants through the tort deceit.⁷ This tort action eventually evolved to include breach of contract or warranties in the sale of goods.⁸ As merchants became increasingly sophisticated, common law fraud needed to adapt for consumers to achieve a successful action.⁹ Prior to the adoption of consumer protections, proving the elements necessary for relief under common law fraud presented hurdles for consumers.¹⁰ Furthermore, small damages awards hardly made the effort of bringing a claim worthwhile.¹¹ As a result of the need for increased consumer protections, states began enacting Consumer Protection Acts based on the Federal Trade Commission Act.¹²

B. From Common Law Origins to Modern Consumer Protection

Common law fraud traditionally governed transactions within the marketplace.¹³ Common law fraud rested on notions of "caveat emptor", or "buyer beware"

2. *See id.*

3. *See* James Copland & Rafael Mangual, *Keep reforming Missouri lawsuit abuse in 2018*, SPRINGFIELD NEWSLEADER, (Feb. 2, 2018 11:20 AM), <https://www.news-leader.com/story/opinion/readers/2018/02/02/keep-reforming-missouri-lawsuit-abuse-2018/1087167001/>.

4. *See* Philip A. Hart, *A Shield For The Shopper – Truth In Packaging Legislation Needed*, CONGRESSIONAL RECORD 12349, 12349 (July 10, 1963), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1963-pt9/pdf/GPO-CRECB-1963-pt9-12.pdf>.

5. *See Missouri Aims to Weed out Meritless Punitive Damage Claims and Reign in Consumer Protection Claims*, LATHROP GAGE (May 22, 2020), <https://www.lathropgpm.com/newsletter-72561.html>.

6. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, at 7 (2006).

7. *Id.* at 6.

8. *Id.*

9. *See id.* at 7.

10. *See id.*

11. *See id.* at 61; Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 374 (1990).

12. *See* Schwartz, *supra* note 6, at 3.

13. *See e.g.*, Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 337, 338 (1905); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1138 (1931).

and “ordinary care and attention,” in that buyers held a duty to inspect the quality of goods during transactions.¹⁴ Under the common law, the presumption was that buyers would only want to purchase goods from merchants who were honest and fair.¹⁵ Conversely, it was presumed that sellers would be motivated to be honest and fair in order to attract buyers.¹⁶ The remedy for fraud eventually developed, leading to contractual ideologies of fair dealing.¹⁷ If merchants could not be trusted to deal fairly on their own, “the law ought to exact of men at least common honesty in their dealings with each other”.¹⁸

When aggrieved consumers brought an action under common law fraud, they needed to prove nine elements:

(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker’s knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer’s ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequence and proximate injury.¹⁹

Common law fraud, and its remedy,²⁰ proved to be ineffective as merchants became increasingly sophisticated.²¹ Under the common law, consumers could not bring suit without having already suffered damages.²² In turn, consumers and attorneys could not combat misrepresentations unless they had already become a victim of such falsehoods.²³ Furthermore, the elements of the “merchant intending to deceive” and the consumer “justifiably relying on those deceptions” were “notoriously difficult and expensive” to prove.²⁴

The difficulties inherent with this approach demonstrated the common law was inadequate to combat the fraudulent behavior of modern merchants.²⁵ These difficulties led Congress to establish the Federal Trade Commission (“FTC”) in 1914.²⁶ The primary objective of the FTC was, initially, to combat antitrust violations.²⁷ The enactment of the FTC in 1914 did not grant governmental protection to consumers, nor did it grant a private right of action under the act.²⁸ At the time, some Members of Congress believed citizens who were deceived by merchants could successfully bring worthwhile actions under common law.²⁹ This was hardly the case, due to the nature of bringing an action and the relief available under the

14. See Hamilton, *supra* note 13; Joanna Shepard, *The Expanding Missouri Merchandising Practices Act*, ATR FOUNDATION 3, http://www.judicialhellholes.org/wp-content/uploads/2017/02/103114_MMPAreport.pdf; *McAdams v. Cates*, 24 Mo. 223, 225 (Mo. 1857).

15. See Shepard, *supra* note 14.

16. *Id.*

17. *McAdams*, 24 Mo. at 226.

18. *Id.*

19. See *e.g.* *Black v. Rite Mortgage and Financial, Inc.*, 239 S.W.3d 165, 169 (Mo. Ct. App. E.D. 2007); *Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 537 (Mo. Ct. App. E.D. 2011).

20. See Schwartz, *supra* note 6, at 7.

21. See Shepard, *supra* note 14.

22. See *id.* at 6.

23. See Schwartz, *supra* note 6, at 6.

24. *Id.*

25. *Id.* at 7.

26. *Id.*

27. *Id.*; Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 720-721 (1914) (codified as amended at 15 U.S.C. § 41 (1914)).

28. See Schwartz, *supra* note 6, at 13.

29. *Id.* at 14.

common law.³⁰ Congress granted the FTC consumer protection powers in 1938.³¹ Congress, however, did not grant a private right of action to consumers under the act which created the FTC.³² As a result, states began enacting their own consumer protection laws.³³

C. State Consumer Protection

Upon suggestions by the FTC, many states began enacting consumer protection acts in the 1960's and 1970's.³⁴ Despite variance in state law, the thrust of these consumer protection laws was to counter unfair or deceptive merchant practices.³⁵ Most state consumer protection laws gave consumers a right to bring lawsuits without exhausting administrative remedies.³⁶ State consumer protection laws varied as to the elements of proof necessary to bring an action as well as the prohibited acts.³⁷

Most states did not require proof of reliance as an element.³⁸ Some of these states required that the reliance be reasonable or justifiable.³⁹ Other states followed a standard mirroring the FTC Act: "whether the act has the tendency or capacity to mislead consumers, regardless of whether the plaintiff actually and reasonably relied on the misrepresentation."⁴⁰

In recent years, states have broadened or restricted consumer protections.⁴¹ In 2018, Maryland amended its consumer protection statute to include more claims under the purview of consumer protection.⁴² The statute now prohibits "unfair, *abusive*, or deceptive trade practices."⁴³ Conversely, Arkansas has restricted consumers' ability to bring an action.⁴⁴ The prior Arkansas statute allowed consumers to bring an action for suffering actual damage or injury as a result of the consumer protection statute.⁴⁵ The amended statute requires claimants to suffer "an actual financial loss as a result of his or reliance on the use of a practice declared unlawful."⁴⁶ The claimant's recovery is limited to "his or her actual financial loss proximately caused by the offense or violation."⁴⁷ As a result, Arkansas consumers can

30. *See id.* at 13.

31. *Id.* at 8.

32. *Id.* at 14-15.

33. *Id.* at 15.

34. *Id.*

35. *See id.*

36. *See generally id.* at 16 (granting a private right of action meant consumers no longer had to rely on administrative remedies).

37. *Id.* at 17.

38. *Id.*

39. *Id.* at 18.

40. *Id.* at 19.

41. *See* Allen Denson & Latif Zaman, *State's Divergent Approaches to Unfair, Deceptive, and Abusive Acts and Practices Reveal Consumer Protection Priorities*, AMERICAN BAR ASSOCIATION (Aug. 22, 2019) https://www.americanbar.org/groups/business_law/publications/blt/2019/09/abusive-acts/.

42. *Id.*

43. *Id.* (emphasis added).

44. *Id.*

45. *Id.*

46. *Id.* (indicating an actual financial loss as a result of his or reliance on the use of a practice declared unlawful).

47. *Id.*

only bring an action when they suffer “financial losses,” and a consumer’s damages must stem from “reliance” on the unlawful practice.⁴⁸

The rationale behind some states’ initial departure from common law fraud may also explain Arkansas’s amended statute. Arkansas consumers can no longer be proactive in holding businesses accountable prior to loss. Instead, they are only able to bring an action after suffering such loss.⁴⁹ Issues may stem from the reactive nature of the statute, in that consumers may be reluctant to bring an action when they have suffered minimal monetary damages.⁵⁰

Some states allow statutory remedies when a consumer’s damages are insufficient to justify bringing an action, taking into account expenses such as attorney’s fees.⁵¹ Again, there is variance between states.⁵² States vary in the available remedies, in that some states may allow for emotional distress damages, double damages, treble damages, increased awards, attorney’s fees or punitive damages.⁵³ An award for attorney’s fees serves as a prominent method states use to curtail bad business practices.⁵⁴ Awarding attorney’s fees grants clearly wronged consumers an opportunity to bring their case, even when they suffer minimal damages.⁵⁵ Although awarding attorney’s fees in the statute would encourage consumers to bring claims when they are clearly wronged, if the suit is not accompanied by other sufficient damages, then many consumers would be reluctant to file suit when the damages are nominal. Attorney’s fees are one method to punish bad actors, yet without more incentive for the consumer to bring suit, merchants are not fully discouraged from acting in bad faith.⁵⁶

An alternative solution for aggrieved consumers with minimal losses is a class action lawsuit. The ability to bring a class action lawsuit under state consumer protection statutes differs from state to state.⁵⁷ Plaintiffs may prefer a class action lawsuit because it may show the court that a significant number of people were harmed by the action, while also allowing for plaintiffs to split attorney’s fees.⁵⁸ Some states prohibit class actions under their consumer protection statute while others remain silent on the issue.⁵⁹ Of the states that do allow class actions, some limit the amount a plaintiff can recover.⁶⁰

D. “Abuse” Of Consumer Protection Acts

There is no doubt that as consumer protections have increased, litigation on the subject has also increased.⁶¹ This spike in litigation has caused legislators to

48. See *infra* part II (actual financial losses are often difficult to ascertain due to the nature of consumerism).

49. Denson, *supra* note 41.

50. See Schwartz, *supra* note 6, at 13.

51. See *id.* at 26.

52. *Id.*

53. *Id.* 22-25

54. *Id.* at 26.

55. *Id.*

56. See Shepard, *supra* note 14, at 8.

57. Schwartz, *supra* note 6, at 28-29.

58. See Shepard, *supra* note 14, at 8.

59. Schwartz, *supra* note 6, at 29.

60. *Id.*

61. See Shepard, *supra* note 14, at 13.

question whether consumer protections actually cause more harm than good.⁶² “Frivolous” consumer protection litigation has been a topic of discussion for years.⁶³ Opponents of consumer protection argue that an increase in state consumer litigation leads to increased consumer costs as businesses raise prices on products to cover these increased litigation costs.⁶⁴ However, these theories are based on the speculative complexities of consumer pricing.⁶⁵ Similarly, the social value of consumer protection statutes is in controversy due to the speculative nature of the benefits derived from these statutes.⁶⁶ The concepts of consumer pricing and social values are often quite complicated and cannot be firmly established.⁶⁷ Basic theories of economics tend to state that supply and demand govern consumer pricing.⁶⁸ Ultimately, the complexities governing corporate pricing clearly incorporate a wide variety of factors into establishing the cost of products, with litigation being one of those considerations.⁶⁹

Missouri has recently seen notorious class action lawsuits under the state’s consumer protection act.⁷⁰ The American Tort Reform Society has dubbed Missouri as a “Judicial Hellhole,” and commentators have called Missouri the “Sue Me State.”⁷¹ More than 60% of the class actions against Johnson & Johnson alleging cancer-causing baby powder were filed in Missouri.⁷² This illustrates how varied consumer protection laws lead to forum shopping. A 2017 survey of corporate executives and their attorneys ranked Missouri as one of the highest liability litigation states.⁷³ This is purported to make it difficult for corporations to justify expanding operations and creating jobs within the state.⁷⁴

The extent of consumer litigation has reached astonishing levels. A 2009 study found that the number of state consumer protection judicial decisions rose 119% from 2000 to 2007.⁷⁵ In terms of all cases filed, consumer litigation substantially exceeded all other categories of actions.⁷⁶ Missouri, the “Sue Me State,” saw a 678% increase in judicial decisions from 2000 to 2009 under the Merchandising Practices Act.⁷⁷ Missouri saw the fourth-highest growth in consumer protection lawsuits from 2000 to 2009.⁷⁸ This number, however, does not tell the entire story.

62. See Schwartz, *supra* note 6, at 33; Stefon David, *Can I Sue for That*, BUS., ENTREPRENEURSHIP, & TAX L. REV., <https://mulaw.missouri.edu/betr/2019/04/12/can-sue-overstretched-missouri-merchandising-practices-act/> (last visited April 17, 2021); Shepard, *supra* note 14, at 15-16.

63. Copland, *supra* note 3.

64. See *generally id.* (indicating that lax evidentiary standards have led to increased class actions lawsuits in Missouri).

65. See *generally* Bill Merrilees & Nigel Cotman, *An Economic Analysis of Consumer Protection Law*, 48-1 AUSTRALIAN Q. 79, 82-83 (1976) (explaining several models used to determine loss); E. Glen Weyl, *What Is “Price Theory”?*, MARGINAL REVOLUTION (July 29, 2015 7:38 AM) <https://marginalrevolution.com/marginalrevolution/2015/07/what-is-price-theory.htm> (describing the complexities in properly defining price theory).

66. See Shepard, *supra* note 14, at 27.

67. See *id.*

68. See Weyl, *supra* note 65.

69. See *id.*

70. Copland, *supra* note 3.

71. *Id.*

72. *Id.*

73. *Id.*

74. See *id.*

75. See Shepard, *supra* note 14, at 13.

76. *Id.*

77. *Id.*

78. *Id.*

Because these are judicial decisions, the above data do not fully represent cases which are filed or settled.⁷⁹

Some consumer protection litigation is likely frivolous.⁸⁰ Examples include lawsuits over a box of candy.⁸¹ While it is not likely congress's intention to protect consumers on every aspect of a transaction, the basic concepts behind the consumer protection lawsuits shed light onto a myriad of deceitful and confusing tactics employed by merchants. One can probably imagine this news headline: "Jury awards \$50,000 in damages for half box of candy." These "shock headlines" beget outrage and draw attention to matters that some consumers may consider frivolous.⁸² Excessive outrage leads to nationwide opinions on our judicial system that may not necessarily be conceptually sound.⁸³ For example, a 2016 study conducted by the Wall Street Journal found that 87% of voters believed there were "too many lawsuits filed in America."⁸⁴ These negative impressions tend to paint a picture that there are too many frivolous lawsuits and unsound jury awards,⁸⁵ thereby causing consumer prices to increase. The underlying merchant tactics leading to the allegations can shed light on truly deceitful practices that can affect consumers.⁸⁶

For example, an allegation of deceit over a half full box of candy seems facially frivolous. Consumers likely wonder why they should care about minor consumer complaints when there are more pressing concerns to society. However, the merchant tactics underlying the allegations certainly raise concerns. A 1963 Congressional Record highlights a number of these concerns in a historical context.⁸⁷ It is evident that congress has historically sought to protect consumers from corporate deceit through the use of statutes as a "shield."⁸⁸ These statutes are considered a shield because they protect innocent consumers from deceitful merchants.⁸⁹ Consumers want to know what they are buying. They want the packaging representing the product to be truthful and accurate.⁹⁰ The half-box of candy lawsuit brought attention to the controversial merchant practice of under-packaging, otherwise known as "slack-filling."⁹¹ It makes sense that a corporation seeking to increase profits would do so by simply decreasing the amount of product quantity per

79. See generally Kirsten B. Mitchell & Susan Burgess, *Disappearing Dockets*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, (2006), <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2006/disappearing-dockets/> (explaining that some lawsuits and prosecutions appear off the record or sometimes sealed to the point one would not know they exist).

80. See David, *supra* note 62.

81. See *id.*

82. See *Exaggerated headline shock*, 4 *Nature Microbiology* 377, 377 (2019), <https://www.nature.com/articles/s41564-019-0408-7.pdf>.

83. See Copland, *supra* note 3.

84. Jay Feinman, *Five myths about lawsuits*, WASH. POST (July 23, 2020 9:05 AM), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-law-suits/2020/07/23/8006d532-c169-11ea-b4f6-cb39cd8940fb_story.html.

85. *Id.*

86. See generally Schwartz, *supra* note 6, at 3 (explaining how some business sometimes engage in deceitful practices).

87. See Hart, *supra* note 4.

88. *Id.* at 12349-50.

89. *Id.*

90. See *id.*

91. See generally *What is Slack Fill?*, WINSTON & STRAWN, <https://www.winston.com/en/legal-glossary/slack-fill.html> (last visited April 18, 2021) (explaining what slack fill is and how laws attempt to regulate it).

package over time.⁹² In conjunction, a business may increase or modify the packaging to appear as though the quantity of product has not changed or possibly even increased. Such actions could be deemed a deceitful practice because the intent underlying the actions is to create appearances that are not true,⁹³ and the practice leads to consumers feeling cheated or deceived.⁹⁴ Under the new Missouri consumer protection scheme, the merchant in this example would be able to point the finger at the consumer and blame them for being deceived.⁹⁵

II. THE DEVELOPMENT OF THE MISSOURI MERCHANDISING PRACTICES ACT

In 1967, Missouri enacted its consumer protection statute, the Merchandising Practices Act.⁹⁶ Before this enactment, Missouri, like many states, suffered from the pitfalls of common law fraud. Inadequate damages coupled with a high burden of proof meant many claims were not worth bringing.⁹⁷ The original 1967 Merchandising Practices Act was fourteen sections, and was a broad prohibition constricting business acts:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely on such concealment, suppression or omission in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice.⁹⁸

The 1967 enactment was limited to the Attorney General filing actions on behalf of consumers.⁹⁹ The Attorney General was empowered to file injunctions, seek restitution, and recover attorney's fees.¹⁰⁰ In 1973, consumers were granted a private right of action.¹⁰¹ The 1973 amendment granted consumers the ability to bring a class action, sue for punitive damages, and even recover attorney's fees.¹⁰² In 1985, the Missouri Merchandising Practices Act was further amended.¹⁰³ The most significant aspect of the 1985 amendment is that consumers can now bring suit against out-of-state businesses conducting commerce in the state of Missouri.¹⁰⁴ Additionally, on top of litigation costs, opposing attorney's fees, and punitive damages, businesses are now faced with a new threat of punishment: felony charges for willful violation of the 1985 Merchandising Practices Act.¹⁰⁵ The deterrent effect

92. See Pierre Chandon, *Research: Customers Notice When Products Shrink More than When They Get Bigger*, HARVARD BUSINESS REVIEW (March 7, 2017), <https://hbr.org/2017/03/research-customers-notice-when-products-shrink-more-than-when-they-get-bigger>.

93. *Id.*; Cynthia Owens, *Supersizing and downsizing: the impact of changing packaging and portion sizes on food consumption*, INSEAD KNOWLEDGE (Sep. 28, 2008), <https://knowledge.insead.edu/business-finance/marketing/the-impact-of-changing-packaging-and-portion-sizes-1884>.

94. *Id.*

95. See *infra* note 123.

96. Shepard, *supra* note 14, at 9.

97. *Id.*

98. *Id.* at 10.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*; see also MO. REV. STAT. § 407.020 (2020).

104. Shepard, *supra* note 14, at 11.

105. *Id.*

of these remedies was enhanced as class action punitive damage awards proved an attractive incentive for plaintiff's attorneys.¹⁰⁶

The 1985 amendment signified a dramatic change for consumers and attorneys in Missouri.¹⁰⁷ The amendment has been cited as the point at which “the scales tipped,” and consumers were “excessively encouraged” to seek litigation.¹⁰⁸ There are several reasons for this.¹⁰⁹ Plaintiffs did not have to show reasonableness nor reliance when they brought an action.¹¹⁰ A reasonableness inquiry into the plaintiff's suit would require the plaintiff to demonstrate they acted reasonably under the circumstances which lead to the litigation.¹¹¹ The surge in litigation is also attributed to the fact that the 1985 amendment did not have a reliance requirement,¹¹² which would require that the consumer actually relied on the representation.¹¹³ A plaintiff must have actually fallen for the deceit before bringing an action.¹¹⁴ Essentially, the lack of a reliance requirement in the 1985 amendment meant consumers could be proactive in bringing suits against deceitful business actors.¹¹⁵ Consumers were able to craft consumer protections through the courts,¹¹⁶ and doctrines evolved from concepts of caveat emptor to those of encouraging businesses to act in accordance with the expectations of modern consumers.¹¹⁷

The newest addition to the MMPA came in 2020. The new MMPA makes it more difficult to certify class members and makes it more difficult to recover all attorney's fees expended on the action.¹¹⁸ Before the new amendment, a plaintiff bringing an action under the MMPA was required to show they: (1) purchased merchandise or services from the defendants; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the MMPA.¹¹⁹ The newest amendment requires additional showings of: (1) reasonableness in “light of all circumstances”; (2) actual reliance; and (3) proof of actual ascertainable damages.¹²⁰ Plaintiffs must also now seek a leave of court to file for punitive damages and meet a higher standard for those punitive damages.¹²¹

106. *Id.* at 12.

107. *Id.*

108. *Id.*

109. *Id.* at 18.

110. *Id.* at 12.

111. FEDERAL TRADE COMMISSION, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, (Oct. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [hereinafter *Brief Overview of the FTC*].

112. See Shepard, *supra* note 14, at 11.

113. See *Brief Overview of the FTC*, *supra* note 110.

114. See *id.*

115. See Shepard, *supra* note 14, at 11.

116. See Schoenlein v. Routh Homes, Inc., 260 S.W.3d 852 (Mo. App. E.D. 2008); Raster v. Ameristar Casinos, Inc., 280 S.W.3d 120 (Mo. App. E.D. 2009)

117. See *infra* note 151.

118. See Shepard, *supra* note 14, at 19.

119. Edmonds v. Hough, 344 S.W.3d 219, 223 (Mo. App. E.D. 2011).

120. See *Missouri Aims to Weed out Meritless Punitive Damage Claims and Reign in Consumer Protection Claims*, LATHROP GPM (May 22, 2020), <https://www.lathropgpm.com/newsletter-72561.html>.

121. *Id.*

III. NEW AMENDMENT & NEW EFFECTS – IMPLICATIONS FOR CONSUMERS

The 2020 amendment set forth modifications and requirements to the old Missouri Merchandising Practices Act standard.¹²² The first requirement this article will address is the reasonableness standard. This article will then discuss the new proof of damages requirement. Finally, the article will address punitive damages under the MMPA. Throughout each of these requirements, this article will also discuss the implications businesses and consumers can expect as a result of the amendment.

The new MMPA includes a reasonableness requirement.¹²³ A plaintiff now needs to show that, as a consumer, they acted reasonably under the circumstances in their reliance during the transaction.¹²⁴ This requirement is a plain attempt to thwart frivolous litigation.¹²⁵ Essentially, even if a practice is unfair or fraudulent under the MMPA, it does not matter unless a reasonable consumer could show they were victimized by the unfair or fraudulent activity.¹²⁶ Unfortunately, this heightened requirement specifically affects the most vulnerable Missouri consumers,¹²⁷ including the elderly, the uneducated, people with poor mental health, and the trusting or impulsive.¹²⁸ Consumers who fall into these categories are more likely to fall victim to misconception and deceit.¹²⁹ As a result of the amendment, the merchants who employ deceitful conduct, by scamming, lying, or general cheating can escape liability by pointing the finger at the deceived consumer.¹³⁰ A fraudster would only need to show that a reasonable consumer in such a position would not have relied on their statements or reasonably construed the statements or actions as being literal.¹³¹ This opens the door for fraudsters to continue doing what they do best, commit fraud, all while placing the blame on the consumer for believing what they are told.¹³²

The next issue presented by the new MMPA is heightened proof of damages.¹³³ Consumers must now establish sufficient, definitive, and objective evidence which

122. S.B. No. 591, 2020 Mo Legis. Serv. 26 (West) (codified as amended at MO. REV. STAT. § 407.020 (2020)).

123. Steven Ahillen, *Changes to the Missouri Merchandising Practices Act and Claims for Punitive Damages*, BEYOND THE FINE PRINT (Sep. 9, 2020), <https://beyondthefineprint.com/2020/09/changes-to-the-missouri-merchandising-practices-act-and-claims-for-punitive-damages/>.

124. *Id.*

125. *See generally* Shepard, *supra* note 14, at 18-19 (explaining that such requirements will reduce unnecessary litigation).

126. *See id.*

127. *Analysis of Mo. S.B. No. 591*, NATIONAL CONSUMER LAW CENTER (Mar. 11, 2020), <http://protect-missouriconsumers.com/wp-content/uploads/2017/01/NCLC-analysis-of-MO-SB-591-3-11-20.pdf> [hereinafter *Analysis of Mo. S.B. No. 591*].

128. *See id.*

129. Ted Ruffiman, et al., *Age-related differences in Deception*, 27(3) *Psychol. & Aging* 543, 543 (2012); *see also Analysis of Mo. S.B. No. 591, supra* note 126; David Brancaccio *Age of fraud: Are seniors more vulnerable to financial scams?*, MARKETPLACE (May 16, 2019), <https://www.marketplace.org/2019/05/16/brains-losses-aging-fraud-financial-scams-seniors/>.

130. *See generally* Brancaccio, *supra* note 128 (explaining the vulnerabilities of the elderly).

131. *See* Ahillen, *supra* note 122.

132. *See generally* Brancaccio, *supra* note 128 (providing an example of a situation where an elderly woman was taken advantage of).

133. Erwin O. Switzer & Ronnie L. White II, *Missouri Legislature Makes Major Changes to State's Consumer Protection Statute*, GREENSFELDER (June 25, 2020), <https://www.greensfelder.com/newsroom-publications-Missouri-legislature-makes-major-changes.html>.

allows damages to be calculated with a reasonable degree of certainty,¹³⁴ which ideally would produce a fair estimation of the consumer's harm.¹³⁵ The effect of this provision is to reduce frivolous suits.¹³⁶ Proving the value of a consumers' expectation versus what they receive, however, is difficult.

Above, the article discusses a "box of candy" lawsuit and how it seems, on its face, to be a frivolous suit.¹³⁷ One can look at consumers who fell for the "slack-filled" candy box and question what damages they could have suffered.¹³⁸ It is easy to downplay the significance of an insufficiently filled candy box, but this is a practice that extends to many realms of consumer transactions. It is common practice to purposefully deceive and convince millions of consumers to act according to impulse based on what they see.¹³⁹ Consumer psychology is not a new concept and is quite evolved.¹⁴⁰ It is well established that consumers make purchasing decisions quickly.¹⁴¹ In as little as one-third of a second, a consumer will decide what to buy based on what is advertised to them.¹⁴² There is a fine line between what we as consumers are shown, and what really lies behind the packaging. Clearly, we as consumers want companies to be truthful with the products they advertise and sell to us.¹⁴³ However, companies employing psychological tactics can make it difficult for a consumer to ascertain the truth while making efficient consumption choices.¹⁴⁴ Requiring a consumer to read every letter of fine print is impractical, and it should not be the only way a consumer can act reasonably.

The last major change to the MMPA in the 2020 amendment was an alteration to pleading punitive damages.¹⁴⁵ It is not only a change that affects the MMPA, but all lawsuits filed in Missouri.¹⁴⁶ Prior to the amendment, a plaintiff could file for punitive damages within their petition.¹⁴⁷ Now, plaintiffs must move for leave of the court, and make a special request for punitive damages.¹⁴⁸ The punitive damages pleading standard has been further heightened to punish only those actors demonstrating a nefarious intent by clear and convincing evidence.¹⁴⁹ Before the amendment, a plaintiff needed to show punitive damages were appropriate by a preponderance of the evidence, the typical standard for civil cases.¹⁵⁰ Further, before the

134. *Id.*

135. See Ahillen, *supra* note 122.

136. See generally Shepard, *supra* note 14, at 18-19 (explaining that such requirements will reduce unnecessary litigation).

137. See *supra* Section I(D).

138. David, *supra* note 62.

139. See generally Dorie Clark, *Cracking the Code of Consumer Psychology*, FORBES (Aug. 20, 2013), <https://www.forbes.com/sites/dorieclark/2013/08/20/cracking-the-code-of-consumer-psychology/?sh=41b7663152f8> (explaining some of the mechanics behind consumer psychology).

140. *Id.*

141. Milosavljevic, Koch, & Rangel, *Consumers can make decisions in as little as a third of a second*, 6(6) JUDGMENT AND DECISION MAKING 520, 520 (2011).

142. *Id.*

143. See Nicole Audrey, *Consumers Prefer 'Honest' Brands – And Are Willing to Pay Extra for Them*, NBC NEWS (Sep. 8, 2016 12:06 PM), <https://www.nbcnews.com/business/consumer/consumers-prefer-honest-brands-are-willing-pay-extra-them-n644916>.

144. See Clark, *supra* note 138.

145. Ahillen, *supra* note 122.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See *id.*

amendment, a plaintiff only needed to show recklessness on behalf of the merchant to qualify for punitive damages.¹⁵¹ Now, a plaintiff must show the defendant *intentionally* harmed the plaintiff or did so with a “deliberate and flagrant disregard” for the safety of others.¹⁵²

Punitive damages play a significant role in the judicial system.¹⁵³ As compensating an aggrieved party for economic harm is difficult to conceptualize, punitive damages play an important role in punishing bad actors for offensive conduct while still providing some form of relief to the injured party.¹⁵⁴ Punitive damages also deter similar action by others.¹⁵⁵

While consumers may be offended that merchants use human psychology to manipulate them into making choices based on unconscious factors, it is difficult to value their harm when they receive less than expected in a transaction. This is where punitive damages play a special role. Punitive damages allow for some economic reprieve when the compensatory damages are zero or difficult to value.¹⁵⁶ The purposes of punitive damages can be analogized to the foundational reasoning behind consumer protection acts: protecting aggrieved consumers from malicious and deceitful acts of merchants.¹⁵⁷ Like punitive damages, they were introduced because the damages stemming from common law were often inadequate to make a lawsuit worthwhile.¹⁵⁸

A. *New MMPA v. Old MMPA: It's A Match!*

Improvements to law can be followed by setbacks. This section is dedicated to the foundational concepts of common law fraud and state consumer protection in comparison with the most recent MMPA amendment.

Common law fraud rested on notions of *caveat emptor*, or “let the buyer beware.”¹⁵⁹ As the concept evolved, courts sought to restrict merchants who were unfair in dealings with consumers.¹⁶⁰ The common law was not without deficiencies. Consumers could not bring suit until they had suffered damages.¹⁶¹ This effectively meant that proactive consumers could not prevent merchants from harming less sophisticated consumers.¹⁶² Additionally, inadequate damages coupled with the fact that merchant deception was “notoriously difficult and expensive to prove” during a time of increasing merchant sophistication meant aggrieved consumers suffered harms without reprieve.¹⁶³

151. *See id.*

152. *See id.*

153. *See id.*

154. Daniel Liberto, *Punitive Damages*, INVESTOPEDIA (Jan. 7, 2019), <https://www.investopedia.com/terms/p/punitive-damages.asp>.

155. Dan Markel, *How Should Punitive Damages Work?* 157 U. PA. L. REV. 1383, 1404 (2009).

156. Liberto, *supra* note 154.

157. *See supra* Part I § C.

158. *See supra* Part I.

159. *See e.g.* Bohlen, *supra* note 13; Hamilton, *supra* note 13, Shepard, *supra* note 14, at 13.

160. *See* McAdams v. Cates, 24 Mo. 223, 226 (Mo. 1857).

161. *See* Schwartz, *supra* note 6, at 6.

162. *See id.*

163. *Id.*

State consumer protections developed to address the inadequacies of common law fraud,¹⁶⁴ providing an efficient platform for bringing lawsuits.¹⁶⁵ Consumers could be proactive to keep merchants in check because inadequate damages no longer dissuaded consumers.¹⁶⁶ If consumers were confident that a merchant was acting in violation of consumer protections, they could confidently bring suit and expect it to thwart bad merchants.¹⁶⁷

In 1963, legislators recognized a need for packaging that “fairly represents the product inside.”¹⁶⁸ Even then, new marketing methods were being “spawned daily” that made consumers “increasingly vulnerable” due to “an army of motivational researchers and promotion specialists... prepared to [deliver] misleading information and clever deceptions.”¹⁶⁹ It was apparent in 1963 that “boxes partly filled with air, and odd-shaped containers holding less than they appear to” was a dishonest and undesirable merchandising practice.¹⁷⁰ Fears that broad consumer protection would lead to frivolous litigation are still present today,¹⁷¹ keeping businesses on edge.¹⁷²

The 2020 MMPA amendment is a step back in time to common law fraud and fails to adequately protect consumers from merchants. Consumers and legislators alike are fearful of deceitful tactics used by merchants.¹⁷³ Despite these concerns, the 2020 MMPA amendment represents a step toward removing the “shield” that consumers have used for the last quarter century.¹⁷⁴ The most vulnerable consumers, including the elderly and unsophisticated, are now being exposed to the same psychological games that have been employed by merchants for decades.¹⁷⁵

IV. CONCLUSION

No longer can Missouri consumers be proactive in their pursuit of merchant honesty. Instead, we have reverted to the same issues faced by common law fraud. Before bringing suit, a consumer must be “reasonably and ascertainably” damaged, after having “reasonably” depended on what a merchant purported to sell. Today’s Missouri consumer needs to be more cautious than ever. If a consumer is deceived, they cannot reasonably expect their litigation to be a worthwhile venture. Today’s Missouri consumers will continue to suffer from the deceitful practices employed by sophisticated merchants until legislation is amended. Vladimir Lenin once said, “It is necessary sometimes to take one step backward to take two steps forward.” One can only hope this significant step backward will reveal the effects that stem from inadequate consumer protection, and, in turn, lead to legislation which furthers both the interests of the unsophisticated consumer and honest businesses.

164. *Id.* at 8.

165. *See id.* at 17-19.

166. *See id.* at 6.

167. *See supra* Part II.

168. *See Hart, supra* note 4, at 12349-50.

169. *Id.*

170. *Id.*

171. *See id.*

172. *See id.*

173. *See Ahillen, supra* note 122.

174. *See id.*

175. *Analysis of Mo. S.B. No. 591, supra* note 126.