

Winter 2010

Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit, The

Michael B. Barnett

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Michael B. Barnett, *Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit, The*, 75 Mo. L. REV. (2010)

Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss1/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit

I. INTRODUCTION

If the plaintiffs' bar were considered an industry, with annual revenue of almost \$40 billion, it would be twice the size of Coca-Cola and 50% larger than either Intel or Microsoft.¹ The large revenue has contributed to ever-higher tort litigation costs, especially for corporations. As a whole, costs resulting from tort litigation in the United States exceed \$250 billion a year;² tort claims against corporations account for \$161 billion of those costs.³ Though many of these cases have merit, many commentators suspect rampant abuse in the system. Specific to consumer fraud claims, Professor Scheuerman has noted that many consumer fraud class actions provide negligible relief to the plaintiff class.⁴ For instance, in one case plaintiffs were awarded coupons for free bottled water as a result of a finding that they were deceived in that the water they purchased was not "spring water" as it was advertised.⁵ As relief, the plaintiffs received coupons for something they alleged they did

1. Found. for Fair Civil Justice, The FFCJ Legal Reform Speaker's Resource: A Comprehensive Collection of Facts and Insights Related to Legal Reform ch. 5, p. 1 (2009), <http://www.legalreforminthenews.com> (follow "Speakers Resource" hyperlink; then follow "Chapter 5: The Plaintiffs' Bar" hyperlink). This number comes from an underlying assumption that 19% of tort costs are revenue for the plaintiffs' bar. *Id.* at ch. 3, p. 1 chart "How Tort Costs Are Spent" (follow "Speakers Resource" hyperlink; then follow "Chapter 3: Lawsuit Abuse Costs") (quoting Richard H. Nicolaides, Jr., U.S. Tort Reform and the Implications on Insurance Risks Within the U.S. Market, Presentation to the Non-Life Insurance Institute, The General Insurance Association of Japan in Tokyo, Japan 5 (July 15, 2004) (transcript available at <http://www.legalreforminthenews.com/Reports/Nicolaides%20Insurance%20Risks%2007-2004.pdf>)).

2. TOWERS PERRIN, 2008 UPDATE ON U.S. TORT COST TRENDS 5-8, *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2008/200811/2008_tort_costs_trends.pdf. (This figure includes three components: benefits paid or expected to be paid to third parties, defense costs, and administrative expenses.).

3. *Id.* at 7 tbl.4.

4. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reigning in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 9-10 (2006).

5. *Id.* at 9.

not want in the first place. The attorneys, on the other hand, received \$1.35 million under the settlement agreement.⁶

Many scholars have argued more generally that the class-action system in the United States is broken and allows rampant abuse.⁷ One of the concerns raised in commentary is the belief that “the class action was never designed to serve as a free-standing legal device for the purpose of ‘doing justice,’ nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.”⁸ Essentially, critics argue the class action mechanism often results in “[u]nwarranted [l]itigation” and “[j]udicial [b]lackmail,” influences litigation outcomes, and allows plaintiffs’ counsel to receive extraordinary benefits while the class members receive little.⁹ Victor Schwartz has described the leverage created by class actions as “legal extortion” and “legal shakedowns” because he believes that class action attorneys, by bringing large lawsuits regardless of merit, drive down stock prices and force settlements.¹⁰ Judge Richard Posner also has noted the difficult choice facing a corporate defendant – either risk the company on a single jury trial or settle regardless of any legal liability.¹¹

These commentators believe that the tort system should be striving to make plaintiffs whole after they have suffered a wrong, not serving as a regulator of the public good. Though the commentators’ claims are strong, if not extreme, there is no doubt that waste results when major corporations have to spend millions a year to defend massive class actions based on spurious allegations.¹²

Class actions arising under consumer protection statutes are an area of particular concern. This is due in part to the widespread use of these claims – approximately one-third of class actions against business defendants contain a consumer claim.¹³ Many consumer protection statutes also allow for relaxed proof – compared to common law fraud claims – on issues like reliance and

6. *Id.*

7. See Scheuerman, *supra* note 4; Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71; Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000). For a discussion of recent changes in class action litigation, including the Class Action Fairness Act of 2005, see Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008).

8. Redish, *supra* note 7, at 74.

9. Schwartz et al., *supra* note 7, at 489-95.

10. *Id.* at 484 (footnote omitted).

11. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

12. Some examples discussed below include suits based on the type of sweetener used in fountain soda and another involving windshield wipers that fail after more than 100,000 miles of use. See *infra* Part III.C.

13. Scheuerman, *supra* note 4, at 3-4.

intent. Essentially, these statutes often purport to view a violative action or practice as the harm, irrespective of any actual damage to an individual.

That said, a common thread in the judicial application of consumer protection statutes (commonly referred to as consumer fraud statutes) has been for courts to require a plaintiff to show something more than only the presence of a deceptive or unfair act; some courts have required a level of causation to be established between the complained of practice and an injury. Most statutes, however, do not expressly require that the plaintiff prove any reliance, and the courts generally have not required it. Difficulty arises, though, when a class action is brought under a consumer protection statute by plaintiffs who were allegedly injured by a deceptive practice but who either did not rely on the practice or relied on it in different ways. Since Federal Rule of Civil Procedure 23(b)(3) requires common facts to predominate over individual ones, courts must determine whether the relevant common fact is only that the violative practice *caused* the damage to class members or that the violative practice caused the damage to class members *in the same way*.

In 2008, the United States Court of Appeals for the Eighth Circuit considered this issue in *In re St. Jude Medical, Inc., Silzone Heart Valves Product Liability Litigation (In re St. Jude)* and found that Minnesota's statute barring deceptive business practices required similar causation among class participants to permit certification.¹⁴ Specifically, the court found that differing degrees or types of reliance among the plaintiffs was fatal to certification because the proof of causation would require examining the differing reliance of the plaintiffs, and thus individual issues would predominate.¹⁵ This requirement of similar reliance came despite significant authority in Minnesota that said *no reliance* was required for individual plaintiffs.¹⁶ Regardless, the Eighth Circuit determined that the violative practice must cause damage to the class members in the same way for a class action to be appropriate. Going forward, it is more likely that plaintiffs will have to show common causation, including the same or similar reliance, between an alleged unfair business practice and their injury to recover under state consumer fraud statutes in federal court.

This Note will specifically consider the implications of *In re St. Jude* on class certification sought under the Missouri Merchandising Practices Act (MMPA)¹⁷ in federal court. Though Missouri case law does not require reliance to be shown to bring an individual action under the MMPA,¹⁸ federal

14. 522 F.3d 836, 840 (8th Cir. 2008); *see also infra* Part III.A. For a discussion embracing this decision, see Drug and Device Law, <http://druganddevice.com/2008/04/st-jude-is-heavenly.html> (Apr. 14, 2008, 6:16 EST).

15. *In re St. Jude Med., Inc.*, 522 F.3d at 840.

16. *Id.* at 839 (discussing *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001)).

17. MO. REV. STAT. §§ 407.010-.130 (2000 & Supp. 2008).

18. *See Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. 2006).

courts likely would require a showing of causation in which common facts of reliance exist in the class context. This is true, in part, because of the similarities in the Missouri and Minnesota statutes. Further, even though the Supreme Court of Missouri is the final arbiter of Missouri law, the MMPA adopts the Federal Rules of Civil Procedure for class actions.¹⁹ Thus, any interpretation of Rule 23(b)(3)'s requirements should control class certification in Missouri courts as well. At bottom, this will result in more classes being refused certification in federal court under consumer fraud statutes.

This Note will proceed by looking at the development of consumer protection statutes generally and then examine Missouri's adoption and expansion of the MMPA.²⁰ Next, it will consider cases from Minnesota, Arkansas, and Missouri in order to establish that the Eighth Circuit has taken a consistent approach in requiring common causation in consumer protection statutes, despite some differences between the underlying state statutes.²¹ Finally, the Note will contend that nothing in the MMPA would lead to a different result in Missouri than the Eighth Circuit reached in *In re St. Jude*.²²

II. LEGAL BACKGROUND

A. Expansion and Purpose of Consumer Protection Statutes

Prompted by the shortfalls of the rule of caveat emptor, early consumer protection statutes centered on accurate determinations of weights and measures. These laws were around as early as the Justinian Code²³ and the Bible.²⁴ But, until the last 100 years, little change took place in the field. However, in 1906 Upton Sinclair published *The Jungle* and described the terrible conditions of a sausage factory in Chicago.²⁵ That book and a federal investigation prompted President Theodore Roosevelt to begin efforts to increase consumer protection in the United States.²⁶ As a continuation of Roosevelt's efforts, the Federal Trade Commission (FTC) was established in 1914 and given the power to control "unfair methods of competition" that injured other

19. MO. REV. STAT. § 407.025.3 (Supp. 2008).

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. James F. Bush, *Science and the Adulteration of Food and Other Natural Products in Ancient Rome*, 57 FOOD & DRUG L.J. 573, 585 (2002); LESLEY ADKINS & ROY A. ADKINS, HANDBOOK TO LIFE IN ANCIENT ROME 195, 313 (1994).

24. Richard H. Hiers, *Biblical Social Welfare Legislation: Protected Classes and Provisions for Persons in Need*, 17 J.L. & RELIGION 49, 61 (2002).

25. *See* UPTON SINCLAIR, *THE JUNGLE* (Cambridge Press 1971) (1906).

26. Phillip Kurata, *Consumer Protection Has Deep Roots in U.S. History: Social Critics Blaze Trails to Government Oversight* (Oct. 9, 2007), <http://www.americagov/st/usg-english/2007/October/20071009171007liameruoy0.6069757.html>.

business or competition generally.²⁷ Then, in 1938, the FTC was given power to “protect consumers from ‘unfair and deceptive trade practices.’”²⁸ But even after the agency had this power, it “did little to stop manufacturer misrepresentations.”²⁹

Real consumer protection from deceptive practices did not begin to take hold until the 1960s.³⁰ In 1962, President John F. Kennedy called upon Congress to provide more protection to consumers. He listed four consumer rights that should be protected: (1) the right to safety, (2) the right to be informed, (3) the right to choose, and (4) the right to be heard.³¹ To effectuate these goals, President Kennedy urged Congress to enact the Consumer Protection Act, which would both strengthen existing programs and create new protections for consumers.³² Despite the eventual enactment of the stronger federal legislation during the 1960s,³³ the FTC was described in 1969 as “rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent.”³⁴

Against this backdrop, many states began to enact consumer protection statutes of their own, and today every state has a statute that prohibits deceptive trade practices.³⁵ As a whole, the statutes have sought to provide a basis of recovery that does not require the strict showings of common law fraud or misrepresentation – allowing easier recovery for predatory business practices aimed at consumers.³⁶

B. Missouri Merchandising Practices Act

The original consumer protection statute in Missouri, the Missouri Merchandising Practices Act (MMPA), was enacted in 1967.³⁷ Though there

27. Scheuerman, *supra* note 4, at 11.

28. *Id.* at 12.

29. *Id.*

30. Kurata, *supra* note 26.

31. Special Message to the Congress on Protecting the Consumer Interest, 1962 PUB. PAPERS 235, 236 (Mar. 15, 1962), available at <http://www.america.gov/st/usg-english/2007/October/20071009171007liameruoy0.6069757.html>.

32. *Id.*

33. Scheuerman, *supra* note 4, at 10 n.57.

34. *Id.* at 14 (quoting Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 (1969)).

35. Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 829 (2006).

36. *Id.* at 830.

37. William Webster et al., *Combating Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act*, 52 MO. L. REV. 365, 368 (1987) (containing a comprehensive discussion of the history and development of the MMPA up to 1987).

have been several additions and amendments, most of the original Act remains today. In fact, section 407.020, the operative section that proscribes unlawful business practices, has changed little since the MMPA's original enactment.³⁸ One of the most significant changes was the addition of a private cause of action as one part of a major expansion of the act in 1973.³⁹ Prior to that expansion, the only available remedies were injunctions or restitution sought by the attorney general after an investigation.⁴⁰

The MMPA attained most of the broad scope it has today when significant additions were made in 1985. For example, the words "unfair practice" were added to the list of prohibited actions.⁴¹ The inclusion of this broad term served as a catchall provision and allowed the Missouri law to more closely track the Federal Trade Commission's powers.⁴² The reach of the statute also broadened. The jurisdiction of the MMPA was expanded to unlawful practices "in or from the state of Missouri."⁴³ After this change, suits could be brought under the MMPA if a Missouri company were preying on out-of-state citizens or if an out-of-state company were taking advantage of Missourians.⁴⁴ Also, the 1985 amendments allowed actions to be brought against entities for unfair practices "whether committed before, during or after the sale, advertisement or solicitation."⁴⁵ The MMPA previously required that the practice be "'in connection with' [a] 'sale or advertisement.'"⁴⁶ One year later, the MMPA was expanded to include leases and offers to lease,⁴⁷ and, in 2000, section 407.025 was amended to allow civil actions arising from the sale of real estate.⁴⁸

As it stands today, the MMPA is meant to "cover every practice imaginable and every unfairness to whatever degree."⁴⁹ Its goal is "to preserve fun-

38. MO. REV. STAT. § 407.020 (Supp. 2008) (originally enacted in 1967).

39. *Id.* § 407.025 (2000) (originally enacted in 1973); *see also* Webster et al., *supra* note 37, at 376.

40. Webster et al., *supra* note 37, at 378.

41. § 407.020.1.

42. Webster et al., *supra* note 37, at 383.

43. § 407.020.1.

44. Webster et al., *supra* note 37, at 384-85.

45. § 407.020.1.

46. Webster et al., *supra* note 37, at 385.

47. MO. REV. STAT. § 407.010 (2000) (amended 1986).

48. H.B. 1509, 90th Gen. Assem., 2d Reg. Sess. (Mo. 2000) (amending § 407.025.1). *See Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 768-69 (Mo. 2007). The court was not entirely clear on what brought about this change. *Id.* The likely conclusion is that it was a result of the amendment to section 407.025 that substituted "merchandise" for "goods or services." *See* H.B. 1509.

49. *Ports Petroleum Co. Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001) (en banc).

damental honesty, fair play and right dealings in public transactions.”⁵⁰ Section 407.020 intentionally has been crafted to be both broad and vague so that violators cannot evade liability due to “overly meticulous definitions.”⁵¹ It reads,

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice.⁵²

To emphasize this scope of coverage, the Missouri attorney general issued a regulation broadly defining an unfair practice as one that “[o]ffends any public policy, . . . [i]s unethical, oppressive or unscrupulous,” or “[p]resents a risk of, or causes, substantial injury to consumers.”⁵³ This broad reading appears to encompass not only practices that actually injure consumers but also those that may present a risk of injury. In fact, if the attorney general seeks an injunction, harm is presumed,⁵⁴ but more must be shown for an individual to bring a civil action under the private enforcement provision.

For a plaintiff to bring a private action for damages under the MMPA, the seller or lessor must have engaged in an unlawful practice “in connection with the sale.”⁵⁵ Additionally, “as a result” of the seller or lessor’s actions, the customer must have “suffer[ed] an ascertainable loss of money or property.”⁵⁶ Beyond this basic structure, however, suits seeking damages on behalf

50. *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899 (Mo. App. E.D. 2003).

51. *Schuchmann v. Air Servs. Heating & Air Conditioning*, 199 S.W.3d 228, 233 (Mo. App. S.D. 2006).

52. MO. REV. STAT. § 407.020.1 (Supp. 2008).

53. MO. CODE REGS. ANN. tit. 15, § 60-8.020(1) (2009).

54. *Clement*, 103 S.W.3d at 900, n.3; *see also* State *ex rel.* *Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837-38 (Mo. App. E.D. 2000).

55. § 407.020.1. The operative language states,

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice.

Id.

56. MO. REV. STAT. § 407.025.1 (2000) (“Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the coun-

of individual plaintiffs do not have to prove the extensive elements required for a claim of common law fraud.⁵⁷ In fact, there is no requirement of any reliance by the plaintiff or even intent to commit fraud by the defendant.⁵⁸

Actions for damages get more complicated when brought on behalf of a class of plaintiffs. The only statutory requirements are that the unlawful practice “has caused similar injury to numerous other persons”⁵⁹ and that the action be maintained as if it were brought under Missouri Rule of Civil Procedure 52.08 or Federal Rule of Civil Procedure 23 (Rule 23).⁶⁰ It is critical to note, though, that the action only can be brought pursuant to Rule 52.08 to the extent it is consistent with the federal rule.⁶¹ So, effectively, Rule 23 controls class action proceedings under the MMPA.⁶² This is a very recent modification – a result of a 1999 amendment.⁶³ This critical change makes decisions by the federal district courts in Missouri and the Eighth Circuit very influential with respect to how Missouri state courts treat class actions because the state courts must follow the federal rule. Further, the case law indicates that Missouri courts treat the two rules as substantially similar: a case interpreting one is applicable to the other.⁶⁴ In general, Rule 23(a) requires numerosity, typicality, commonality, and adequacy as conditions precedent for certifica-

ty in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages.”).

57. *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 232 (Mo. App. S.D. 2006); *see also* MO. CODE REGS. ANN. tit. 15, § 60-8.020(2). In Missouri, the tort of fraudulent misrepresentation has nine essential elements:

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

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 765 (Mo. 2007).

58. *Compare* § 407.025.1 (MMPA private right of action), *with Hess*, 220 S.W.3d at 765 (elements of fraud).

59. MO. REV. STAT. § 407.025.2 (2000).

60. *Id.* § 407.025.3.

61. *Id.*

62. *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d 151, 163 (Mo. App. W.D. 2006) (determining that class actions under the MMPA must “be maintained in a manner consistent with Rule 23”).

63. S.B. 1, 92, 111, 129 & 222, 90th Gen. Assem., 1st Reg. Sess. (Mo. 1999) (amending § 407.025.3). The statute indicates that it can be brought under the Missouri rule as well but only to the extent that the rule is consistent with Federal Rule of Civil Procedure 23. § 407.025.3.

64. *Dale*, 204 S.W.3d at 161 (finding that “cases interpreting Rule 23, Rule 52.08 and § 407.025 are essentially interchangeable”). For the sake of consistency and clarity, the federal rule will be referenced.

tion of a class action.⁶⁵ Though all of these can be issues in class actions under consumer protection statutes, of particular concern in these cases is the requirement of commonality. Rule 23(b)(3) supplements the 23(a) requirement of “questions of law or fact common to the class” with the requirement that common questions predominate over those that affect individual class members.⁶⁶

The interplay of these rules was the focus of a recent Eighth Circuit case relating to a class action claiming damages under Minnesota’s consumer protection statutes. The following Section discusses recent developments that indicate a heightened requirement of causation in the Eighth Circuit, which, in turn, may cause difficulties for those who attempt class actions under the MMPA.

III. RECENT DEVELOPMENTS

A. *Minnesota – The Consumer Fraud Act*

Minnesota’s version of the MMPA is known as the Consumer Fraud Act (CFA).⁶⁷

The CFA bans

[t]he act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby⁶⁸

By its express language, the statute purports to have no requirement of reliance, deception, or damage. However, the statute itself only applies to injunctions sought by the state attorney general.⁶⁹ A private right of action is allowed by a separate statute – Minnesota’s private attorney general statute.⁷⁰ This statute provides for the enforcement of the state’s various consumer protection statutes by an individual through a civil action that can recover myriad remedies, including damages, costs, attorney’s fees, and possible

65. FED. R. CIV. P. 23(a).

66. *Id.* at 23(b)(3).

67. MINN. STAT. ANN. §§ 325F.68-.70.

68. § 325F.69.

69. § 325F.70.

70. MINN. STAT. ANN. § 8.31(3a) (“In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees, and receive other equitable relief as determined by the court.”).

equitable relief.⁷¹ Despite the fact that the statute allows private enforcement, the Eighth Circuit in *In re St. Jude* determined that more is required for a private class action than what is explicitly contained in the Minnesota statute.⁷²

St. Jude Medical produced and marketed the Silzone prosthetic heart valve.⁷³ Problems existed with the valve, so it was recalled.⁷⁴ As a result, individuals from across the country who already had the valve implanted sued, and their actions were consolidated in Minnesota federal court for pre-trial proceedings.⁷⁵ In 2003, the United States District Court for the District of Minnesota granted class certification under three Minnesota statutes,⁷⁶ and, in 2005, the Eighth Circuit reversed.⁷⁷ Regarding the “consumer protection class,” the court remanded the case so that the district court could conduct a more thorough choice of law analysis.⁷⁸ On remand, the district court held that Minnesota law governed and re-certified the class.⁷⁹

St. Jude again appealed, arguing that it was an abuse of discretion to certify the class under Federal Rule of Civil Procedure 23(b)(3).⁸⁰ It claimed that a class action was not the superior method of adjudication because causation would have to be proven on an individual basis.⁸¹ Particularly, St. Jude alleged that some patients and doctors had not received any representations about the heart valve.⁸² Further, it contended that the treating physicians learned about the valve in a variety of ways, including through St. Jude sales representatives, colleagues, and cardiology conferences.⁸³ Finally, St. Jude argued that many doctors would testify that they relied on their professional judgment, rather than a representation from St. Jude, in deciding whether to implant the valve.⁸⁴

The plaintiffs countered by contending that common issues did predominate because the CFA does not require proof of individual reliance.⁸⁵ In fact, the statute specifically states that a violation does not require any show-

71. *Id.*

72. 522 F.3d 836, 839-40 (8th Cir. 2008).

73. *Id.* at 837.

74. *Id.*

75. *Id.*

76. *In re St. Jude Med., Inc.*, No. MDL 01-1396, 2003 WL 1589527, at *17 (D. Minn. Mar. 27, 2003), *rev'd*, 425 F.3d 1116 (8th Cir. 2005).

77. *In re St. Jude Med., Inc.*, 425 F.3d at 1123.

78. *Id.* at 1118, 1121.

79. *In re St. Jude Med. Inc.*, No. MDL 01-1396, 2006 WL 2943154, at *7 (D. Minn. Oct. 13, 2006), *rev'd*, 522 F.3d 836, 839-40 (8th Cir. 2008).

80. *In re St. Jude Med., Inc.*, 522 F.3d at 838.

81. *Id.*

82. *Id.*

83. *Id.* at 839.

84. *Id.*

85. *Id.*

ing that a person was misled or deceived.⁸⁶ In addition to an early district court decision in *In re St. Jude*, which determined “that proof of reliance is unnecessary” under the CFA,⁸⁷ the Minnesota Supreme Court also had held previously that proving reliance was not required.⁸⁸

Indeed, in *Group Health Plan, Inc. v. Philip Morris Inc. (Group Health)* the Minnesota Supreme Court, in response to certified questions, made an important distinction⁸⁹ that the Eighth Circuit embraced in *In re St. Jude*.⁹⁰ First, the supreme court noted that there is a distinction in the cause of action depending on whether the remedy sought is an injunction or damages.⁹¹ But this distinction alone was not determinative. Second, the court focused on the private attorney general statute that enabled the private civil action and its language requiring the plaintiff to have been “injured by a violation” of the consumer protection statute.⁹² These points, together, led the court to conclude that – even though the Minnesota Supreme Court found that the legislature had eliminated the requirement to plead and prove common law reliance – the causation element remained.⁹³ The *Group Health* court also concluded that when the damages alleged were a result of a deceptive business practice, “as a practical matter,” the plaintiffs also had to show reliance on the conduct.⁹⁴ While trying to illuminate what this means, the court made it clear that the standard it espoused does not require proof of common law reliance or strict causation.⁹⁵ Instead, it held that proof of a legal, or causal, nexus must be shown through *either* circumstantial or direct evidence.⁹⁶ Since it was outside of the scope of the certified question of the case, the Minnesota Supreme Court expressly refused to provide “any greater detail” about the requirement of showing a causal nexus other than to find that it hinges on the specific allegations and evidence.⁹⁷

86. MINN. STAT. ANN. § 325F.69(1).

87. No. MDL 01-1396 JRTFLN, 2003 WL 1589527, at *18 (D. Minn. Mar. 27, 2003), *rev'd. on other grounds*, 425 F.3d 1116 (8th Cir. 2005).

88. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001).

89. *Id.*

90. *In re St. Jude Med., Inc.*, 522 F.3d at 839-40.

91. *Group Health Plan, Inc.*, 621 N.W.2d at 12.

92. *Id.* at 13 (citing MINN. STAT. ANN. § 8.31(3a)).

93. *Id.*

94. *Id.* (“[W]here . . . the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws . . . it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes.”).

95. *Id.* at 14-15.

96. *Id.* at 14.

97. *Id.* at 15.

In *In re St. Jude*, the Eighth Circuit applied Minnesota law and read an arguably larger hurdle for plaintiffs into *Group Health*. The court determined that, regardless of the relaxed proof-of-reliance requirement under consumer protection statutes, the defendant has a right to present evidence negating the plaintiffs' showing of causation and reliance by establishing that the plaintiffs did not rely on its representations.⁹⁸ The court reasoned, "When such evidence is available, then it is highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury."⁹⁹ Since *St. Jude* demonstrated its intent to present evidence of individual differences in reliance, the court found that individual issues would dominate the inquiries into both causation and reliance.¹⁰⁰ As a result, class certification was not proper because the requirements of Rule 23(b)(3) were not met – that is, common questions would not predominate.¹⁰¹ Essentially, the Eighth Circuit took the relaxed "causal nexus" standard from the Minnesota Supreme Court and found that, although plaintiffs had a low bar to meet in class certification, the defendant could raise that bar by presenting its own evidence that individual issues would predominate. After the receipt of information from the defense showing individualized causation, a significant individualized issue is before the court, and certification of the class is improper.

B. Arkansas – *The Arkansas Deceptive Trade Practices Act*

Arkansas's consumer protection statute is known as the Arkansas Deceptive Trade Practices Act (ADTPA).¹⁰² The operative section of the ADTPA lists a number of trade practices that are deceptive and unconscionable, but for the purposes of this Note the primary ban is on "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model"¹⁰³ or "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce or trade."¹⁰⁴ The ADTPA explicitly states that it does not intend to limit business practices that are actionable under the common law or other statutes but that its listed actionable practices are merely extra protection for consumers.¹⁰⁵ Also, a private civil remedy is afforded to "[a]ny person who suffers actual damage or

98. *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008).

99. *Id.*

100. *Id.*

101. *Id.*

102. ARK. CODE ANN. §§ 4-88-101 to -115.

103. ARK. CODE ANN. § 4-88-107(a)(1).

104. *Id.* § 4-88-107(a)(10).

105. *Id.* § 4-88-107(b).

injury as a result of an offense or violation,” and the statute explicitly allows actual damages and attorney’s fees in appropriate circumstances.¹⁰⁶

Arkansas courts have not delved as deeply into the ADTPA as their counterparts in Minnesota or Missouri have into their own statutes. However, the state’s model jury instruction for claims seeking damages based on deceptive trade practices provides some insight into the application of the ADTPA. The instruction requires the plaintiff to establish “three essential propositions” in order to recover.¹⁰⁷ First, the plaintiff must prove that he or she actually suffered damages.¹⁰⁸ Second, the plaintiff must establish that a deceptive or unfair trade practice actually occurred.¹⁰⁹ Finally, the plaintiff must show that “[the defendant]’s conduct was a proximate cause of [the plaintiff]’s damages.”¹¹⁰ These instructions make it clear that causation is required for the plaintiff to succeed.

The Eighth Circuit emphasized this causation requirement in *Ashley County, Arkansas v. Pfizer, Inc.* (*Ashley County*) to affirm the dismissal of a case brought under the ADTPA.¹¹¹ In that case, a number of counties in Arkansas sued several pharmaceutical companies that sold drugs containing ephedrine and pseudoephedrine to recover money spent combating a methamphetamine epidemic in the state.¹¹² The court ultimately affirmed the district court’s dismissal on the pleadings.¹¹³ In doing so, the Eighth Circuit examined the proximate causation required under the ADTPA and stated that a plaintiff must prove both cause in fact and legal cause.¹¹⁴ To prove cause in fact, the plaintiff must establish that the “injury followed from a particular action.”¹¹⁵ Further, to establish legal cause, the counties would have to convince the factfinder that legal responsibility should be laid upon the manufacturers.¹¹⁶ In this case, the counties would have had to prove that the metham-

106. *Id.* § 4-88-113(f) (emphasis added).

107. ARK. MODEL JURY INSTRUCTIONS – CIVIL, AMI 2900 (2009).

108. *Id.* It should be noted the Arkansas Supreme Court has concluded that the statutory requirement of “actual damage or injury” in Arkansas Code Annotated § 4-88-113(f) bars recovery for diminution in value in private actions for enforcement of the ADTPA. *Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 161-62 (Ark. 2005). Also, damages for mental anguish may not be recovered under similar logic. *See FMC Corp., Inc. v. Helton*, 202 S.W.3d 490 (Ark. 2005).

109. ARK. MODEL JURY INSTRUCTIONS – CIVIL, AMI 2900.

110. *Id.*

111. 552 F.3d 659, 666-73 (8th Cir. 2009).

112. *Id.* at 662-63 (Those ingredients are required to produce the drug methamphetamine.).

113. *Id.* at 663.

114. *Id.* at 666-67.

115. *Id.* at 667. The action in the context of consumer protection statutes is the deceptive practice.

116. *Id.*

phetamine epidemic was a result of a practice banned by the ADTPA and that the manufacturers should be held responsible for its consequences.¹¹⁷

For purposes of this Note, the important takeaway from this case is not the result but the Eighth Circuit's requirement of a detailed examination of the causal chain that led to the injury.

C. *Missouri – The Merchandising Practices Act*

As discussed above,¹¹⁸ the MMPA aims to ““preserve fundamental honesty, fair play, and right dealings in public transactions.””¹¹⁹ For a private cause of action to arise, the plaintiffs must present evidence that they “purchased personal merchandise and that they suffered an ascertainable loss *as a result*.”¹²⁰ Specifically,

to succeed on a claim [for damages] under the MMPA, a plaintiff must prove the following elements: (1) the act, use or employment of; (2) a deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or a concealment, suppression or omission of a material fact; (3) occurring in connection with the sale or advertisement of any merchandise in trade or commerce; (4) *resulting in an ascertainable loss* of money or real or personal property; (5) occurring to a person who purchases or leases merchandise primarily for personal, family or household purposes.¹²¹

Cases applying the MMPA have made a few things clear. First, the MMPA is more permissive of claims than is common law fraud.¹²² In fact, the difficulty of proving common law fraud was part of the legislature's motivation for enacting the MMPA and other similar statutes.¹²³ Second, reliance, as understood by the common law, is not required.¹²⁴ So, there is no need to show that the unlawful practice or misrepresentation of the seller was

117. The court ultimately found that intervening acts prevented the harm from being foreseeable to the manufacturers and that the costs associated with rampant methamphetamine production in the state were too far removed from the manufacturer's actions to hold them responsible. *Id.* at 667-673.

118. The details of the MMPA are set out above. *See supra* Part II.B.

119. *Owen v. General Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008) (quoting *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 160 (Mo. App. W.D. 2006)).

120. *Id.* at 922 (emphasis added). *See also* MO. REV. STAT. § 407.025(1) (2000).

121. *Owen v. General Motors Corp.*, No. 06-4067-CV-C-NKL, 2007 WL 1655760, at *2 (W.D. Mo. June 5, 2007) (emphasis added), *aff'd* 533 F.3d 913 (8th Cir. 2008).

122. *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 232 (Mo. App. S.D. 2006).

123. *Webster et al.*, *supra* note 37, at 367-69.

124. *Schuchmann*, 199 S.W.3d at 233.

the reason the buyer purchased the product or service. However, recent decisions indicate that more is required than a bare assertion of an unfair practice. This is especially true when dealing with MMPA claims brought as class actions.

Two recent cases have illuminated the requirements of class action certification under the MMPA. First, in *State ex rel. Coca-Cola Co. v. Nixon*, a consumer brought an action against Coca-Cola, asserting that the company omitted information about the artificial sweeteners used in its fountain version of Diet Coke.¹²⁵ The plaintiff alleged that she would not have consumed fountain Diet Coke had she known about the use of saccharin in the drink and that the deception itself was an irreparable harm.¹²⁶ She sought certification of a class that included every individual who purchased fountain Diet Coke in Missouri after March 24, 1999.¹²⁷ The Circuit Court of Jackson County certified the class, and, after an unsuccessful interlocutory appeal, the Supreme Court of Missouri accepted a writ of prohibition.¹²⁸ Upon review, the court found numerous problems with the plaintiff's class action request; in particular, the court refused to imply irreparable harm to each possible member of the class.¹²⁹ It also demanded proof that "all consumers suffered an economic injury that was based on an objective characteristic."¹³⁰ The class certification was reversed.¹³¹ The supreme court made it clear that the injury suffered must be objective and that an actual economic harm must be shown.¹³²

In *Owen v. General Motors Corp. (Owen)*, a case that eventually reached the Eighth Circuit, Timothy Owen and his wife brought a putative class action against General Motors (GM), claiming it knew that windshield wipers attached to Tahoes had a propensity to fail, as the Owens' wipers did, because previous models with a similar unit had been recalled.¹³³ In fact, the previous failures had resulted in a National Highway Traffic Safety Administration investigation and a limited recall.¹³⁴ The plaintiffs alleged that it was an unfair trade practice not to inform buyers of this information.¹³⁵ Further, because they had owned their vehicle for six and a half years and traveled

125. 249 S.W.3d 855, 858-59 (Mo. 2008) (en banc). Specifically, the bottled version of Diet Coke contained only aspartame, while the fountain version was sweetened with both aspartame and saccharin. *Id.*

126. *Id.* at 859.

127. *Id.*

128. *Id.*

129. *Id.* at 862-63 (noting that the implication is only appropriate in cases seeking an injunction).

130. *Id.* at 863.

131. *Id.* at 864.

132. *Id.* at 863.

133. No. 06-4067-CV-C-NKL, 2007 WL 1655760, at *1 (W.D. Mo. June 5, 2007).

134. *Id.*

135. *Id.*

98,000 miles in it during that time, it was out of warranty.¹³⁶ As a result of the wiper failure, the Owens paid \$91.87 to replace the wiper assembly themselves.¹³⁷ The Owens brought a class action suit claiming that their Tahoe “had an ‘increasing likelihood that it [would] fail outside the warranty period,’” but they presented no evidence as to why their wiper actually failed.¹³⁸ The trial court granted the defendant’s motion for summary judgment after determining that the plaintiffs had failed to show either any evidence that GM’s failure to disclose the alleged defect was the proximate cause of their wiper failure or that, if they had known about the defect, they would not have purchased their Tahoe.¹³⁹

On appeal, the Owens argued that the district court erred in requiring a showing of proximate cause for their MMPA claim.¹⁴⁰ The Eighth Circuit affirmed the grant of summary judgment because it ultimately found that the Owens “presented no evidence from which a jury reasonably could conclude that their *loss was the result of* the alleged defect that GM failed to disclose.”¹⁴¹ The court interpreted the MMPA as requiring a demonstration that the plaintiffs made a purchase of personal merchandise and “that they suffered an ascertainable loss as a result” of the defendant’s unlawful practice.¹⁴² Specifically, it found that “there is no denying that causation is a necessary element of an MMPA claim” and that “the MMPA [actually] demands that a causal connection” be established from the unfair practice to an ascertainable loss.¹⁴³ In this specific case, the court held that “evidence of the precise nature of the defect is paramount” because only a specific defect that GM failed to disclose could give rise to an MMPA claim.¹⁴⁴

The court did hedge its requirement of specific causation though, and it appears that circumstantial evidence establishing causation to show that the practice or “defect was the more reasonable cause of the loss” would be sufficient.¹⁴⁵ So, the fact that the Owens had not kept the wiper assembly that failed did not, in itself, prevent their claim, even though it would prevent the fact-finder from examining the specific reason for the failure. In this case, there were too many other possible explanations for why the wiper unit

136. *Id.* at *2.

137. *Id.*

138. *Id.* at *2.

139. *Id.* at *5.

140. *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008).

141. *Id.* at 924 (emphasis added).

142. *Id.* (emphasis omitted). See MO. REV. STAT. §§ 407.020, 407.025(1) (2000 & Supp. 2008).

143. *Owen*, 533 F.3d at 922.

144. *Id.* at 922-23 (quoting *Owen v. Gen. Motors Corp.*, No. 06-4067-CV-C-NKL, 2007 WL 1655760, at *5 (W.D. Mo. June 5, 2007)).

145. See *id.* at 923 (noting that the district court properly considered the direct and circumstantial evidence that could have established causation). The court did not explain the type of circumstantial evidence that would have been sufficient. See *id.*

failed, and the Owens had presented too little evidence to establish causation.¹⁴⁶ Although the court did not dictate how causation needed to be shown, its determination made it clear that a “causal connection” is required and that a line must be drawn from the unlawful practice to an “ascertainable loss.”¹⁴⁷

IV. DISCUSSION

“Whether and to what extent reliance is required for a private plaintiff seeking damages under the [M]MPA are questions that have not been decided in Missouri.”¹⁴⁸

The goal of this Note is to suggest that one implication of the recent Eighth Circuit cases is that federal courts will require plaintiffs in a class action arising under a consumer protection statute to show a causal link between the allegedly deceptive practice and the plaintiffs’ similar injury. Generally, proof of similar reliance may have to be established to meet the requirement of showing causation common to the class; in any event, it will have to be shown if the defendant produces evidence of differing reliance among the class. Particularly, there is little to suggest that an application of the MMPA by the federal courts would lead to a different result than that in *In re St. Jude*. Before examining these effects, it is worth addressing the origin of the three statutes discussed above.

The states’ efforts to respond to the ineffective system of federal consumer protection resulted in the adoption of separate legislation at the state level. To aid this process, the Federal Trade Commission and the Committee on Suggested State Legislation of the Council of State Governments suggested three different versions of a model consumer protection statute.¹⁴⁹ Minnesota, Arkansas, and Missouri all adopted the same version, which prohibited “all [f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce.”¹⁵⁰ Though changes have been made so that the current statutes are no longer identical to the original common source, each of

146. *Id.* at 923; *see also* Willard v. Bic Corp., 788 F. Supp. 1059, 1069-70 (W.D. Mo. 1991) (finding plaintiff’s attempt to prove causation insufficient). An alternate argument presented by the Owens was that they should be permitted to present evidence of causation through *res ipsa loquitur*. *Owen*, 533 F.3d at 923. This argument also failed because the plaintiffs could not rule out other possibilities for the failure that had been identified by GM. *Id.*

147. *Owen*, 533 F.3d at 922.

148. *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368, 384 (Mo. App. E.D. 2006).

149. Scheuerman, *supra* note 4, at 16-17.

150. *Id.* (quoting UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW § 2 (1970)).

the statutes retains a similar provision in terms of prohibited acts.¹⁵¹ Additionally, each state requires an award of damages in a private civil action to be predicated upon a showing that the offending practice caused an injury, regardless of the specific language or mechanism employed.¹⁵² These broad similarities support the consistent treatment the Eighth Circuit has given to consumer protection provisions across the three states.

What does this mean for the MMPA? The short answer is that we do not yet know. But, without any indication from the Supreme Court of Missouri on the issue, a decision similar to *In re St. Jude* seems likely. Consider what is known about the MMPA from the statute itself and the previously discussed cases. First, despite the fact that neither reliance nor an intent to defraud is required in an individual private cause of action under the MMPA,¹⁵³ the statute “demands a causal connection” between the practice and an ascertainable loss.¹⁵⁴ Second, in order for plaintiffs to bring a class action, the statute requires that the offending practice “caused similar injur[ies] to numerous other persons.”¹⁵⁵ Finally, the statute adopts Rule 23’s requirements for a class action.¹⁵⁶ Accordingly, the result is essentially the same issue the court tackled in *In re St. Jude*: whether Rule 23(b)(3)’s requirement of predominance of common issues requires a showing that the ascertainable loss was suffered in the same way by all members of the class. Indeed, in order to prove uniform causation, as required by the Eighth Circuit in *In re St. Jude*, *Owen*, and *Ashley County*, consumer class actions should not be certified if the levels and kinds of reliance vary among the parties because the causation question would be dominated by individual issues.

This entwinement of causation and reliance is not a novel concept. In fact, commentators have suggested that it is required by the mere inclusion of

151. MINN. STAT. ANN. § 325F.69.1 (Unlawful practices include an “act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice . . . in connection with the sale of any merchandise.”); ARK. CODE ANN. § 4-88-107(a)(10) (Deceptive or unconscionable trade practices include “[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade.”); MO. REV. STAT. § 407.020.1 (Supp. 2008) (Unlawful practices include “any deception, fraud, false pretense, false promise, misrepresentation, unfair practice . . . in connection with the sale or advertisement of any merchandise in trade or commerce.”).

152. MINN. STAT. ANN. § 8.31(3a) (allowing “any person injured by a violation of” specific statutes to “bring a civil action and recover damages”); ARK. CODE ANN. § 4-88-113(e) (“Any person who suffers actual damages or injury as a result of an offense or violation . . . has a cause of action to recover actual damages.”); MO. REV. STAT. § 407.025.1 (2000) (“Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss . . . may bring a private civil action . . .”).

153. MO. CODE REGS. ANN. tit. 15, § 60-8.020 (2009).

154. *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008).

155. MO. REV. STAT. § 407.025.2 (2000).

156. MO. CODE REGS. ANN. tit. 15, § 60-8.020.

a causal requirement as a predicate to a civil action.¹⁵⁷ Consider Prosser on the issue:

The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, takes in cases of misrepresentation the form of inducement of the plaintiff to act, or to refrain from acting, to his detriment In order to be influenced by the representation, the plaintiff must of course have relied on it, and believed it to be true. If it appears that he knew the facts, or believed the statement to be false, or that he was in fact so skeptical as to its truth that he reposed no confidence in it, it cannot be regarded as a substantial cause of his conduct.¹⁵⁸

It at least can be contended that when the legislature included the causation requirement it “signaled [its] intent that traditional reliance-causation limits apply to private damages actions.”¹⁵⁹ The policy behind class actions makes this requirement even more likely.¹⁶⁰

This conclusion is also supported by the distinction between private and public enforcement provided for by the MMPA. As to public enforcement, the attorney general can issue an order prohibiting any person or company from engaging in any practice that is a violation of the MMPA.¹⁶¹ There is no requirement imposed upon the attorney general to show any causation or damage before issuing the order.¹⁶² In fact, the language allows for the issuance of the order before any unlawful practice has actually occurred.¹⁶³ This is in sharp contrast with the previously discussed requirement that a plaintiff in a private civil action show that the unfair practice caused an ascertainable loss.¹⁶⁴ This scheme of public enforcement allows protection against unfair practices that cause no ascertainable loss, but the provided statutory remedy requires the attorney general, rather than a private citizen, to be the

157. Scheuerman, *supra* note 4, at 44-45.

158. *Id.* (quoting WILLIAM PROSSER, LAW OF TORTS § 108, at 714 (4th ed. 1971)).

159. *Id.* at 46.

160. *See* Beatty v. Metro. St. Louis Sewer Dist., 914 S.W.2d 791, 794 (Mo. 1995) (en banc) (“The purpose of class action procedure is to facilitate litigation when the number of persons having interest in a lawsuit is so great that it is impractical to join them all as parties. In many cases this allows the accumulation of many relatively small but meritorious claims into a single suit that would otherwise not be pursued.” (internal citation omitted)).

161. MO. REV. STAT. § 407.095.1 (2000).

162. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837-38 (Mo. App. 2000). As previously mentioned, when the attorney general finds that the MMPA has been violated, damage is imputed. *Id.*; *see also supra* note 54 and accompanying text.

163. MO. REV. STAT. § 407.100 (2000).

164. *Id.* § 407.025.1. *See also supra* note 56 and accompanying text.

enforcer. A court should not ignore such a significant difference in language and render the extra requirements of the private action meaningless.

Practically, this means that if recovery will be too small to make a private claim practicable under the MMPA, an order of the attorney general can provide a cure for the problem, making it so that there is no clear policy reason to require a class action to be allowed under similar circumstances. Though the attorney general's office does not have sufficient time or resources to pursue every technical wrong, the structure established by the MMPA should not be conflated by the courts to certify a class unless the injury to the class members was caused in the same way – including similar causation and reliance by the class members.

Though the merits of proving reliance in every consumer fraud class action are debatable,¹⁶⁵ the Eighth Circuit came to a good result in *In re St. Jude* when it found that class actions under the Minnesota consumer fraud statute require causation to be common among the class. Indeed, *In re St. Jude*, read with the other cases on this issue, should be understood not to require proof of reliance but to require clear evidence of common issues of proof of causation. This likely will mean that more classes will be refused certification due to the predominance of individual issues of reliance, even though none of the plaintiffs would have to prove reliance in an individual action. But this requirement ensures that those with similar claims are the only individuals who can be part of a class and should help ensure that plaintiffs who are actually injured receive sufficient compensation, rather than getting lost in a massive class of differently interested parties.

While this will present a hurdle for private enforcement of the MMPA through class actions in some cases, the statute can and should be enforced for the public good by the attorney general of the state. The role of private torts is to compensate those actually injured by the wrong committed against them.¹⁶⁶ If the Missouri legislature believes that plaintiffs' attorneys should be responsible for enforcing the MMPA, it should amend the MMPA to ease the Rule 23 restrictions on class actions or impute damage like it does for the attorney general's enforcement actions. As written, the distinction should be recognized, and class actions should be maintained according to the rigorous requirements of Rule 23.

V. CONCLUSION

The Eighth Circuit's decisions in *In re St. Jude*, *Owen*, and *Ashley County* strike an encouraging balance between the goals of consumer protection statutes and the procedural and policy limitations of class actions. Its decisions will discourage the growing trend of the plaintiffs' bar serving as a substitute for the states' attorneys general in protecting the public. It is a

165. See Scheuerman, *supra* note 4.

166. See Redish, *supra* note 7, at 76.

better system for a state to enforce its laws for the benefit of the people than for private attorneys to bring class actions that provide little benefit to those actually harmed, especially when the harm to any one individual is minimal or varies among the class. However, the decisions will not hamper claims of harm resulting from unfair or deceptive practices from being aggregated in the name of efficiency for those aggrieved plaintiffs – they simply require a grouping of plaintiffs who are actually similar. This balance gives effect to the goal of the statute while being true to the policy behind both tort and class action litigation.

In light of recent case law, it is likely that federal courts will require proof of common class-wide causation – including similar reliance – for an action brought in federal court under the MMPA. Specific to Missouri, there is nothing in the Eighth Circuit's jurisprudence that indicates that any lower bar should be placed on claims under the MMPA. In fact, cases like *Owen* give support to the argument because Missouri courts already have required more than a bare assertion of a wrong to allow a class to proceed. Coupled with the adoption of the federal rules for class actions under the statute, it is clear that – if the Eighth Circuit were faced with a case under the MMPA – there is nothing to suggest a result different from the one reached in *In re St. Jude*.

MICHAEL B. BARNETT

