

**IN THE
SUPREME COURT OF MISSOURI**

No. SC 88023

RODNEY D. GIBBONS,

Appellant,

v.

J. NUCKOLLS, INC., D/B/A FENTON AUTO SALES,

Respondent.

**BRIEF OF ATTORNEY GENERAL OF MISSOURI
AS AMICUS CURIAE**

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INTEREST OF AMICUS

The Attorney General appears under Rule 84.05(f)(1) and (4) for the purpose of urging resolution of a conflict that has emerged among the appellate courts of this State as to the scope and purpose of the Merchandising Practices Act (MPA).¹ The Attorney General also urges correction of an erroneously broad interpretation by the Eastern District Court of Appeals of a portion of the MPA. The MPA, the statute invoked by Gibbons, provides specific authority to the Attorney General. The Eastern District's broadly worded decision, if left undisturbed, will be read as a limitation on the scope of the MPA, and thus on the authority of the Attorney General to protect Missouri consumers. The Attorney General, as the State's primary enforcer of the MPA, has an interest in resolving dissonant interpretations of the statute and regulations and judicial decisions interpreting and applying both.

BACKGROUND

The Eastern District held that the trial court properly dismissed Rodney D. Gibbons' (Gibbons) MPA claims against Fenton Auto Sales (Fenton), an automobile wholesaler which allegedly failed to disclose an accident involving the vehicle that Gibbons purchased from Ed Napleton Honda (Napleton), a dealership.² The Eastern District based its opinion on Gibbons' lack of privity with Fenton, holding that the MPA

¹Chapter 407 RSMo 2000. All statutory references are to RSMo 2000.

²*Gibbons v. J. Nuckolls, Inc.*, 2006 (Mo. Ct. App. E.D. July 18, 2006).

does not apply to third-party automobile wholesalers. Opinion at pages 2-3. The Eastern District's opinion (1) conflicts with an opinion of the Western District regarding who may be held liable for violating the MPA; (2) fails to restrict its language and application to the portion of Chapter 407 actually at issue, thus threatening to improperly affect the portions of the chapter under which the Attorney General acts; (3) contradicts the premise, endorsed by this Court, that the MPA is to be construed liberally in favor of protecting consumers; and (4) misapplies the plain language and meaning of the statute it construes.

The MPA prohibits in part:

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.

Section 407.020.1.

The MPA provides both the Attorney General and private citizens causes of action for violations. The Attorney General is further provided investigative authority and an

array of litigation tools to enforce the MPA and obtain broad relief.³ The MPA also authorizes private citizens to bring civil suits – including class actions – in response to violations of the MPA, as Gibbons has done here. § 407.025.

ARGUMENT

I. The Eastern District’s holding creates a split of authority between the Eastern and Western Districts.

The Court of Appeals, Western District has allowed the type of suit that the Eastern District here forbids. In *State ex rel. Nixon v. Polley*, the Western District held that a siding contractor violated the MPA even though that contractor did not enter into a contract directly with a consumer. 2 S.W.3d 887, 892 (Mo. App. W.D. 1999). There, the siding contractor, Polley, entered into a sub-contract with a general contractor for the provision and installation of siding on the home of a consumer, Braverman. *Id.* Braverman did not contract with Polley; nor did he directly pay Polley for the work. *Id.* When the trial court later awarded restitution to Braverman for Polley’s shoddy work,

³The Attorney General may, in the administration of Chapter 407, accept assurances of voluntary compliance from alleged violators (§ 407.030) and may issue civil investigative demands (§ 407.040) and cease and desist orders (§ 407.095). The Attorney General may also file an action in circuit court seeking injunctive relief, restitution for consumers, civil penalties, and other such relief. § 407.100.

Polley appealed, citing lack of privity of contract. *Id.* The Western District held that Polley was rightly found liable for restitution to Braverman:

The consumer who receives the product or services through a third party such as a builder would have no restitution remedy under the statute if Mr. Polley’s position were correct. The consumer of the siding material sold and installed by Mr. Polley is included within the meaning of the statute as one for whom restitution shall apply. To hold otherwise would undermine the fundamental purpose of the Act: the protection of consumers.

State ex rel. Nixon v. Polley, 2 S.W.3d 887, 892 (Mo. App. W.D. 1999).

By holding that selling through an intermediary shields a seller from MPA liability – a holding that would have barred relief in *Polley* – the Eastern District has not only “undermine[d] the fundamental purpose of the Act,” it has created a conflict within the Court of Appeals.

II. The Eastern District’s broadly stated holding improperly limits the Attorney General’s ability to enforce the MPA.

The court below broadly pronounced that “the MPA was passed in order to provide recourse specifically against *sellers* and *lessors* – not wholesalers.” Opinion at pages 2-3 (emphasis in original). This holding was based not on some substantive limitation in the statute, but only on a venue provision. Section 407.025.1 authorizes

private suits to be brought in one of two possible locations: “in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place.” The Eastern District extracted from this first venue option – where “the seller or lessor resides” – a new rule that suit may only be brought against a “seller or lessor.” Deriving such a limitation on substantive rights from the first option in a venue provision makes little sense. Worse, such loose language in the Eastern District’s opinion may affect the Attorney General’s authority to seek relief against all participants in unlawful practices under other portions of the MPA.

The Eastern District erred when it drew from the private action venue provision a limitation on the MPA *in totum*, without examining other portions of the MPA to determine if such an expansion was justified. Other venue-type provisions within the MPA are plainly different from the venue provision in § 407.025. For example, § 407.030, authorizing the Attorney General to accept an assurance of voluntary compliance, contains a venue provision directing that an assurance be filed in the “circuit court of the county in which the alleged violator resides or has his principal place of business, or the circuit court of Cole County.” Sections authorizing the Attorney General to issue a civil investigative demand allow the recipient to petition “in the circuit court of the county where the parties reside or in the circuit court of Cole County” for an extension or other relief, and also authorize the Attorney General to seek enforcement “in the trial court of general jurisdiction of a county or judicial district in which such person resides, is found, or transacts business.” § 407.070; § 407.090. Section 407.100, under

which the Attorney General pursues most enforcement actions, provides for proper venue “in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.” § 407.100.7. The contrasts among the venue provisions demonstrate that the one use of the venue language to find a substantive limit should be likewise limited.

The result of limiting the application of the MPA to direct sellers – and not to distributors, wholesalers or manufacturers – would effectively represent a sweeping judicial re-writing of many statutory sections of Chapter 407. For example, the MPA prohibits:

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.

Section 407.020.

The scope of this prohibition is further expanded by the statement “[a]ny act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.” § 407.020.1. “Advertisement” is defined by § 407.010 (1) to include any efforts “to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in any merchandise.” “Trade” or “commerce” is defined by § 407.010(7) to include “any trade

or commerce directly or indirectly affecting the people of this state.” These provisions explicitly pull all actors in the chain of commerce within the scope of the MPA.

But that is not all. Section 407.100 provides that the Attorney General may seek an injunction whenever it appears “that a person has engaged in, is engaging in, or is about to engage in any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter” and the Court may issue “an injunction prohibiting such person from continuing such methods, acts, uses, practices, or solicitations, or any combination thereof, or engaging therein, or doing anything in furtherance thereof.” Nowhere is it suggested that only a retailer is a “person” who can be prevented by the court from employing unlawful practices.

Consistent with the application of the MPA to “persons” all along the distribution chain is § 407.030, which authorizes the Attorney General to accept an assurance of voluntary compliance “from any person who has engaged in or is engaging in” any violation of the MPA. The Attorney General’s investigative authority under § 407.040 is similarly expansive, entitling the Attorney General to demand information from “any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation.” Furthermore, the Attorney General is authorized to issue administrative orders to cease and desist against “any other person or persons concerned with or who, in any way, have participated, are participating or about to participate in” a violation of the MPA. § 407.095. The expansive coverage of the MPA is inescapable.

The Eastern District’s restrictive view of the MPA undoubtedly will be argued by future litigants to apply to those sections of the MPA that authorize the Attorney General to investigate and prosecute violations. In a commercial society in which consumers are affected - and taken advantage of – by people who they do not even know exist, barring the Attorney General from reaching deceptive conduct above the bottom rung of the ladder of commerce clearly would work an injustice.

III. The Eastern District’s holding is inconsistent with the premise of liberal construction of the MPA.

Cases interpreting the MPA, commenting on its purpose, and instructing in its application, do not support the holding of the Eastern District. The purpose of the MPA is remedial, *i.e.*, the protection of consumers. *State ex rel. Nixon v. Polley*, 2 S.W.3d 887, 892 (Mo. App. W.D. 1999). More specifically, the MPA “supplement[s] the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play, and right dealings in public transactions.” *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. W.D. 1973). And in furtherance of these aims, both the Western and Eastern Districts have agreed that the MPA is to be liberally construed. *State ex rel. Nixon v. Continental Ventures, Inc.*, 84 S.W.3d 114, 117 (Mo. App. W.D. 2002); *Missouri v. Marketing Unlimited of America, Inc.*, 613 S.W.2d 440, 445 (Mo. App. E.D. 1981).

This Court has endorsed the remedial purpose of the MPA by citing from the Eighth Circuit:

In short, Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.

Electrical and Magneto Service Co, Inc. v. AMBAC International Corp., 941 F.2d 660, 663 (8th Cir. 1991), quoted with approval, *High Life Sales Company v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. banc 1992).

It is inapposite to this “paternalistic” purpose to suggest that one damaged by the conduct described in § 407.020 cannot pursue recovery for losses because the wrongdoer was two or more links away in the chain of commerce. Such an arbitrary restrictive interpretation both denies relief to the injured consumer and protects the wrongdoer. But this inequitable result is precisely what the Eastern District’s interpretation accomplishes in *Gibbons*.

IV. The Eastern District’s holding misapplies the plain language of the MPA.

It is a “cardinal rule” of statutory construction that the legislature’s intent is best divined by analyzing the plain and ordinary meaning of every word in the statute being

analyzed. *Brownstein v. Rhomberg-Haglin and Assoc., Inc.*, 824 S.W.2d 13, 15 (Mo. 1992). And in doing this analysis, when a word is not defined by statute, it is appropriate to employ the meaning provided by a dictionary. *Missouri Ethics Commission v. Wilson*, 957 S.W.2d 794, 799 (Mo. App. W.D. 1997). Applying this framework to the decision below reveals a misapplication of the plain language used by the legislature.

The portion of the MPA under which Gibbons brought a claim against Nuckolls provides:

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

Section 407.025.1.

The Eastern District honed in on one portion of the venue provision: “may bring a private civil action in . . . the circuit court of the county in which the seller or lessor resides.” § 407.025.1. The Court concluded that this language reflects the legislative

intent that consumers be limited to “recourse against *sellers* and *lessors* – not wholesalers.” Opinion at pages 2-3 (emphasis in original).

In focusing solely on the “seller or lessor” venue option, the Court twice overlooked the use of the word “person” earlier in that same sentence. Section 407.025.1 provides a cause of action for “any person” who suffers ascertainable loss at the hand of “another person.” The word “person” is broadly defined by § 407.010(5) to include, *inter alia*, both natural persons and corporate entities.⁴ So “any person,” including Gibbons, a natural person, has a cause of action under the MPA when he suffers ascertainable loss at the hand of “another person,” including a company like Fenton. This is consistent with the legislature’s intention that consumers recover for their losses regardless of whether it was the “seller” or an up-line wholesaler who caused those losses by engaging in conduct proscribed by § 407.020.1.

⁴ (5) “Person”, any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

Section 407.010(5).

The Eastern District also failed to account for the fact that the terms “seller” and “lessor” are not defined. A seller is “someone who promotes or exchanges goods or services for money.”⁵ This would include a wholesaler, like Fenton, that promotes and exchanges goods (vehicles) for money. The Court also failed to account for the fact that venue is also deemed proper “in the circuit court in which the transaction complained of took place.” § 407.025.1. This second venue option offers no description of any prospective defendant.

The court ought not read a limitation into a statute, such as the common law requirement of privity of contract, when there is no evidence it was intended by the legislature - and significant evidence that such restrictions were actually intended to be avoided throughout the MPA.

⁵“seller.” *WordNet*® 2.0. Princeton University. 07 Sep. 2006. <Dictionary.com.
<http://dictionary.reference.com/search?q=seller>>.<http://dictionary.reference.com/search?q=seller>

CONCLUSION

In light of the above authorities, the Attorney General urges this Court to reverse the Eastern District's decision in *Gibbons*. Alternatively, the Attorney General urges this Court to remand the case to the Eastern District to properly limit the opinion's scope to the portion of the MPA under which Gibbons sued, thereby removing the language unnecessarily and erroneously threatening to limit the attorney general's authority as set forth above to engage in the protection of Missouri consumers.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND CERTIFICATE OF SERVICE**

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 3,031 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief further complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version 9 in 13 point Times New Roman. In compliance with Rule 84.06(g) the diskette provided has been scanned for viruses and is virus free.

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