SC 96499

IN THE MISSOURI SUPREME COURT

JEFF REED,

Appellant,

v.

THE REILLY COMPANY, LLC,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

Honorable Marco Roldan, Judge
Case Number 1616-CV15889

BRIEF OF THE NATIONAL CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CONSENT OF PARTIES TO FILING THIS BRIEF

Appellant consents to the filing of this brief. Respondent denied consent. This brief has been conditionally filed with a motion for leave to file, pursuant to Rule 84.05(f)(3).

STATEMENT OF INTEREST

Amicus Curiae The National Consumer Law Center ("NCLC") is a national non-profit research and advocacy organization focusing on the needs of consumers. It was founded in 1969 at Boston College School of Law, and is a legal aid organization under Section 501(c)(3) of the Internal Revenue Code. For over 40 years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policymakers, consumer and business reporters, and consumer and low income community organizations across the nation have turned for legal answers, policy analysis, and technical legal support.

NCLC has been referred to as the "leading non-profit low-income consumer advocacy organization in the country." *Mazola v. May Dept. Stores Co.*, 1999 WL 1261312 at *4 (D. Mass. 1999). This Court has previously recognized NCLC's role as a national expert in consumer law. *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 n.13 (Mo. 2007) (citing NCLC as a "national expert" on the proposition that privity is not required in consumer protection law). And this Court has previously accepted briefing from the NCLC in *CACH, LLC v. Askew*, SC Case No. 91780, and *Watson v. Wells Fargo Home Mortgage, Inc.*, 438 S.W.3d 404 (Mo.banc 2014).

NCLC is the author of the widely praised twenty-volume Consumer Credit and Sales Legal Practice Series, including *Unfair and Deceptive Acts and Practices* (9th ed. 2013), *Fair Debt Collection* (7th ed. 2011), *Collection Actions* (3rd ed. 2014), *Mortgage Lending* (2012), *Foreclosures* (4th ed. 2012), *Automobile Fraud* (5th ed. 2015), and *Repossessions* (8th ed. 2013). The United States Supreme Court has relied upon NCLC's treatise on debt collection practices. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 593 n.12, 598 n.16 (2010) (also at 605, J. Breyer, concurring).

NCLC staff members have served on the Federal Reserve Board's Consumer Advisory Council and testified frequently before the Federal Trade Commission and Congress regarding debt collection and unfair and deceptive practices. NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before trial and appellate courts and does so in cases that promote NCLC's goals, including protection of low-income and other potentially vulnerable groups.

NCLC respectfully submits this *amicus* brief to provide its expertise in the interpretation and application of consumer protection statutes. NCLC has been monitoring the development of case law interpreting Missouri's Merchandising Practices Act ("MMPA") with keen interest, in particular the recent decisions by some courts that bar consumers from actions under the MMPA against certain "regulated entities". NCLC believes the decisions are contrary to the plain terms of the MMPA, and contrary to the purposes of the MMPA as repeatedly stated by this Court. NCLC writes as an aid to this Court in interpreting and applying the MMPA for its fundamental purpose of protecting Missouri consumers from the abuses proscribed by the MMPA.

ARGUMENT

I. Introduction

The Respondent/Defendant below The Reilly Company, LLC, asserted to the trial Court[1] that the "regulated entities" exemption in § 407.020.2(2) is in effect a complete defense to any suit against regulated entities on any claim under any part of the Missouri Merchandising Practice Act, Chapter 407 in the Missouri Statutes. The trial Court's judgment did not address that argument. On appeal the Respondent asserted the same argument, and the Court of Appeals accepted it. The issue of the correct interpretation of the "regulated entities" exemption in § 407.020.2(2), as amended with qualifying language in 1992, and in conjunction with § 407.025, is a matter of first impression in this Court. This is of great importance to consumers in Missouri, since a ruling on this issue, depending on the scope of the ruling, may determine whether wronged consumers can protect themselves from unfair and deceptive practices by these entities via claims for damages or equitable or injunctive relief under § 407.025.

The abuses of consumers by entities that fit the "regulated entities" description are painfully widespread. The Federal Consumer Financial Protection Bureau ("CFPB") compiles information about the abuses American consumers report in their financial services, to give an important example. In the time period between July 2011, when the CFPB began tracking this information, and March 2017, the CFPB received over one

[1] This was made for the first time only in Respondent/Defendant's reply suggestions in the trial Court.

million one-hundred thousand consumer complaints, including the handling of mortgages (272,153 complaints), credit cards (118,732), bank accounts and services (115,055), and credit reports (195,826). CONSUMER FINANCIAL PROTECTION BUREAU, Monthly Complaint Report vol. 25 (Aug. 1, 2017), Appx. A, pp. 14-16, *available at* https://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-25/ (last visited September 25, 2017).

In that realm, among the most problematic areas of consumer finance is debt collection. "In 2016, as in past years, debt collection was the category in which the [CFPB] received the most complaints from consumers." CONSUMER FINANCIAL PROTECTION BUREAU, Fair Debt Collection Practices Act: CFPB Annual Report 2017 (Mar. 20, 2017), p.3, *available at* https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-annual-report-2017/ (last visited September 25, 2017). The most common complaint involved "continued attempts to collect debt not owed." *Id.* Forms of abusive conduct complained about include unauthorized assessment of charges, all manner of telephone harassment, false statements about the character or amount of the debt, false threats to sue the debtor, refusals to verify the debt, violations of confidentiality, and even threats of violence to the borrower. *See generally Id.*, pp. 16-19.

In short, abusive and unfair conduct by the "regulated entities" of all kinds listed in § 407.020.2(2) are among consumers' very worst problems.

The NCLC respectfully urges this Court, if it addresses the "regulated entities" exemption, to hold that §§ 407.020.2(2) and 407.025, read together, give the limited

subset of private citizens described in § 407.025 – those who 1) purchase or lease merchandise 2) primarily for personal, family or household purposes and 3) thereby suffer an ascertainable loss of money or property, real or personal, 4) as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020 – the authority to bring claims under § 407.025 against such entities.

II. The Plain Language of the MMPA

At issue is the meaning of the language added in 1992 to § 407.020.2(2): "unless . . . the powers of this chapter . . . *are provided to . . . a private citizen by statute*." 1992 Mo. S.B. 705 (emphasis added to new language).

A. The Plain Language Reading of §§ 407.020 and 407.025 Together

First, § 407.020.1 RSMo provides:

> **Unlawful practices, penalty — exceptions.** — 1. 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 …. is declared to be an unlawful practice.

Section 407.020.2 RSMo then states:

> 2. Nothing contained *in this section* shall apply to:

(2) Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, financial institutions and professional registration under chapter 354 or chapters 374 to 385, the director of the division of credit unions under chapter 370, or director of the division of finance under chapters 361 to 369, or chapter 371, *unless* such directors specifically authorize the attorney general to implement the powers of this chapter or *such powers are provided to* either the attorney general or *a private citizen by statute.*

[Emphasis supplied.]

Next, § 407.025 provides a specific and limited subset of private citizens with the power to bring action:

407.025. Civil action to recover damages — class actions authorized, when — procedure. — 1. 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. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the

amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

[Emphasis supplied.]

Read together, § 407.020.2(2) generally exempts the listed regulated entities from actions under Chapter 407 by private citizens for § 407.020 violations, unless (as provided by the 1992 amendment) such powers are granted to private citizens by statute; but § 407.025 does grant such powers to a limited subset of citizens – those who 1) purchase or lease merchandise, 2) primarily for personal, family or household purposes, 3) and thereby suffer an ascertainable loss of money or property, real or personal, 4) as a result of the use or employment by another person of a method, act or practice declared unlawful by § 407.020. That limited subset of private citizens, and only that subset, can therefore bring claims against the regulated entities under § 407.025 for violations of § 407.020.

B. The Plain Language Reading of § 407.913 and § 407.020

The particular claim at issue between the parties in this case revolves around a section farther along in Chapter 407, under which appellant Reed lodged his claim for sales commissions against his former employer:

> **407.913. Failure to pay sales representative commission, liability in civil action for actual damages — additional damages allowed — attorney fees and costs. —** Any principal who fails to timely pay the sales representative commissions earned by such sales representative shall be

> liable to the sales representative in a civil action for the actual damages sustained by the sales representative and an additional amount as if the sales representative were still earning commissions calculated on an annualized pro rata basis from the date of termination to the date of payment. In addition the court may award reasonable attorney's fees and costs to the prevailing party.

Three things are immediately apparent from a reading of the above statutes in the context of the dispute between the parties in this case. First, Reed's claim had nothing to do with § 407.020, as he did not assert a claim against his former employer for any unfair or deceptive practice; he simply sued for commissions he was owed. Second, because Reed did not accuse his former employer of engaging in "a method, act or practice declared unlawful by section 407.020", he did not pursue his claim under § 407.025. Third, because § 407.913 spoke specifically to Reed's predicament, he properly brought his claim for unpaid commissions under that expressly applicable statutory section. So the regulated entity exemption from claims based on § 407.020 plainly had no application to Reed's claim.

But even if Reed's claim for unpaid commissions could somehow be shoehorned into § 407.020's prohibition against unfair and deceptive practices, a ruling barring Reed's claim based on the exemption of regulated entities in § 407.020.2(2), as rendered by the Court of Appeals before the transfer of this case, still could not stand. This is because of the 1992 amendment exception to the exemption at the end of that section – "unless ….. such powers are provided to ….. a private citizen by statute." It is plain that

the legislature has, in § 407.913, provided a subcategory of private citizens, those who work on commission, with the right to sue for unpaid commissions. Thus the regulated entity exemption would have no application to Reed's claim, even if he were asserting it as a violation of § 407.020.

C. The Harmful Implications of Misreading the Plain Language

The Appellate Court's ruling, should it be repeated here, would have very harmful implications for consumer cases brought pursuant to § 407.025 against regulated entities. This is so because, although § 407.913 plainly provides the power to bring a civil action under Chapter 407 to a limited subset of private citizens (salespersons working on commission), there was no discussion at all in the appellate court's opinion about whether that provision in § 407.913 fits within the language in § 407.020.2(2) "*unless . . . the powers of this chapter . . . are provided to . . . a private citizen by statute*." The appellate court appears simply to have overlooked that exception in its analysis.

For consumer claims for violations of § 407.020 brought pursuant to § 407.025 against regulated entities, if the sweeping ruling of the Court of Appeals were repeated in this case, the NCLC believes the impact upon Missouri consumers with such claims would be extremely harmful and widely felt.[2] There is a split among circuit courts of this

[2] The Appellate Court's decision has already been cited in support of attempts to bar Missouri consumers from asserting claims pursuant to § 407.025 against the entities listed in § 407.020.2(2). For example, a little over two weeks after that decision was

state and federal district courts and one 8th Circuit decision on the issue of whether consumers can assert claims under § 407.025 against entities listed in § 407.020.2(2); this split in a large number of recent cases by itself gives a strong idea of the importance of this issue. The cases ruling against consumers stem almost entirely from the decisions in the *Rashaw* case, as will be discussed in the next section of this brief; those cases got off on a wrong track by a very understandable process.

III. The *Rashaw* Decisions, And The Way Many Courts Were Led To Wrong Results

A. The Genesis of the *Rashaw* Decisions

Rashaw v. United Consumers Credit Union, 2011 WL 10806 (W.D.Mo. 2011), and the 8th Circuit's decision affirming it in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012), are easily the leading decisions against consumers bringing claims under § 407.025 against regulated entities.

The problem in those cases started when the plaintiff Rashaw argued in the trial court, and later in the Court of Appeals, that the regulated entities exemption was in effect totally wiped out by the 1992 amendment language, "unless such powers . . . are

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handed down, it was cited in support of such an attempt in *Christopher Main v. Nicholas Financial, Inc.*, No. 1716-CV00130, Circuit Court of Jackson County. *See* defendant Nicholas Financial's May 18, 2017, supplemental filing in the foregoing matter. The trial Court thereafter dismissed the plaintiff's MMPA claim on September 12, 2017.

provided to . . . a private citizen by statute". For example, at page 29 of Rashaw's Suggestions in Opposition to Defendant's Motion to Dismiss in the District Court, the plaintiff flatly argued, "Defendant's claim to an exemption is also meritless because the second clause of §407.020.2(2) applies and ***removes the applicability*** of that claimed exemption." Plaintiff's Suggestions in Opposition to Defendant's Motion to Dismiss in *Rashaw v. United Cons. Credit Union*, 11-cv-00105-ODS, Doc. 22, p 29 (W.D. Mo., filed Apr. 15, 2011) (emphasis in original). Similarly, on appeal to the 8th Circuit, the appellant repeated its argument below, contending, at page 71 of its brief, "The statutory exemption is also not available to Defendants because the second clause of §407.020.2(2) applies and negates the exemption." Appellants' Joint Brief in *Rashaw v. United Cons. Credit Union*, 11-2327, pp. 71 (8th Cir., filed Aug. 30, 2011). (Two other arguments rather far-fetched arguments were advanced by Rashaw to both Courts for effectively wiping out the regulated entities exemption, and were overruled in those decisions, but they need not be discussed here.) Given this very limited horizon in the arguments, Judge Ortrie Smith (in section B of his decision) succinctly stated the obvious: this argument is "circular" as it would simply "eliminate the exclusion". *Rashaw v. United Cons. Credit Union*, 11-cv-00105, Doc. 35, p. 9 (W.D. Mo. May 26, 2011). The 8th Circuit, effectively misled by the plaintiff with identical arguments, of course even more succinctly affirmed the District Court's decision, holding simply that "The contention that one provision of the MMPA completely negates another violates well-accepted principles of statutory construction." *Rashaw v. United Cons. Credit Union*, 685 F.3d 739, 745 (8th Cir. 2012).

Of course, as the plain language discussion above shows, only the limited subset of consumers who meet all four limiting criteria in § 407.025 are provided with power to bring claims against regulated entities, so one section of the MMPA does *not at all* "completely negate" the other. But the plaintiff in *Rashaw* presented its argument in ignorance of the correct construction of §§ 407.020.2(2) and 407.025 together, and so misled both the District Court and the 8th Circuit to this holding.

And case after case subsequently followed either or both of the *Rashaw* decisions, either directly or by following cases that did follow the *Rashaw* decisions.

B. Other Cases – *No Negative Case Even Mentions The Harmonizing Plain Language*

At this point a sizable list of decisions have ruled either for or against consumers regarding whether they could sue regulated entities under § 407.025. A complete list of those decisions, known to the NCLC, is footnoted here.[3] One point about those decisions is critical.

[3] **Courts that ruled for the consumer on exemption issue:**

Marra v. Lititz Mut. Ins. Co., 1116-CV20478 (3/29/13) (Jackson County)

First Fin. Credit Union v. Gary R. Blank, 12BA-CV01351 (7/25/13) (Boone County)

Missouri Credit Union v. Nduwayo Simon, 13BA-CV01461 (12/2/13) (Boone County)

Kelso v. Mo Cars, LLC, and SCCA Financial, LLC, 1331-CC00415 (Greene County) (8-12-15 trial brief by defendant SCCA Financial, LLC asserting regulated entities exemption, and judgment entered against it 8-26-15 on the MMPA claim after trial)

Romanchuk v. Gateway Buick GMC, Inc., 15SL-CC01775 (11/4/15) (St. Louis County)

Westlake Serv., LLC v. Hudson, 13BA-CV02487-01 (3/16/16) (Boone County)

Roberson v. Sinclair of Lee's Summit, Inc., 1416-CV21574 (3/17/16) (Jackson County)

Westlake Serv., LLC v. Wade, 1416-CV02935-01 (4/28/16) (Jackson County)

Johnson v. The Penn Warranty Corp., 1616-CV17539 (2/7/17) (Jackson County)

Courts that ruled against the consumer on exemption issue:

Smith v. J.Wells Inv. Group, LLC, 0722-CC09226, 2008 WL 8487908 (6/10/08) (St. Louis City)

Rashaw v. United Consumers Credit Union, 2011 WL 10806 (W.D.Mo. 2011), *affirmed* *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012)

Cridlebaugh v. CitiMortgage, Inc., 2012 WL 5362257 (W.D.Mo. 2012)

Reitz v. Nationstar Mortgage, LLC, 954 F.Supp.2d 870 (E.D.Mo. 2013)

Myers v. Sander, 4:13CV2192 (E.D.Mo. 2/3/2014)

Wilmering v. Bank of America, 4:14-cv-00852 (E.D.Mo. 8/28/2014)

Discover Bank v. Simon, 1416-CV13930-01 (12/23/14) (Jackson County)

Pleasant v. Noble Finance Corp., 1431-CC00747 (11/5/15) (Greene County)

Not a single decision ruling against consumers on this issue even discusses, let alone rules on, the plain language view that §§ 407.020.2(2) and 407.025 harmonize because only a subset of private citizens are given powers under § 407.025.

By all indications, in almost all of the negative decisions the plaintiffs made the same mistake as the *Rashaw* plaintiff, and did not even mention the construction showing that these statutes harmonize. These negative decisions are thus almost entirely derived from yet additional effectively misleading arguments from plaintiffs, coupled of course with the wrong track taken by the *Rashaw* cases due to misleading plaintiff arguments.

There were some other arguments that probably helped mislead at least a few of the Courts that made negative rulings. For example, in the recent case of *Johnson v. Safe Auto Insurance Co*., 1316-CV31993 (1/26/16) (Jackson County), the defendant relied on cites (in its suggestions supporting its Motion to Dismiss filed 10/2/15, page 11) to

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Simon v. Blue Cross and Blue Shield of Kansas City, 1416-CV12675 (1/6/16) (Jackson County)

Riley v. JCN Inc Auto LLC, 1416-CV22896 (1/20/16) (Jackson County)

Johnson v. Safe Auto Insurance Co., 1316-CV31993 (1/26/16) (Jackson County)

Wright v. United Auto Credit Corp., 15SL-CC01951-01 (5/18/16) (St. Louis County) [citing *Backlin v Commerce Bank*, CV7-99-842AC, 2001 WL 36238989 (4/23/01) (St. Francois County) , a case that did not address the regulated entity exemption]

Vogt v. State Farm Life Ins. Co., 2017 WL 471574 (W.D.Mo. 2017)

Main v. Nicholas Financial, Inc., 1716-CV00130 (9/12/17) (Jackson County).

Rokusek v. Security Title Ins. Co., No. 06CC-001255, 2006 WL 4584352 (Mo. Cir. Ct. (St. Louis County) Oct. 17, 2006) (granting summary judgment to defendant insurance company on all claims, including plaintiffs' claim under MMPA), and cited that decision as "*aff'd*, No. ED88953, 2007 WL 1814294 (Mo. Ct. App. Sept. 25, 2007)". However, that appellate decision had been taken by this Court on transfer, and the trial court's decision was reversed and the MMPA claim reinstated, see *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928 (Mo.banc 2008) (consolidated with the *Rokusek* case, and reinstating the *Rokusek* plaintiff's MMPA claim against a company regulated by the Missouri Department of Insurance). No mention of that direct reversal by this Court was mentioned by the defendant. Again, in the recent case of *Wright v. United Auto Credit Corp*., 15SL-CC01951-01 (5/18/16) (St. Louis County), defendant United Auto Credit relied on its cite to *Backlin v Commerce Bank*, CV7-99-842AC (4/23/01) (St. Francois County) (2001 WL 36238989), a case that did in fact simply did not address the regulated entity exemption; the trial Court trusted that cite and included it in its decision.

IV. The History Of Chapter 407 Amendments, And Continuing Expansion Of Consumer Protection

The evolution of the MMPA over the twenty years following its 1967 enactment is recounted in thorough detail in *Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act* (Vol. 52 Mo.L.Rev., Issue 2 [1987], Art. 3). That Article merits thorough review to obtain a full sense of the

evolution of the MMPA over the years. Only a few of the more salient points there will be mentioned here.

As explained in the article, when originally enacted in 1967, § 407.020.1 contained a list of unlawful practices, and the power to enforce the Act was exclusively delegated to the Attorney General. Certain regulated entities were exempted from § 407.020, unless the directors of the agencies that regulated them requested the Attorney General to implement the powers of the Act. As originally enacted, Chapter 407 contained fourteen sections.

The Act was significantly amended in 1973, adding several provisions enlarging its scope. Id., p. 12. Among them was § 407.025, allowing private citizens who purchased merchandise primarily for personal, family or household purposes and who suffered an ascertainable loss because of a practice declared unlawful by § 407.020, to sue for actual damages, punitive damages, attorney fees and equitable relief. It also provided for class actions. *Id.*, p. 14. Other specific practices, odometer fraud and home solicitation sales, were addressed in newly-created mini-acts. *Id.*, pp. 15-19.

Among the 1985 MMPA amendments was an important one that expanded the reach of § 407.020 to unlawful practices whether they occurred "before, during or after" the transaction. *Id.*, p. 21. Consumer protections were further expanded in the 1985 amendments by adoption of the Time Share Act, providing consumers a five day right of rescission for time share contracts. *Id.*, pp. 52-53.

With the 1986 MMPA amendments came the repeal of the original Act's exemption for advertisements subject to and in compliance with Federal Trade

Commission ("FTC") statutes and regulations. *Id.*, pp. 30-31. Another amendment expanded MMPA coverage to lease transactions by including the term "lease" within the definition of the term "sale" under the Act. *Id.*, pp. 29-30.

Since 1987 legislature has continued to enact amendments expanding Chapter 407's coverage. More "mini-acts", as they are referred to in the above law review article, have been added into Chapter 407 to cover various specific practices. For example, 1988 saw §§ 407.660 to 407.665 added to address Rent to Own transactions (Rental Purchase Agreements). Also added in 1988 were §§ 407.670 – 407.679, concerning Buyers' Clubs. In 1989 the chapter was expanded to cover Motor Vehicle Rentals and Subleasing (§§ 407.730 – 407.748). In 1991 §§ 407.635 – 407.644, relating to Credit Service Organizations, were added. Sections 407.932 – 407.943 covering Foreclosure Consultants were added in 1992. The Wheelchair Lemon Law, §§ 407.950 – 407.970, was enacted in 1995. Sections 407.1380 – 407.1385, providing consumers with the right to place a security freeze on their credit reports, were added in 2008.

The above is by no means a complete listing of all the sections that have been added to the original fourteen sections of Chapter 407. They are simply listed to impart a sense of the legislature's steady march forward expanding Chapter 407's coverage and its increasing protection of consumers.

It is also important to note that, consistent with the legislature's steady broadening of protections and its 1986 move to ratchet back the exemption for advertisements regulated by the FTC, the legislature in 1992 amended § 407.020.2(2) solely to add the

exception to its regulated entity exemption described above: "*or such powers are provided to either the attorney general or a private citizen by statute*".

V. Powerful Statutory Construction Rules And MMPA Precedent Would Favor Consumers

The plain language of §§ 407.020.2(2) and 407.025, read together, provides a clear and harmonious reading, as described above, so that resort to rules of statutory construction and this Court's precedents relating to the MMPA should not be necessary. The Legislature is presumed to have chosen the words of a statute specifically and purposefully, and when the language of a statute is unambiguous, as it is here, the courts are not afforded any room for construction. *Tuft v. City of St. Louis*, 936 S.W.2d 113, 118 (Mo. App. E.D. 1996). Instead, the courts must presume that the Legislature intended that every word and provision of a statute would have effect. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo. banc 2003).

If for any reason there were resort to such rules and precedents, powerful additional support is found for interpreting these statutes to be read as suggested in favor of consumers, above.

The Court's primary responsibility in statutory interpretation is to determine the legislative intent from the language of the statute and to give effect to that intent. *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo. banc 2014). And this Court has already held that the legislature enacted the MMPA to protect consumers, and the protection of consumers is its "fundamental purpose." *Huch v.*

Charter Commc'ns., Inc., 290 S.W.3d 721, 724 (Mo. banc 2009); see also *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. 2007). Even if some seeming ambiguity were found in these statutes, a reviewing Court must attempt to harmonize conflicts to give effect to legislative intent. *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009).

Similarly, "Statutory provisions relating to the same subject matter are considered in pari material and are to be construed together." *Crawford v. Div. of Emp't Sec.*, 376 S.W.3d 658, 664 (Mo. banc 2012) (internal quotation omitted). When "two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect." *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). R.S.Mo. § 407.025 is a remedial statute and should be liberally construed to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case. *Antle v. Reynolds*, 15 S.W.3d 762, 766 (Mo.App.W.D. 2000); *State ex rel. Ford v. Wenksay*, 824 S.W.2d 99, 100 (Mo.App.E.D. 1992).

At the time the short additional language was inserted in § 407.020.2(2) by the 1992 amendment, the legislature was of course fully aware of the full text of the existing statutes. This later-enacted language is only more significant given that history, adding to the importance of giving it full effect.

The Courts deciding the negative cases that were listed above – all of which Courts felt backed into a contradictory corner of one statute completely contradicting the

other – provided no coherent alternative meaning to this language (when they suggested anything at all) that would not be at best simple surplusage, redundant, and ultimately of no effect.

With regard to construction of the commission statutes in Chapter 407 relied on by the plaintiff in the instant case, the understanding of the word "section" in § 407.020 may be the most significant issue. Missouri courts have already dealt with this exact question and unsurprisingly have held that the word "section" means "section". The Eastern District Court of Appeals held that when the Legislature uses the word "section," that's exactly what it means:

> The Division retorts that section 288.045.13(1) indicates that its language applies to the entire 'chapter,' which would include section 288.050.2, rather than any particular 'section.' Indeed, the legislature uses the word 'section' instead of 'chapter' several times within other subsections of 288.045. We presume the legislature intended for these two words to have different meaning and effect. *Christensen v. Am. Food & Vending Servs., Inc.*, 191 S.W.3d (Mo. App. E.D. 2006).

The Southern District reached the same conclusion: "section" means "section". *Division of Employment Sec. v. Comer*, 199 S.W.3d 915, 921 (Mo. App. S.D. 2006).

The 1992 amendment was not a useless act. Consumers who fit the four limiting criteria in § 407.025 should be deemed to be authorized to bring suits for violation of § 407.020 against "regulated entities" under § 407.025.

Conclusion

The NCLC respectfully urges this Court, if it addresses the "regulated entities" exemption, to hold that §§ 407.020.2(2) and 407.025, read together, give the limited subset of private citizens described in § 407.025 – those who 1) purchase or lease merchandise 2) primarily for personal, family or household purposes and 3) thereby suffer an ascertainable loss of money or property, real or personal, 4) as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020 – the authority to bring claims under § 407.025 against such entities.

September 25, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, I electronically filed the above with the Clerk of the Court using the Missouri e-Filing System and thereby served the same upon all attorneys of record.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure, because it contains 5,809 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief and its supplements have been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 13 of Times New Roman. This brief also includes the information required by Rule 55.03.

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