

39.01 [2022 Revision] Verdict Directing – Violation of Missouri Merchandising Practices Act where S.B. 591 (Laws 2020) does not apply

[No change to Instruction]

Notes on Use (2022 Revision)

[No change to Notes on Use]

Committee Comment (2025 Revision)

(Approved November 5, 2024; Effective July 1, 2025)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services); (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. 2011). For cases where S.B. 591 (Laws 2020) applies, see MAI 39.02 and § 407.025.1, RSMo (2020).

B. The MMPA prohibits "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 or the solicitation of any funds for any charitable purpose" by defining such activity as an unlawful practice. Section 407.020.1, RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny 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 [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. A consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. banc 2007); 15 CSR §§ 60-9.020, -9.070, -9.110.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1, RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision ..." 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009).

I. For class actions, see § 407.025.3-6, RSMo (2000).

J. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo. App. 1994), and *Shiplet v. Copeland*, 450 S.W.3d 433 (Mo. App. 2014). Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo. App. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo. App. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

K. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).

39.02 [2025 Revision] Verdict Directing – Violation of Missouri Merchandising Practices Act where SB 591 (Laws 2020) applies

(Approved November 5, 2024; Effective July 1, 2025)

Your verdict must be for plaintiff if you believe:

First, in connection with the [purchase] [sale]¹ of (*here identify merchandise afforded protection under the statute*),² defendant (*here insert the alleged method, act or practice declared unlawful by § 407.020, RSMo, such as "misrepresented the (merchandise previously identified)" or "concealed a material fact"*),³ and

Second, such conduct would have caused a reasonable person to [purchase] [lease]¹ the (*here describe merchandise*),² and

Third, plaintiff [purchased] [leased]¹ the (*here describe merchandise*)² primarily for [personal] [family] [household]⁴ purposes, and

Fourth, the plaintiff acted as a reasonable consumer would in light of all circumstances, and

Fifth, as a direct result of defendant's conduct, plaintiff sustained damage.

Notes on Use (2025 Revision)

(Approved November 5, 2024; Effective July 1, 2025)

1. Select the appropriate term.
2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."
3. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph G.
4. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

Committee Comment (2025 Revision)

(Approved November 5, 2024; Effective July 1, 2025)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services); (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. 2011). For cases where S.B. 591 (Laws 2020) applies, the person seeking to recover damages shall establish (a) that the person acted as a reasonable consumer would in light of all circumstances; (b) that the method, act or practice declared unlawful would cause a reasonable person to enter into the transaction that resulted in damages; and (c) individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty. Section 407.025.1, RSMo (2020).

B. In a class action, the class representative is the "person" to have acted as a "reasonable consumer would act in light of all circumstances." Section 407.025.5(1), RSMo (2020).

C. The MMPA prohibits "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 or the solicitation of any funds for any charitable purpose" by defining such activity as an unlawful practice. Section 407.020.1, RSMo (2020). Civil actions may be

brought under the MMPA to recover actual damages by "[a]ny 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 [an unlawful practice]." Section 407.025.1, RSMo (2020).

D. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

E. A consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. banc 2007); 15 CSR §§ 60-9.020, -9.070, -9.110. Section 407.025 was revised in 2020 and states "[t]hat the method, act or practice declared unlawful by section 407.020 would cause a reasonable person to enter into the transaction that resulted in damages." See Section 407.025.1(2)(b), RSMo (2020).

F. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1, RSMo (2020).

G. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision ..." 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common

law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. banc 2007).

H. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007).

I. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009).

J. A person or class action representative seeking to recover damages shall establish "individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." Section 407.025.1(2)(c); 407.025.5(3), RSMo (2020). In a class action, other class members shall establish "individual damages in a manner determined by the court." Section 407.025(5), RSMo (2020). Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo. App. 1994), and *Shiplot v. Copeland*, 450 S.W.3d 433 (Mo. App. 2014).

K. Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo. App. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo. App. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result

of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

L. The Committee takes no position on the constitutionality of any provision of S.B. 591 (Laws 2020).