



SUPREME COURT OF MISSOURI

en banc

August 16, 2013

Effective January 1, 2014

IN RE: REVISIONS TO MAI-CIVIL

Addition to the "Why and How to Instruct a Jury" that appears on Page LXI of the *Missouri Approved Jury Instructions, Seventh Edition*.

TABLE OF INSTRUCTIONS

MAI 2.07	EXPLANATORY – INSURANCE, BENEFITS (Committee Comment – Revision)
MAI 39.01	VERDICT DIRECTING – VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT (Instruction – New) (Notes on Use – New) (Committee Comment – New)

ORDER

1. The paragraph on page LXI of the *Missouri Approved Jury Instructions, Seventh Edition*, that states:

Don't forget!! Your *failure to plead the ultimate facts* necessary to state a claim may be raised defensively for the first time on appeal. Rule 55.27(g)(2).
is hereby deleted and the following paragraph added to read as follows:

CAUTION: MALPRACTICE ALERT. Amendments to Rules

55.27(g)(2) and 78.07(a) (both effective January 1, 2012) and Rule 84.13(a) (effective July 1, 2012), when read together, require that allegations of error (including sufficiency or deficiency of pleadings) be presented to and expressly decided by the trial court in order to preserve those issues for appellate review.

Such issues may no longer be raised for the first time on appeal and must be raised in a post-trial motion (and possibly earlier if so required by the rules).

THIS IS A MAJOR CHANGE IN THE MISSOURI PROCEDURAL REQUIREMENTS FOR PRESERVATION OF ERROR ON APPEAL.

2. Additions and revisions of previously approved MAI-CIVIL Instructions, Notes on Use, and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

3. The Instructions, Notes on Use, and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2014, and may be used prior thereto; any such use shall not be presumed to be error.

4. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

MARY R. RUSSELL
Chief Justice

2.07 [2012 New] Explanatory – Insurance, Benefits

Committee Comment (2013 Revision)

(Approved August 16, 2013; Effective January 1, 2014)

A. This is not a mandatory instruction. In some cases it may be appropriate, in the discretion of the trial judge, to give the instruction as part of the general instruction packet. In other cases, it may be more appropriate to reserve this instruction as a response to a question by the jury during deliberations.

B. There may also be cases in which this instruction would not be appropriate, such as bad faith insurance cases, vexatious refusal to pay cases, and insurance coverage cases. There may be other situations in which this instruction would not be appropriate.

C. The Committee suggests that the trial court and counsel discuss (on the record), during the instruction conference, any issue pertaining to insurance and/or benefits, and the proper scope of argument to the jury on these issues. Since such a discussion is not mandatory, appropriate and timely objections must still be made. However, such a discussion may help clarify issues and reduce the number of interruptions during closing arguments.

D. The existence or use of this instruction is not intended to limit the trial court's discretion in ruling on motions in *limine* or controlling closing arguments.

39.01 [2013 New] Verdict Directing - Violation of Missouri Merchandising Practices Act

(Approved August 16, 2013; Effective January 1, 2014)

Your verdict must be for plaintiff if you believe:

First, plaintiff ["purchased", "leased"]¹ (*here identify merchandise afforded protection under the statute*)², and

Second, such ["purchase", "lease"]¹ was primarily for ["personal", "family", "household"]³ purposes, and

Third, in connection with the ["sale", "lease", "advertisement"]⁴ of (*here identify merchandise*) defendant (*here insert the alleged method, act or practice declared unlawful by § 407.020, RSMo, such as "misrepresented the (here repeat the identification from Paragraph First)" or "concealed a material fact"*)⁵, and

Fourth, as a direct result of such conduct, plaintiff sustained damage.

Notes on Use (2013 New)

(Approved August 16, 2013; Effective January 1, 2014)

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. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".
4. Select the appropriate term.
5. The particular term or phrase incorporated from § 407.020, RSMo, may need to be

defined. See discussion in Committee Comment, paragraph F.

Committee Comment (2013 New)

(Approved August 16, 2013; Effective January 1, 2014)

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) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the 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).

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," 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 of Missouri 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 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).