



# Missouri Aims to Weed out Meritless Punitive Damage Claims and Reign in Consumer Protection Claims

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Last week, the Missouri General Assembly passed and sent to Governor Mike Parson the latest bill advancing the state's ongoing tort reform. Senate Bill No. 591 is widely considered to be a win for corporate defendants statewide and is expected to be signed by the Governor, as it was one of his legislative priorities. The bill includes provisions that, among other things, will screen meritless claims for punitive damages and will increase a plaintiff's burden in bringing a claim under Missouri's consumer protection statute — the Missouri Merchandising Practices Act (MMPA). The provisions in S.B. 591 will apply to cases filed on or after August 28, 2020. Lathrop GPM Consulting, on behalf of the United States Chamber - Institute for Legal Reform, has spent the past three years advocating before the General Assembly for the passage of this measure and found success during the 2020 Missouri regular session.

## **Heightened Standard and Burden of Proof for Punitive Damages**

One of the major effects of the law is a heightened standard for punitive damage claims. Previously, Missouri courts allowed punitive damages in negligence cases if the defendant "knew or should have known that the negligent conduct created an unreasonable risk of injury, showing complete indifference or conscious disregard for the safety of others." See *Coon v. American Compressed Steel, Inc.*, 207 S.W.3d 629 (Mo. Ct. App. 2006). Now, S.B. 591 enhances the standard for punitive damages across the board, making them only available where the defendant "intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others."

The new law also cements into place a heightened burden of proof for punitive damage claims by codifying the "clear and convincing evidence" standard previously recognized by the Missouri Supreme Court. See *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996) (holding that for common law punitive damage claims the evidence must meet the clear and convincing standard of proof). Such a burden is typically required in cases of quasi-criminal wrongdoing and is heavier than the "preponderance of the evidence" standard in most civil cases.

## **Plaintiffs May Only Plead Punitive Damages Upon Leave of Court**



Perhaps the most significant change in the new law is the procedure for pursuing punitive damages. Formerly, plaintiffs in Missouri could include punitive damage claims in their initial petition. Inclusion of punitive damage claims in the initial petition could lead to plaintiffs leveraging the claim against defendants in settlement discussions. Plaintiffs ultimately had to abide by Mo. Rev. Stat. § 510.263 before they could obtain discovery of a defendant's financial information, which required them to come forward with evidence of a submissible case, and the court had to make such a finding before production of financial information.

The new law prohibits plaintiffs from pleading a claim for punitive damages in their initial petition. Instead, claims for punitive damages may only proceed after a motion for leave of court is filed at least 120 days prior to the final pretrial conference or trial. The motion may introduce evidence in the form of affidavits, exhibits, and discovery materials, and must establish a "reasonable basis for recovery of punitive damages." In response, the opposing party may present the same types of evidence to contest that the standard has not been met. The trial court may then grant the motion for leave if it determines that a trier of fact could reasonably conclude the standard has been met.

### **Punitive Damages Against Employers**

Under the new law, employers are generally protected from punitive damage claims based on the independent acts of their employees. However, an employer or other principal may be subject to punitive damages for the acts of an agent if the principal authorized or ratified the agent's conduct, the principal recklessly employed or retained an unfit agent, or the agent acted in the scope of employment in their managerial capacity. If an employer admits liability for compensatory damages for the actions of an agent, courts are obligated to grant limited discovery of information related to the agent's qualifications.

### **Availability and Amount of Punitive Damages**

The new law makes punitive damages available only to the extent they exceed any nominal damages or if the claims invoke privacy rights, property rights, or Constitutional rights. Further, the new law codifies the previous Supreme Court holding that the amount of punitive damages cannot be based on harm to nonparties. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

### **MMPA**

The new law also contains significant amendments to Missouri's consumer protection statute. The MMPA exists to protect consumers in the marketplace by expanding the common law definition of fraud "to preserve fundamental honesty, fair play and right dealings in public transactions." *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410 (Mo. banc 2014). In recent years, consumers have weaponized the statute for its easy accessibility and overbroad interpretations. The newest amendments provide higher standards for consumers seeking to recover under the statute.



### *Reasonableness, Reliance, and Damages as Elements of an MMPA Claim*

One of the notable provisions in the new law creates an increased burden on a consumer seeking to recover under the MMPA. The consumer must now establish that they acted "as a reasonable consumer would in light of all circumstances" and that the defendant's unlawful practice "would cause a reasonable person to enter into the transaction that resulted in damages." Furthermore, the consumer must show definitive and objective evidence of their damages "to allow the loss to be calculated with a reasonable degree of certainty."

### *Class Action Requirements and Attorney's Fees*

In class action proceedings, class representatives must also establish the same requirements of reasonableness, reliance and individual damages. Other members of the class, however, must only establish their individual damages subject to the court's requirements.

Attorney's fees continue to remain available in class actions, but the new law requires that they now must bear "a reasonable relationship to the amount of the judgment." If the relief is equitable, the attorney's fees must be based on "the amount of time reasonably expended."

### *Sale of New Residence Excluded by Warranty and Disclaimer*

Another new provision adds an exclusion for MMPA claims involving new residences. If a builder of a new residence provides or pays for an express warranty under the terms of the sales contract, and the specific language of the contract excludes the sale of the residence from the MMPA, then a consumer may not bring a claim under the MMPA relating to that transaction.

### *Statute of Limitations Commences at the Time of Purchase or Notice of Unlawful Practice*

The new law also provides that a cause of action under the MMPA accrues on the date that the merchandise was purchased or leased or on the date the individual received notice that an alleged unlawful practice occurred. At that time, the statute of limitations begins to run for an MMPA claim.

For more information, please contact Environmental and Tort Practice Group Leader Mara Cohara, Brian Fries, Jean Paul Bradshaw, Brandon Chapman, or your Regular Lathrop GPM contact.

### **About Lathrop GPM Consulting**

Lathrop GPM Consulting, a subsidiary of Lathrop GPM and headquartered in Jefferson City, includes a bipartisan team that offers a unique mix of experience in lobbying all branches of state government, procurement and crisis management. As governmental regulations and interactions with businesses become increasingly more complex, solving client issues requires a greater range of strategies than traditional litigation or regulatory law alone can provide. Lathrop GPM Consulting was created to address that gap in legal services.