

FIRST REGULAR SESSION

HOUSE BILL NO. 902

94TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE STEVENSON.

Read 1st time February 19, 2007 and copies ordered printed.

D. ADAM CRUMBLISS, Chief Clerk

1960L.011

AN ACT

To repeal section 407.025, RSMo, and to enact in lieu thereof two new sections relating to merchandising practices.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 407.025, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 407.015 and 407.025, to read as follows:

407.015. 1. In pertinent cases, the courts shall be guided by the policies of the Federal Trade Commission and interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. Section 45(a)(1), as amended.

2. This section shall not apply to actions or transactions otherwise permitted or approved by the Federal Trade Commission or any other regulatory body or officer acting under statutory authority of this state or the United States.

407.025. 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] **actual out-of-pocket loss. The term "out-of-pocket loss" shall mean an amount of money equal to the difference between the amount paid by the consumer for the good or service and the actual market value of the good or service that**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

9 **the consumer actually received. In order to recover damages in an individual action under**
10 **this section, each person shall be required to prove that the method, act, or practice**
11 **declared unlawful by section 407.020 caused him or her to enter into the transaction that**
12 **resulted in his or her damages.** The court may, in its discretion, award punitive damages [and]
13 **. The court may, in its discretion,** award to the prevailing party attorney's fees, based on the
14 amount of time reasonably expended, and may [provide such equitable relief as it deems
15 necessary or proper] **enjoin the methods, acts, or practices declared unlawful by section**
16 **407.020.**

17 2. Persons entitled to bring an action pursuant to subsection 1 of this section may, if the
18 unlawful method, act or practice has caused similar injury to numerous other persons, institute
19 an action as representative or representatives of a class against one or more defendants as
20 representatives of a class, and the petition shall allege such facts as will show that these persons
21 or the named defendants specifically named and served with process have been fairly chosen and
22 adequately and fairly represent the whole class, to recover damages as provided for in subsection
23 1 of this section. The plaintiff shall be required to prove such allegations, unless all of the
24 members of the class have entered their appearance, and it shall not be sufficient to prove such
25 facts by the admission or admissions of the defendants who have entered their appearance. **In**
26 **order to recover damages in a class action under this section, each class member shall be**
27 **required to prove that the method, act, or practice declared unlawful in section 407.020**
28 **caused the class member to enter into the transaction that resulted in his or her damages.**
29 In any action brought pursuant to this section, the court may in its discretion [order, in addition
30 to damages, injunction or other equitable relief and] **enjoin the methods, acts, or practice**
31 **declared unlawful by section 407.020. The court may also determine a proposed award of**
32 **reasonable attorney's fees for the counsel to the class.**

33 3. An action may be maintained as a class action in a manner consistent with Rule 23
34 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent
35 such state rule is not inconsistent with the federal rule if:

- 36 (1) The class is so numerous that joinder of all members is impracticable;
37 (2) There are questions of law or fact common to the class;
38 (3) The claims or defenses of the representative parties are typical of the claims or
39 defenses of the class; and
40 (4) The representative parties will fairly and adequately protect the interests of the class;
41 and, in addition
42 (5) The prosecution of separate action by or against individual members of the class
43 would create a risk of:

- 44 (a) Inconsistent or varying adjudications with respect to individual members of the class
45 which would establish incompatible standards of conduct for the party opposing the class; or
46 (b) Adjudications with respect to individual members of the class which would as a
47 practical matter be dispositive of the interests of the other members not parties to the
48 adjudications or substantially impair or impede their ability to protect their interests; or
49 (6) The party opposing the class has acted or refused to act on grounds generally
50 applicable to the class, thereby making appropriate final injunctive relief or corresponding
51 declaratory relief with respect to the class as a whole; or
52 (7) The court finds that the questions of law or fact common to the members of the class
53 predominate over any questions affecting only individual members, and that a class action is
54 superior to other available methods for the fair and efficient adjudication of the controversy. The
55 matters pertinent to the findings include:
56 (a) The interest of members of the class in individually controlling the prosecution or
57 defense of separate actions;
58 (b) The extent and nature of any litigation concerning the controversy already
59 commenced by or against members of the class;
60 (c) The desirability or undesirability of concentrating the litigation of the claims in the
61 particular forum;
62 (d) The difficulties likely to be encountered in the management of a class action.
63 4. (1) As soon as practicable after the commencement of an action brought as a class
64 action, the court shall determine by order whether it is to be so maintained. An order pursuant
65 to this subdivision may be conditional, and may be altered or amended before the decision on
66 the merits. **An order permitting a class action shall specifically state how the class claims
67 and any issues affecting only individual members, raised by the claims or defenses asserted
68 in the pleadings, will be tried in a manageable, time-efficient manner.**
69 (2) In any class action maintained pursuant to subdivision (7) of subsection 3 of this
70 section, the court shall direct to the members of the class the best notice practicable under the
71 circumstances, including individual notice to all members who can be identified through
72 reasonable effort. The notice shall advise each member that:
73 (a) The court will exclude such member from the class if such member so requests by
74 a specified date;
75 (b) The judgment, whether favorable or not, will include all members who do not request
76 exclusion; and
77 (c) Any member who does request exclusion may, if such member desires, enter an
78 appearance through such member's counsel.

(3) **Prior to the entry of a judgment against a defendant in an action maintained as a class action under subsection 3 of this section, the court shall require each member of the class who claims to be entitled to monetary relief to submit a statement in a form prescribed by the court requesting a specific dollar amount and providing information regarding the nature of his or her loss, injury, claim, or damage. No award of damages under this section shall be made without proof that the person or persons seeking damages suffered an actual out-of-pocket loss. No judgment shall be entered until the trier of fact has determined the amount of money, if any, owed to each class member based on his or her individual proof. The amount of the judgment shall not exceed the sum of the money owed to each class member. The judgment shall identify each class member of the class and his or her individual monetary award.** The judgment in an action maintained as a class action pursuant to subdivision (5) of subsection 3 of this section or subdivision (6) of subsection 3 of this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action pursuant to subdivision (7) of subsection 3 of this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (2) of this subsection was directed, and who have requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate **in a case that otherwise meets the class action requirements of subsection 3 of this section**, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

5. In the conduct of actions to which this section applies, the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) Imposing conditions on the representative parties or on intervenors;

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) Dealing with similar procedural matters.

114 6. A class action shall not be dismissed or compromised without the approval of the
115 court, and notice of the proposed dismissal or compromise shall be given to all members of the
116 class in such manner as the court directs.

117 7. Upon commencement of any action brought pursuant to subsection 1 of this section,
118 the plaintiff or plaintiffs shall inform the clerk of the court in which such action is brought, on
119 forms to be provided by such clerk, that the action is brought pursuant to this section. The clerk
120 of the court shall forthwith inform the attorney general of the commencement of such action,
121 together with a copy of the complaint or other initial pleading, and, upon entry of any judgment
122 or decree in the action, the clerk shall mail a copy of such judgment or decree to the attorney
123 general.

124 8. Any permanent injunction, judgment or order of the court made pursuant to section
125 407.100 shall be prima facie evidence in an action brought pursuant to this section that the
126 respondent used or employed a method, act or practice declared unlawful by section 407.020.

127 **9. This section shall apply to all claims pending or filed on or after the effective date**
128 **of this section.**

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