



MISSOURI RAISES BAR FOR PUNITIVE DAMAGES AND CONSUMER PROTECTION LAW CLAIMS

by Mark A. Behrens and Jennifer J. Artman

The Missouri legislature has passed sweeping changes to the state's punitive damages law and its consumer protection statute, the Missouri Merchandising Practices Act ("MMPA"). Governor Mike Parson is expected to sign the legislation, S.B. 591. The new law will apply to all cases filed on or after August 28, 2020. The changes add to other recent reforms passed by the legislature that have improved the legal climate in a state that has consistently been positioned near the bottom of businesses' rankings of state legal systems in recent years.

Burden of proof and heightened standard for punitive damages defined

Concern about punitive damages that "run wild" has existed in Missouri since the state's supreme court struck down a cap on such damages in 2014 for tort actions that existed at common law. *See Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014). The legislature enacted the cap after years of state court decisions had diluted the standard for punitive damages and created untenable unpredictability for defendants. Courts had blurred the line between ordinary negligence and the type of conduct that should be required for punitive damages.

The new law codifies a clear standard of liability for punitive damages. Punitive damages will now be limited to egregious cases where a "defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others." The standard returns punitive damages to their intentional tort roots. *See Klingman v. Holmes*, 54 Mo. 304, 308 (1873) (exemplary damages "where an evil intent has manifested itself"). A separate but similar standard is provided for personal injury claims against healthcare providers.

The new law also codifies the "clear and convincing evidence" burden-of-proof standard for punitive damages that has been applied by Missouri courts. This standard reflects the quasi-criminal nature of punitive damages by taking a middle ground between the ordinary civil standard ("preponderance of the evidence") and the criminal law standard ("beyond a reasonable doubt").

Punitive damages only pled after adducing evidence of intentional wrongdoing

The new law changes the procedure for pleading punitive damages to expedite the weeding out of meritless claims and prevent unjustified, speculative claims from driving media attention and settlement discussions. Missouri had required punitive damages claims to be included in the initial petition, which allowed plaintiffs to make claims for punitive damages without evidentiary support.

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The new law follows an approach used in about a dozen states to require trial courts to conduct a meaningful review of the evidence before allowing a plaintiff to assert a claim for punitive damages. Henceforth, a claim for punitive damages in Missouri may be filed only with leave of court after a written motion by the claimant, filed 120 days prior to the final pretrial conference or trial. The claimant must present admissible evidence establishing a reasonable basis for recovery of punitive damages. Other parties may oppose the motion to add a request for punitive damages. If the court decides that a trier of fact could reasonably conclude that the burden of proof and standard for punitive damages have been met, the court will allow the pleading seeking punitive damages.

“Complicity rule” limits vicarious liability for punitive damages

The new law protects employers from punitive damages liability for acts by rogue employees. Punitive damages can be awarded against an employer or other principal for an agent’s acts only if a managerial agent authorized, participated in, or ratified the outrageous conduct, or the agent was “unfit” for the job, making it “reckless” for the principal to employ the person.

Nominal damages insufficient; harm to nonparties not considered

The new law provides that nominal damages are insufficient to support punitive damages. Further, the amount of punitive damages shall not be based on harm to nonparties, as the United States Supreme Court held in *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

Missouri consumer protection statute beefed up

The MMPA (Mo. Rev. Stat. § 407.025, *et seq.*) was intended to provide an outlet for consumers harmed by unlawful business practices, but its broad language has been exploited, turning the MMPA into a vehicle for lawsuit abuse. Between 2000-2009, there was a 678% increase in reported MMPA decisions. The new law will curb that abuse by bringing Missouri’s law in line with other states.

Reasonable consumer and reliance requirements: The MMPA will now require a claimant to show that he or she acted as a “reasonable consumer...in light of all circumstances.” Previously, claimants could seek out and challenge business practices that might mislead the most unsophisticated consumer. The new law also requires a claimant to show that the allegedly unfair business practice would “cause a reasonable person to enter into the transaction” that resulted in damages. In class actions, the class representatives must establish both reasonableness and reliance under the reasonable person standard.

Damages: MMPA claimants will be required to prove damages with “sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty.” The standard applies to class action representatives, while class members must “establish individual damages in a manner determined by the court.”

Statute of limitations: The new law defines when a claim accrues under the MMPA for purposes of applying the statute of limitations. Specifically, the cause of action accrues on the date of the purchase or lease that forms the basis of the MMPA claim, or when the plaintiff first receives notice of the allegedly unfair practice. This codifies a flexible standard previously expressed in case law.

Attorneys’ fees in MMPA class actions: The new law requires attorneys’ fees awarded in MMPA class actions to bear a “reasonable relationship” to the amount of the judgment (or, for equitable relief, be based on the time expended).