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ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

BEFORE THE MISSOURI HOUSE SPECIAL COMMITTEE ON REGULATORY OVERSIGHT AND REFORM

S.B. 591

MAY 6, 2020

On behalf of the American Tort Reform Association (ATRA),[1] thank you for allowing me to testify in support of S.B. 591. The bill is the product of an all-night Senate negotiation and reflects compromise language worked out by stakeholders and policymakers. ATRA, acting in good faith, supports the compromise. We ask you to pass the bill without amendment and send it to Governor Parson for his signature. Below is a summary of the main provisions in the bill's two sections.

Missouri Merchandising Practices Act (MMPA)

The MMPA was created to protect consumers by declaring unfair or deceptive practices to be unlawful. The MMPA, however, "does not define unlawful practice." *Huch v. Charter Commc'ns, Inc*., 290 S.W.3d 721, 724 (Mo. 2009) (citation omitted). Some lawyers have exploited this vagueness, turning the MMPA into a vehicle for lawsuit abuse. Between 2000-2009, there was a 678% increase in reported MMPA decisions. *See* Joanna Shepherd, *The Expanding Missouri Merchandizing Practices Act* 13 (Am. Tort Reform Found. 2014). The growth of consumer litigation in Missouri has outpaced virtually every other state and negative impacts nearly every industry, including food and beverages, cosmetics, household goods, automobiles, and financial and technology services, among others.

MMPA abuse tarnishes the reputation of Missouri's civil justice system. For example, a *Washington Post* headline read, "A man is suing Hershey for 'under-filling' his box of Whoppers," after a court denied a motion to dismiss an MMPA claim. Abha Bhattarai, *A Man is Suing Hershey for 'Under-Filling' His Box of Whoppers*, Wash. Post, May 25, 2017. The plaintiff admitted in a deposition that he had purchased the candy some 600 times over 10 years and was well aware of how much candy the boxes contained. A federal judge ultimately dismissed the lawsuit, but only after two years of costly litigation. *Bratton v. The Hershey Co*., No. 2:16-cv-04322 (W.D. Mo. Feb. 16, 2018).

S.B. 591 addresses key causes of MMPA abuse and brings the statute in line with other states.

- The bill requires an MMPA plaintiff to prove that she acted "reasonably" under the circumstances. Currently, the MMPA lacks an explicit requirement that the challenged business practice would mislead a reasonable consumer. Judges will have the power to dismiss a claim when it is objectively clear that no reasonable consumer would be misled by the practice targeted in the lawsuit.

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[1] ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation.

- Currently, MMPA plaintiffs do not have to show they relied upon (or were even influenced by) an alleged misrepresentation. Thus, individuals who purchased a product can obtain compensation even if they were completely unaware of the purported statement or it played no part in their decision to purchase the product. Under the bill, an MMPA plaintiff must prove that the alleged violation would *cause* a reasonable person to enter into the transaction at issue. This will protect consumers from bad actors while discouraging socially valueless claims.
- The bill requires damages to be presented with sufficiently definite and objective evidence. Attorneys today attempt to take advantage of the loosely-worded MMPA by filing lawsuits on behalf of clients who merely purchased a product or saw an advertisement, but otherwise received what they paid for. Requiring evidence sufficient to calculate damages with a reasonable degree of certainty will reduce the ability of creative lawyers to recover where the consumer has not experienced an actual loss.
- The bill 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 business practice. This codifies a previously flexible standard expressed only in case law, providing consistency for all litigants. *See, e.g., Ball v. Friese Const. Co.*, 348 S.W.3d 172, 179 (Mo. Ct. App. 2011).
- The bill defines the requirements for proceeding as a class action under the MMPA. Each class member must show how their damages were caused by the practice at issue. This provision acknowledges the Missouri Supreme Court's principle that a class member is not injured and has no MMPA claim when the person "did not care" about the aspect of the product at issue or "knew about" the product's features, but "purchased . . . [the] products anyway." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 862 (Mo. banc. 2008).
- The legislation requires that attorneys' fees awarded in MMPA class actions bear a reasonable relationship to the amount of the judgment. This ensures that consumers, and not lawyers, receive the benefit of the MMPA.

Punitive Damages Reforms

It is now almost three decades since the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991), expressed concern about punitive damages awards that "run wild." Since that time, courts and legislatures have worked to develop standards and procedures to advance the twin policy goals of punitive damage – punishment and deterrence – while achieving fairness for all parties. Reforms can provide parties with constitutionally required "fair notice" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)) of the type of conduct that may result in punishment and curb excessive awards that may slow economic growth and employment.

In 2005, Missouri joined many other states that addressed punitive damages "run wild" by capping punitive damages. In 2014, however, the Missouri Supreme Court struck down the cap with respect to tort actions that existed at common law and for which punitive damages were available, such as fraud. In *Lewellen v. Franklin,* 441 S.W.3d 136 (Mo. banc 2014), the court said that because "the punitive damages cap…curtails the jury's determination of damages" it "infringes on the right to a trial

by jury when applied to a cause of action to which the right to jury trial attaches at common law." *Id*. at 145 (quoting *Watts v. Lester E. Cox Med. Ctrs*., 376 S.W.3d 633, 640 (Mo. banc 2012)).

S.B. 591 takes *Lewellen* into account. The jury will decide whether the standard for punitive damages has been met and set the amount of any award. The bill simply makes sure that the standards are clear and the process is fair.

- The bill codifies the "clear and convincing evidence" evidentiary standard for punitive damages that was adopted by the Missouri Supreme Court in *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996). This standard takes a middle ground between the ordinary civil burden of proof standard ("preponderance of the evidence") and the criminal law standard ("beyond a reasonable doubt").

- The bill provides a clear standard for the imposition of punitive damages. Presently, punitive damages may be awarded "for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others." *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989). Other formulations have been used too. S.B. 591 permits punitive damages 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").

- The bill specifies when punitive damages may be awarded against an entity for the acts of an agent. Currently, an employer can be liable for punitive damages when an employee acts in a way that meets the standard for punitive damages, even if the employer did not share the state of mind necessary for punitive damages. The bill allow punitive damages to be awarded against an employer or other principal because of an agent if the principal or a managerial agent of the principal "authorized the doing and the manner of the act;" the agent was "unfit," making it "reckless" for the principal to employ the person; the agent was "employed in a managerial capacity and acting within the scope of employment;" or the "principal or managerial agent of the principal ratified or approved the act."

- The legislation establishes a process by which, before punitive damages may be pleaded, a court must determine based on the evidence to be admitted at trial that a trier of fact could reasonably conclude that the burden of proof and standard of liability for punitive damages have been met. Courts always have a duty to determine whether punitive damages should be submitted to a jury, but the bill will weed out meritless claims faster than today.

- 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) (due process forbids use of punitive damages "to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent").

- Punitive damages will be available in medical malpractice cases when it is "clearly and convincingly demonstrated" that the health care provider "intentionally caused damage to the plaintiff or demonstrated malicious misconduct that caused damage to the plaintiff."

Lastly, it is important to note what the bill does not do. It does not abolish or limit punitive damages. It does not infringe on the right to a jury trial because all issues related to punitive damages remain jury triable as at common law. And the bill does not affect the right of an individual to be fully compensated for any injuries actually sustained.

Conclusion

ATRA supports S.B. 591 and asks the Committee to pass the bill without amendments.