

SECOND REGULAR SESSION

SENATE BILL NO. 793

98TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR RICHARD.

Pre-filed December 9, 2015, and ordered printed.

ADRIANE D. CROUSE, Secretary.

5222S.011

AN ACT

To repeal sections 407.025 and 537.762, RSMo, and to enact in lieu thereof four new sections relating to civil actions.

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

Section A. Sections 407.025 and 537.762, RSMo, are repealed and four
2 new sections enacted in lieu thereof, to be known as sections 407.012, 407.025,
3 537.761, and 537.762, to read as follows:

**407.012. 1. In a civil action brought under section 407.025, the
2 courts shall be guided by the policies of the Federal Trade Commission
3 and interpretations given by the Federal Trade Commission and the
4 federal courts to Section 5(a)(1) of the Federal Trade Commission Act,
5 15 U.S.C. Section 45(a)(1), as amended.**

**6 2. Section 407.025 shall not apply to actions or transactions
7 otherwise permitted, approved, or regulated by the Federal Trade
8 Commission or any other regulatory body or officer acting under
9 statutory authority of this state or the United States.**

407.025. 1. Any person who purchases or leases merchandise primarily
2 for personal, family or household purposes and thereby suffers an ascertainable
3 loss of money or property, real or personal, as a result of the use or employment
4 by another person of a method, act or practice declared unlawful by section
5 407.020, may bring a private civil action in either the circuit court of the county
6 in which the seller or lessor resides or in which the transaction complained of
7 took place, to recover actual damages. **A person seeking to recover damages
8 shall demonstrate that he or she acted reasonably in light of all the
9 circumstances and establish his or her individual damages with**

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

10 sufficiently definitive and objective evidence to allow the loss to be
11 calculated with a reasonable degree of certainty. The damages shall be
12 measured by the person's out-of-pocket loss, which shall be defined as
13 an amount of money equal to the difference between the amount paid
14 by the consumer for the good or service and the actual market value of
15 the good or service that the consumer actually received. In order to
16 recover damages under this section, each person shall be required to
17 prove that the method, act, or practice declared unlawful by section
18 407.020 caused him or her to enter into the transaction that resulted in
19 his or her damages. The court may, in its discretion, award punitive damages
20 [and]. **The court may, in its discretion,** award to the prevailing party
21 attorney's fees, based on the amount of time reasonably expended, and may
22 provide such [equitable] **injunctive** relief as it deems necessary or proper to
23 **protect the prevailing party from the methods, acts, or practices**
24 **declared unlawful by section 407.020. No action may be brought under**
25 **this section to recover damages for personal injury or death. A cause**
26 **of action under this section accrues on the date of the purchase or**
27 **lease described in the first sentence of this section.**

28 2. Persons entitled to bring an action pursuant to subsection 1 of this
29 section may, if the unlawful method, act or practice has caused similar injury to
30 numerous other persons, institute an action as representative or representatives
31 of a class against one or more defendants as representatives of a class, and the
32 petition shall allege such facts as will show that these persons or the named
33 defendants specifically named and served with process have been fairly chosen
34 and adequately and fairly represent the whole class, to recover **compensatory**
35 **but not punitive** damages as provided for in subsection 1 of this section. The
36 plaintiff shall be required to prove such allegations, unless all of the members of
37 the class have entered their appearance, and it shall not be sufficient to prove
38 such facts by the admission or admissions of the defendants who have entered
39 their appearance. **In order to recover damages in a class action under**
40 **this section, each class member shall be required to prove that his or**
41 **her damages were proximately caused by the method, act, or practice**
42 **declared unlawful by section 407.020, and that the method, act, or**
43 **practice caused the class member to enter into the transaction that**
44 **resulted in his or her damages. The court may not infer that damages**
45 **proven to have been suffered by one or more class members were**

46 **suffered by all class members.** In any action brought pursuant to this
47 section, the court may in its discretion [order, in addition to damages, injunction
48 or other equitable relief and] **enjoin the methods, acts, or practices**
49 **declared unlawful by section 407.020. The court may also determine a**
50 **proposed award of** reasonable attorney's fees **for the counsel to the**
51 **class. Attorney's fees, if awarded, shall bear a reasonable relationship**
52 **to the amount of the judgment.**

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

57 (1) The class is so numerous that joinder of all members is impracticable;

58 (2) There are questions of law or fact common to the class;

59 (3) The claims or defenses of the representative parties are typical of the
60 claims or defenses of the class; and

61 (4) The representative parties will fairly and adequately protect the
62 interests of the class; and, in addition

63 (5) The prosecution of separate action by or against individual members
64 of the class would create a risk of:

65 (a) Inconsistent or varying adjudications with respect to individual
66 members of the class which would establish incompatible standards of conduct for
67 the party opposing the class; or

68 (b) Adjudications with respect to individual members of the class which
69 would as a practical matter be dispositive of the interests of the other members
70 not parties to the adjudications or substantially impair or impede their ability to
71 protect their interests; or

72 (6) The party opposing the class has acted or refused to act on grounds
73 generally applicable to the class, thereby making appropriate final injunctive
74 relief or corresponding declaratory relief with respect to the class as a whole; or

75 (7) The court finds that the questions of law or fact common to the
76 members of the class predominate over any questions affecting only individual
77 members, and that a class action is superior to other available methods for the
78 fair and efficient adjudication of the controversy. The matters pertinent to the
79 findings include:

80 (a) The interest of members of the class in individually controlling the
81 prosecution or defense of separate actions;

82 (b) The extent and nature of any litigation concerning the controversy
83 already commenced by or against members of the class;

84 (c) The desirability or undesirability of concentrating the litigation of the
85 claims in the particular forum;

86 (d) The difficulties likely to be encountered in the management of a class
87 action.

88 4. (1) As soon as practicable after the commencement of an action brought
89 as a class action, the court shall determine by order whether it is to be so
90 maintained. An order pursuant to this subdivision may be conditional, and may
91 be altered or amended before the decision on the merits. **An order permitting**
92 **a class action shall specify how the class claims and any issues**
93 **affecting only individual members, raised by the claims or defenses**
94 **asserted in the pleadings, will be tried in a manageable, time efficient**
95 **manner.**

96 (2) In any class action maintained pursuant to subdivision (7) of
97 subsection 3 of this section, the court shall direct to the members of the class the
98 best notice practicable under the circumstances, including individual notice to all
99 members who can be identified through reasonable effort. The notice shall advise
100 each member that:

101 (a) The court will exclude such member from the class if such member so
102 requests by a specified date;

103 (b) The judgment, whether favorable or not, will include all members who
104 do not request exclusion; and

105 (c) Any member who does request exclusion may, if such member desires,
106 enter an appearance through such member's counsel.

107 (3) **Prior to an entry of a judgment against a defendant in an**
108 **action maintained as a class action under subsection 3 of this section,**
109 **the court shall require each member of the class claiming to be entitled**
110 **to monetary relief to submit a statement in a form prescribed by the**
111 **court requesting a specific dollar amount and providing information**
112 **regarding the nature of his or her loss, injury, claim, or damage. No**
113 **award of damages under this section may be made without objective**
114 **proof that the person or persons seeking damages suffered actual**
115 **damages. No judgment shall be entered until the trier of fact has**
116 **determined the amount of money, if any, owed to each class member**
117 **based upon his or her individual proof. The amount of judgment shall**

118 **not exceed the sum of the money owed to each class member. The**
119 **judgment shall identify each member of the class and his or her**
120 **individual monetary award.** The judgment in an action maintained as a class
121 action pursuant to subdivision (5) of subsection 3 of this section or subdivision (6)
122 of subsection 3 of this section, whether or not favorable to the class, shall include
123 and describe those whom the court finds to be members of the class. The
124 judgment in an action maintained as a class action pursuant to subdivision (7)
125 of subsection 3 of this section, whether or not favorable to the class, shall include
126 and specify or describe those to whom the notice provided in subdivision (2) of
127 this subsection was directed, and who have requested exclusion, and whom the
128 court finds to be members of the class.

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

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

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

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

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

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

149 (5) Dealing with similar procedural matters.

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

153 7. Upon commencement of any action brought pursuant to subsection 1

154 of this section, the plaintiff or plaintiffs shall inform the clerk of the court in
155 which such action is brought, on forms to be provided by such clerk, that the
156 action is brought pursuant to this section. The clerk of the court shall forthwith
157 inform the attorney general of the commencement of such action, together with
158 a copy of the complaint or other initial pleading, and, upon entry of any judgment
159 or decree in the action, the clerk shall mail a copy of such judgment or decree to
160 the attorney general.

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

165 9. **In any suit seeking relief under section 407.025 or any suit for**
166 **product liability, subsection 1 of section 507.040 shall not be satisfied**
167 **if the plaintiffs' claims are based on separate occurrences. Separate**
168 **purchases of the same product or service and separate injuries from**
169 **the same product shall be considered separate occurrences for**
170 **purposes of this section.**

537.761. 1. **In a products liability action in which a plaintiff**
2 **alleges a design defect, the burden is on the plaintiff to prove by a**
3 **preponderance of the evidence that:**

4 (1) **There was a safer alternative design; and**

5 (2) **The defect was a producing cause of the personal injury,**
6 **property damage, or death for which the plaintiff seeks recovery.**

7 2. **As used in this section, "safer alternative design" means a**
8 **product design other than the one actually used that in reasonable**
9 **probability:**

10 (1) **Would have prevented or significantly reduced the risk of the**
11 **plaintiff's personal injury, property damage, or death without**
12 **substantially impairing the product's utility; and**

13 (2) **Was economically and technologically feasible at the time the**
14 **product left the control of the manufacturer or seller by the application**
15 **of existing or reasonably achievable scientific knowledge.**

537.762. 1. A defendant whose liability is based solely on his status as
2 a seller in the stream of commerce may be dismissed from a products liability
3 claim as provided in this section.

4 2. This section shall apply to any products liability claim in which another

5 defendant, including the manufacturer, is properly before the court and from
6 whom total recovery may be had for plaintiff's claim.

7 3. A defendant may move for dismissal under this section within the time
8 for filing an answer or other responsive pleading unless permitted by the court
9 at a later time for good cause shown. The motion shall be accompanied by an
10 affidavit which shall be made under oath and shall state that the defendant is
11 aware of no facts or circumstances upon which a verdict might be reached against
12 him, other than his status as a seller in the stream of commerce.

13 4. The parties shall have sixty days in which to conduct discovery on the
14 issues raised in the motion and affidavit. The court for good cause shown, may
15 extend the time for discovery, and may enter a protective order pursuant to the
16 rules of civil procedure regarding the scope of discovery on other issues.

17 5. Any party may move for a hearing on a motion to dismiss under this
18 section. If the requirements of subsections 2 and 3 of this section are met, and
19 no party comes forward at such a hearing with evidence of facts which would
20 render the defendant seeking dismissal under this section liable on some basis
21 other than his status as a seller in the stream of commerce, the court shall
22 dismiss without prejudice the claim as to that defendant.

23 6. [No order of dismissal under this section shall operate to divest a court
24 of venue or jurisdiction otherwise proper at the time the action was commenced.
25 A defendant dismissed pursuant to this section shall be considered to remain a
26 party to such action only for such purposes.

27 7.] An order of dismissal under this section shall be interlocutory until
28 final disposition of plaintiff's claim by settlement or judgment and may be set
29 aside for good cause shown at anytime prior to such disposition.

Section B. If any provision of sections 407.015, 407.025, 537.761, and
2 537.762 or the application thereof to anyone or to any circumstance is held
3 invalid, the remainder of those sections and the application of such provisions to
4 others or other circumstances shall not be affected thereby.

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