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### **COMPARING MISSOURI'S MERCHANDISING PRACTICES ACT WITH THE KANSAS CONSUMER PROTECTION ACT: A LOOK AT THESE LAWS' PRACTICAL APPLICABILITY IN PRIVATE CIVIL ACTIONS**

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#### **I. INTRODUCTION**

Consumer fraud is not an uncommon occurrence. The FTC reported in 2007 that during a year-long study, 13.5 percent of American adults fell victim to fraud.<sup>1</sup> Despite laws created by the federal and state governments, this number remains too high. The laws are intended to level the power inequality between consumer and seller inherent in modern market places. While these laws all provide some benefit to consumers, they are not all created equal.<sup>2</sup> This comment examines differences for consumers between the Missouri Merchandising Practices Act and the Kansas Consumer Protection Act.

#### **II. MISSOURI'S MERCHANDISING PRACTICES ACT**

In Missouri, the Legislature has passed several statutes that work in concert protecting consumers. Missouri Revised Statutes § 407.010 et seq. generally protects consumer's rights.<sup>3</sup> It provides comparatively broad protection to those who have been wronged.<sup>4</sup> Rather than listing specific acts, types of transaction or circumstances that are *per se* violations, § 407 lays out broad categories of actions that break the law when used in connection with sales. For example, § 407.020 reads in part:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any

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<sup>1</sup> Press Release, Federal Trade Commission, FTC Releases Consumer Fraud Survey (Oct. 29, 2007), available at <http://www.ftc.gov/opa/2007/10/fraud.shtm>.

<sup>2</sup> See CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (National Consumer Law Center Inc 2009), available at [www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](http://www.nclc.org/images/pdf/udap/report_50_states.pdf).

<sup>3</sup> MO. REV. STAT. §§ 407.010 – 407.1500 (2012).

<sup>4</sup> See CARTER, *supra* note 2.

material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice.<sup>5</sup>

This section creates a cause of action for the Attorney General to bring criminal action against willful and knowing infringers with the intent to defraud, and it categorizes unlawful practices as a class D felony.<sup>6</sup> A person who has been unfairly deceived by a merchant can file a complaint with the Attorney General's office, and the Attorney General's office will hopefully have the time and manpower to pursue the complaint.

The Missouri Consumer Protection Act also creates a private cause of action for individuals. Section 407.025 reads in part:

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.<sup>7</sup>

Section 407.025 empowers Missouri's consumers. While the Attorney General has the burden to show the seller's intent to defraud to prevail on the criminal charge, this private right of action established here does not require that the consumer show such intent to defraud.<sup>8</sup> By omitting the intent to defraud requirement, the legislature has significantly lowered a consumer's burden of proof for this type of lawsuit. Essentially, all a plaintiff has to show is that an unlawful practice occurred in connection with a sale or advertisement and an ascertainable loss of money or property.<sup>9</sup>

### III. KANSAS' CONSUMER PROTECTION ACT

The Kansas Consumer Protection Act has a similar goal of protecting consumers, but the legislature's approach is quite different. Rather than adopting the broad definitions approach as Missouri has, Kansas created a long non-exclusive list of circumstances and actions that break the law.<sup>10</sup> The Kansas Consumer Protection Act explicitly bans seven types of deceptive practices if the supplier knows or should know that they are false.<sup>11</sup> It bans "the willful use, in any oral or written representation, of exaggeration, falsehood, innuendo or

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<sup>5</sup> MO. REV. STAT. § 407.020(1) (2012).

<sup>6</sup> *Id.* § 407.020(3).

<sup>7</sup> *Id.* § 407.025(1).

<sup>8</sup> See discussion *infra* Part IV.

<sup>9</sup> MO. REV. STAT. § 401.025(1) (2012).

<sup>10</sup> See KAN. STAT. ANN. § 50-626 (2012).

<sup>11</sup> *Id.*

ambiguity as to a material fact.”<sup>12</sup> The act also bans “the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact.”<sup>13</sup> Section 50-626 has eleven other similar provisions that make a type of deceptive practice unlawful.

Under the Kansas Consumer Protection Act, unconscionable acts and practices are also illegal.<sup>14</sup> Here the legislature created another nonexclusive list of factors for the courts to consider in making a determination of unconscionability.

The Kansas legislature hoped to create a strong tool for consumers to help create fairness in the markets. “This act shall be construed liberally to promote the following policies: (a) To simplify, clarify and modernize the law governing consumer transactions; (b) to protect consumers from suppliers who commit deceptive and unconscionable practices; (c) to protect consumers from unbargained for warranty disclaimers . . .”<sup>15</sup> The Attorney General of Kansas is charged with enforcing the provisions of the act, but the act also creates a private right of action for consumers to recover damages if they are aggrieved by the practices outlawed by the act.<sup>16</sup> The provision is intended to create a fleet of “private attorneys general” to pursue the many cases that the government cannot.<sup>17</sup>

#### IV. COMPARING THE MISSOURI AND KANSAS LAWS

For a consumer who has been taken advantage of, the legislature’s decisions when constructing the state’s consumer protection statute affect outcomes in many ways. When Missouri adopted the broad protection of a “little-FTC” statute, it gave its citizens a great deal of power to combat sellers who use unfair practices.<sup>18</sup> By adopting many specific statutes to protect its citizens, Kansas has often times made hurdles for consumers much higher when they seek justice through the courts. In this section, the substantive differences for a consumer working through a consumer protection claim in Missouri and Kansas are discussed.

The initial inquiry for an attorney presented with this scenario will be whether their state’s consumer protection statute applies to their client. In Missouri, a person may avail themselves of the protection of the Merchandising Practices Act if the purchase was made “primarily for personal, family or household purposes . . .”<sup>19</sup> Purchases made for a business are not protected.<sup>20</sup> However, in Kansas this protection is a bit more inclusive. “‘Consumer’ means an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or

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<sup>12</sup> *Id.* § 50-626(b)(2) (2012).

<sup>13</sup> *Id.* § 50-626(b)(3) (2012).

<sup>14</sup> *Id.* § 50-627 (2012).

<sup>15</sup> *Id.* § 50-623 (2012).

<sup>16</sup> *Id.* § 50-634 (2012).

<sup>17</sup> *See Id.* § 50-636 (2012) (as interpreted in Note 9 of LexisNexis).

<sup>18</sup> *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 166 (Jan. 2011) (While Missouri’s statute is not specifically mentioned in this article as a “Little-FTC Act,” Missouri’s statute does fit within the article’s framework.)

<sup>19</sup> MO. REV. STAT. § 407.025 (2012).

<sup>20</sup> *See id.*

agricultural purposes.”<sup>21</sup> The Kansas statute allows certain small businesses to bring private claims. A farmer in Missouri who fell victim to a misrepresentation made by a tractor dealer would not be afforded the same protection he would if his farm were in Kansas.

Most consumer protection claims are relatively low value lawsuits. For this reason, an attorney is unlikely to take the suit unless he has the possibility of being awarded attorney’s fees. Luckily, both the Missouri Merchandising Practices Act and the Kansas Consumer Protection Act allow for the award of attorney fees to the prevailing party.<sup>22</sup> In fact in Missouri, awarding attorney fees to successful plaintiffs under Missouri Merchandising Practices Act is “the rule rather than the exception.”<sup>23</sup> However, lawyers should beware because this is a double-edged sword. When a consumer bringing a claim under the Kansas Consumer Protection Act “has brought or maintained an action the consumer knew to be groundless and the prevailing party is the supplier” the court may award the defendant, supplier, and attorney fees.<sup>24</sup>

One of the advantages of a broad inclusive statute like Missouri Merchandising Practices Act is that lower courts do not have to spend time contemplating statutory intent and parsing statutory language. This is evident when we consider how Missouri and Kansas determine whether an act breaks the law depending on when it occurred in relation to the sale. Under Missouri law, “[a]ny act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.”<sup>25</sup> It is important here to notice that *any* unlawful act made at *any* time is included. The Kansas Consumer Protection Act, however, sets different temporal requirements for different types of illegal behavior within the act. “An unconscionable act or practice violates this act whether it occurs before, during or after the transaction,”<sup>26</sup> whereas a run of the mill deceptive act or practice is only a violation of the law when it occurs “in connection with a consumer transaction.”<sup>27</sup> The legislature’s decision to allocate different temporal requirements for different classes of infractions has left it to the courts to clean up the mess. *Chief Eagle v. C & G Auto* provides a clear example of the difficulties inherent in interpreting if something occurs too late in the transaction to be considered “part of the ‘consumer transaction’” under the statutory definition.<sup>28</sup> Here the court had to make a determination of whether a trial court was incorrect for strictly adhering to the statutory language by determining that “all deceptive statements proven by Eagle were made by defendant Farthing after the sale of the vehicle and were not, therefore, part of the ‘consumer transaction.’”<sup>29</sup> The court of appeals sent the case back to the trial court for a decision of whether the statements made after the sale rose to the level of

<sup>21</sup> KAN. STAT. ANN. § 50-624(b) (2012).

<sup>22</sup> MO. REV. STAT. § 407.025 (1) (2012); KAN. STAT. ANN. § 50-634(e) (2012).

<sup>23</sup> *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1028 (8th Cir. 2000).

<sup>24</sup> KAN. STAT. ANN. § 50-634(e) (2012).

<sup>25</sup> MO. REV. STAT. § 407.020(1) (2012).

<sup>26</sup> KAN. STAT. ANN. § 50-627(a) (2012).

<sup>27</sup> *See id.* § 50-626(a)-(b) (2012).

<sup>28</sup> *Chief Eagle v. C & G Auto*, No. 90643, 2004 WL 944252, at \*1-\*6 (Kan. Ct. App. 2004) (unpublished decision).

<sup>29</sup> *Id.* at \*4; *See* KAN. STAT. ANN. § 50-624(c) (2012).

unconscionability.<sup>30</sup> In this instance, a broader statute such as Missouri's leads the court towards a fairer result faster.

Both the Missouri and Kansas consumer protection statutes were crafted to expand on the common law fraud, contract and tort rights.<sup>31</sup> The idea is that these statutes would make access to justice greater for consumers because obtaining relief at common law is a heavy burden to bear in even the most egregious deceptive acts. In Missouri, after the legislature created the private right of action for consumers the regulatory rules and case law followed the trend of expanding consumer rights. Deceptive practices, as referenced in § 407.020, have been left undefined by statute.<sup>32</sup> Accordingly, each court can decide on a case-by-case basis whether fair dealing has been violated.<sup>33</sup> Unfair practice, as referenced in § 407.020 has been defined broadly in the regulatory register as:

[A]ny practice which--

(A) Either--

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes, substantial injury to consumers.<sup>34</sup>

Taking a further step away from the common law, the courts have explicitly stated that “[i]t is not necessary in order to establish ‘unlawful practice’ to prove the elements of common law fraud.”<sup>35</sup> The Merchandising Practices Act also breaks from the common law fraud requirement of reliance on a misrepresentation.<sup>36</sup> “Both our case law and the governing regulations make clear that the consumer's reliance on an unlawful practice is not required under the MMPA.”<sup>37</sup> Missouri's consumer protection jurisprudence has moved further and further away from the formalities and constraints of the common law towards a more consumer friendly body of law.

Kansas on the other hand has not made as clean a break from the elements of common law fraud. One heavy constraint on the private cause of action in Kansas consumer protection is the interpretation of the “aggrieved consumer.”<sup>38</sup> Where KSA 50-626 gives broad power to bring claims against sellers when the act is violated, the language of KSA 50-634 makes an individual's road to getting private remedies more difficult. The Kansas courts have interpreted the “aggrieved consumer” to mean that private citizens must show causation to recover damages even though the seller's actions constitute a

<sup>30</sup> *Chief Eagle*, *supra* note 28, at \*6.

<sup>31</sup> See MO. REV. STAT. § 407 and KAN. STAT. ANN. § 50-626.

<sup>32</sup> See MO. REV. STAT. §§ 407.010-407.1500 (2012).

<sup>33</sup> *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (internal citations omitted).

<sup>34</sup> MO. CODE REGS. ANN. tit. 15, § 60-8.020 (2012).

<sup>35</sup> *Webster*, 756 S.W.2d at 635.

<sup>36</sup> *Plubell v. Merck & Co.*, 289 S.W.3d 707, 713-14 (Mo. Ct. App. 2009).

<sup>37</sup> *Id.* at 714.

<sup>38</sup> See *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685, 692 (Kan. 1993).

*per se* violation of KSA 50-626.<sup>39</sup> The language of the statute “has been interpreted, in connection with standing requirements, to require proof of detrimental reliance, mirroring an element of common law fraud.”<sup>40</sup> Furthermore, in *Finstad*, the “aggrieved consumer” language required that the plaintiffs show personal injury in the form of money damages.<sup>41</sup> These added elements of a claim for private remedies raise the bar for access to justice for consumers in Kansas.

At common law, a plaintiff bringing a fraud claim needs to prove the speaker’s intent that his false statements be acted upon.<sup>42</sup> This is a difficult proposition to prove in a court of law. Short of an in court smoking gun statement by the defendant, a plaintiff has very few surefire ways to prove a speaker’s intent. Other ways to prove intent involve a plaintiff undertaking in depth investigations, finding pattern and practice evidence, and expensive discovery. It is the nature of consumer protection that most cases will involve relatively small sums of money. Under common law fraud systems, attorneys need to consider whether the eventual payout will be worth the expense of proving the defendant’s intent. Many times these cases are simply not worth the cost to prove the elements of fraud.<sup>43</sup> Missouri and Kansas have both taken this into consideration in their consumer protection statutes, but the language of their two statutes have yielded vastly different results.

Missouri Merchandising Practices Act offers a much more robust protection for consumers than common law fraud. The act “eliminates the need for the Attorney General to prove intent to defraud . . . in order for the court to find that a defendant has engaged in unlawful practices.”<sup>44</sup> Section 407.025 incorporates this interpretation of § 407.020 to the civil cause of action.<sup>45</sup> Indeed, “it is not the person’s intent that is determinative of the remedial provisions of Chapter 407 but rather that the defendants’ conduct constituted unfair practices.”<sup>46</sup> This significantly lowers the plaintiff’s burden of proof in a consumer protection case. By placing the focus of the law on observable conduct, rather than intangibles within a defendant’s head, a plaintiff has a much easier time assessing whether they will be able to influence a jury in their favor. The legislative language and the court’s subsequent interpretation of that language is a great improvement over common law within the Missouri Merchandising Practices Act. Not all consumer protection statutes have been as successful in diverging from the common law in this respect.

As referenced earlier, the Kansas Consumer Protection Act is a laundry list of specific practices that violate the law. Some provisions of the statute only require that the defendant perform the deceptive practice “knowingly or with

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<sup>39</sup> *Id.*

<sup>40</sup> Ellen Byers, *Addressing the Consumer’s Worst Nightmare: Toward a More Expansive Development of the Law of Tortious Fraud and Deceptive Practices in Kansas*, 38 WASHBURN L.J. 455, 488 (Spring 1999).

<sup>41</sup> See *Finstad v. Washburn*, *supra* note 38 at 691.

<sup>42</sup> See *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 683 (Mo. Ct. App.1997).

<sup>43</sup> Interview by Erich Vieth with Bernard Brown, Consumer Protection Attorney (2008), available at <http://www.youtube.com/watch?v=sZMthqWO08>.

<sup>44</sup> State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 837 (Mo. Ct. App. 2000).

<sup>45</sup> See MO. REV. STAT. § 407.025 (2012).

<sup>46</sup> State ex rel. Webster v. Cornelius, 729 S.W.2d 60, 64 (Mo. Ct. App. 1987).

reason to know” the falsity of certain representations.<sup>47</sup> To sustain a claim based on this part of the statute, a plaintiff need only show that the defendant had knowledge or was in a position to have knowledge before he made the illegal representations. In the Kansas Consumer Protection Act, these practices requiring knowledge are the simplest for a plaintiff to prove. They are also a slight boost to the consumer above the protections of the common law.

For plaintiffs, it is much harder to prevail on other provisions, which require willful action on the part of the defendant.<sup>48</sup> The court in Kansas has observed that, “a willful act is one ‘performed with a designed purpose or intent on the part of a person to do wrong or to cause injury to another.’”<sup>49</sup> These willful sections prohibit “oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact . . . failure to state a material fact, or the willful concealment, suppression or omission of a material fact.”<sup>50</sup> Requiring a plaintiff to prove to a jury the intent in the defendant’s head at the time of a representation is difficult. The legislature has taken what should have been the most useful portions of the Kansas Consumer Protection Act (outlawing falsehoods and misstatements of material fact) and made them very difficult to prove. The intent requirement is no different than proving fraud at common law, and for that reason the statute fails its intended purpose of expanding upon consumer’s rights. Proving a defendant’s intent can be costly, time consuming, and, given the low damages in many cases, a financial impracticality. As is the theme in consumer protection, the juice may not be worth the squeeze.

## V. CONCLUSION

Despite the differences between Kansas and Missouri consumer protection laws, lawyers are able to create successful law firms taking cases in both states. The key for these attorneys is case selection. These consumer protection attorneys get many calls every day, from prospective clients with perfectly legitimate claims that the attorneys have to turn away.<sup>51</sup> The problem is that these cases, even when the law is completely on the side of the plaintiff, are not economically viable when it comes to protracted litigation against a large corporation for relatively small actual damages.<sup>52</sup> The attorneys who make a living in this area of law can only accept the best of the best clients. The clients who are turned away have no one to take their case, because no attorneys can afford the risk of taking a case worth small actual damages based on only the chance that a judge may award attorney fees.<sup>53</sup>

Looking at the differences between Missouri and Kansas consumer protection laws through this prism reveals that these laws are not complete answers to the problem. Even the broad Missouri Merchandising Practices Act does not fix the economic pressures that keep claims from being heard in court.

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<sup>47</sup> KAN. STAT. ANN. § 50-626(b)(1)(A)-(G) (2012).

<sup>48</sup> KAN. STAT. ANN. § 50-626(b)(2)-(3) (2012).

<sup>49</sup> *Tufts v. Newmar Corp.*, 53 F.Supp.2d 1171, 1178 (D. Kan. 1999).

<sup>50</sup> *See* KAN. STAT. ANN. § 50-626(b)(2)-(3) (2012).

<sup>51</sup> *See* Brown interview, *supra* note 43.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.*

What the breadth of the Missouri law does better than the Kansas law is to allow a larger swath of valid consumer protection claims to be accepted by attorneys. Missouri's lower burdens on plaintiffs, in terms focusing on defendant's conduct rather than intent, make it more economically viable for an attorney to take on a consumer's case. The Missouri Merchandising Practices Act does not cure all consumer protection violations, but it does theoretically provide greater access to justice for Missouri citizens than the Kansas Consumer Protection Act provides to those in Kansas.