

# The Expanding Missouri Merchandising Practices Act

by Joanna Shepherd

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## I. INTRODUCTION

Consumer protection statutes were enacted with a noble and meritorious aim: to protect American consumers from fraudulent and deceptive business practices in commercial transactions. Congress initially sought to effectively define and deter wrongs to consumers that the existing legal system failed to remedy, and states subsequently localized and individualized these rights. Yet all of the early efforts at consumer protection legislation attempted to maintain a careful balance between protecting consumers and preventing the proliferation of lawsuits that harm both consumers and businesses.

Unfortunately, in many states, this tradition of thoughtful and careful balancing of interests has given way to harmful legislative and judicial over-corrections premised upon the misconception that additional consumer protection litigation necessarily protects consumers more. Both economic principles and empirical scholarship affirm that the optimal amount of consumer protection litigation requires a fair balancing of interests and costs. Yet courts and legislatures have gradually abolished many of the procedural and remedial protections designed to ensure that state consumer protection acts do not become all-purpose business litigation statutes. In other words, legislatures and courts have gone too far in attempting to protect consumers and, in the process, have actually created harm by enabling litigation that damages commerce and imposes real costs on consumers – the very class of persons they were trying to protect.

Missouri has been one of the worst offenders and Missouri consumers are suffering as a consequence. Although the Missouri Merchandising Practices Act (“MPA”) was enacted to protect consumers from unfair and deceptive commercial conduct, in recent years it has been applied in ways not originally contemplated by the Missouri legislature. Indulgent amendments and lenient interpretations have encouraged class-action lawyers and professional litigants to bring claims, resulting in a dramatic increase in consumer protection litigation. Far too much of this litigation is without merit and rewards trial lawyers without contributing in any way to the health, safety, or general welfare of consumers. This increase in litigation inflicts real costs on Missouri consumers through higher product costs, lower employment, and an overburdened and under-financed justice system.

Fortunately, restoring the balance needed to truly protect consumers without inflicting harm on commerce and consumers themselves is possible with a handful of reforms. These modest reforms will prevent abuse of the current statute by self-interested actors who have not suffered real harm and by enterprising trial lawyers who have realized opportunities to turn these statutes into cash machines. With these protections, Missouri lawmakers can be confident that the MPA will protect consumers on an individual basis and in the long run.

This paper proceeds in four additional parts. Part II outlines a brief history of American consumer protection laws, beginning with the common law and FTC Act and proceeding to the introduction of traditional State consumer protection acts. Part III describes the origins of Missouri’s MPA and subsequent expansions of various provisions in the Act. Part IV reviews and discusses the consequences of the excessive litigation that results from these expansions in the Missouri MPA, including harm to consumers themselves, litigants, and the judicial system. Part V concludes, recommending several salutary policy prescriptions for lawmakers considering amending the MPA.

## II. THE HISTORICAL DEVELOPMENT OF AMERICAN CONSUMER PROTECTION LAW

Under the common law, consumer purchases were largely governed by principles of *caveat emptor*—“let the buyer beware”—under the assumption that buyers and sellers had equal responsibility and ability to judge the quality of goods.<sup>1</sup> The law presumed that market pressures would give most merchants an incentive to maintain a reputation for honesty and fair dealing, and that consumers could negotiate additional contractual terms when necessary.<sup>2</sup> Contract and tort law provided some remedies for major breaches of the merchant-consumer relationship, with aggrieved consumers resorting to fraud claims for misrepresentations as to the nature or quality of purchased goods for single transactions.<sup>3</sup>

However, the right to bring common law fraud claims did not adequately protect buyers as sellers became more powerful and sophisticated. The requirements of common-law fraud claims—an intentional misstatement of fact delivered with the purpose of deceiving the victim, the victim’s justified reliance, and demonstrable damages—presented significant hurdles for consumers in many suits.<sup>4</sup> Intent to deceive and justifiable reliance were notoriously difficult and expensive for consumers to prove,<sup>5</sup> and the typical damage award was so meager that it did not justify economically the expense of bringing a fraud claim.<sup>6</sup>

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<sup>1</sup> See, e.g., Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 273, 337 (1905); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

<sup>2</sup> William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 (1971) (suggesting that while these roles were assumed, there was an ever increasing breakdown of these responsibilities and incentives, particularly on the side of the merchant); see also SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION (PRELIMINARY REPORT) 6 (2009) [hereinafter SEARLE STUDY], available at <http://ssrn.com/abstract=1708175>.

<sup>3</sup> Michael S. Greve, *Consumer Law, Class Actions and the Common Law*, 7 CHAP. L. REV. 155, 156 (2004).

<sup>4</sup> Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 7 (2005).

<sup>5</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 10:1 (2013); see also Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1766–67 (2007).

<sup>6</sup> Schwartz & Silverman, *supra* note 4, at 7.

Nevertheless, the requirements reflected common law assumptions about the symmetry of the consumer-merchant relationship. A consumer claiming fraud had to demonstrate that the merchant's misstatement was intentional, as opposed to accidental, as both the merchant and consumer were in approximately equal positions to ascertain the truth of the claim as of the time of the sale.<sup>7</sup> The consumer further had to show that his reliance was justified: that a reasonable person in his position, dealing with the merchant as a peer, evaluating the goods and transaction at the time, would have reasonably believed the false claim was true.<sup>8</sup> And the consumer had to prove some demonstrable, quantifiable harm in damages for the purported deception, under the assumption that both parties could ascertain cheaply and readily the value difference between his reasonable expectations and the defective goods he received.<sup>9</sup>

However, economic developments during the first part of the twentieth century undermined then-prevailing assumptions that consumers and merchants stood in equal positions to one another when evaluating goods for sale. The marketplace had changed. Buyers were no longer equally able to judge the quality and nature of products as these products became increasingly sophisticated and diverse. New credit and financing arrangements and unfamiliar warranty disclaimers further increased the complexity of transactions for consumers.<sup>10</sup> And as consumers grew increasingly ill-equipped to judge the nature of products and transactions, sellers became only more sophisticated. Merchants were no longer the "shopkeeper-neighbors" with knowledge and bargaining power equal to consumers. Instead, as industrialization and mass production expanded, and the scale of enterprise became national and then global, merchants grew increasingly remote from consumers and large enough to deal with product disputes through internal specialization and economies of scale.<sup>11</sup> These changes led to the widespread belief that merchants managed to escape liability for practices that, if not vindicated in fraud claims, were essentially unfair in a world where the balance had changed.<sup>12</sup>

Appreciating the common law's growing inability to protect consumers, Congress sought to update consumer protection law with the Wheeler-Lee Amendment of the FTC Act. Yet, it recognized that any new law must strike a balance between curbing consumer abuses through

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also Lovett, *supra* note 2, at 726–31.

<sup>10</sup> Lovett, *supra* note 2, at 725.

<sup>11</sup> See George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 185, 188–89 (1951) (identifying that increased specialization must entail increased economies of scales).

<sup>12</sup> Brian J. Linn & Gretchen Newman, *Part III: Implementing the Washington Consumer Protection Act*, 10 GONZ. L. REV. 593, 597 (1975).

unfair commercial conduct while also preventing consumer and lawyer abuses through unjustifiable litigation. Congress deliberated about how to effectively define the class of impermissible acts in a way that neither invited constant evasion by merchants nor constant abuse by potentially mischievous litigants.<sup>13</sup> While a narrowly-defined list of prohibited practices would provide consumers clear protection from known undesirable practices, it would also invite sophisticated merchants to modify these practices slightly, requiring yet another new legal intervention to prevent them. In contrast, a broad prohibition against all undesirable business practices could lead to the professional “hunting up and working [of] such suits,”<sup>14</sup> deterring beneficial business dealings, leading to strategic claims by competitors, and chilling commerce through regulatory uncertainty.<sup>15</sup> Ultimately, Congress recognized that consumers were often employers and merchants themselves, and that only a carefully balanced consumer protection statute would protect consumers as a whole.

The result of this careful balancing was the consumer protection language added to the FTC Act. Instead of prohibiting specific business practices, the amended Act created a multi-member administrative body—the Federal Trade Commission—and empowered it to define and enforce the prohibition against “unfair or deceptive acts or practices in or affecting commerce.”<sup>16</sup> Understanding the potential breadth of this “unfair or deceptive” language, Congress paired the broad prohibition (“unfair or deceptive”) with a tightly cordoned enforcement power: Congress entrusted only the FTC to sue under this power, and injunctions would be these suits’ primary goal.<sup>17</sup> Congress expected that the Commission’s members would possess substantial business and commercial backgrounds, enabling them to distinguish malevolent business practices harming consumers from disingenuous claims of “unfairness” prompted only by consumer litigation.<sup>18</sup> Finally, Congress

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<sup>13</sup> See, e.g., 51 CONG. REC. 11,084-109, 11,112-16 (1914). The Wheeler-Lee Amendment of 1938 added the consumer-oriented protection that had become a concern of the government, declaring unlawful “unfair or deceptive acts or practices.” Wheeler-Lee amendment, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45).

<sup>14</sup> AMERICAN TORT REFORM FOUNDATION, STATE CONSUMER PROTECTION LAWS: UNHINGED 7 (2013), [hereinafter ATRA (2013)] (citing 51 CONG. REC. 13,113, at 13,120 (1914) (statement of Sen. Stone)) available at <http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf>.

<sup>15</sup> Henry N. Butler & Jason S. Johnston, *Consumer Harm Acts? An Economic Analysis of Private Actions Under State Consumer Protection Acts* 70 (Nw. Univ. Sch. of Law Faculty Working Papers, Paper No. 184, 2009), available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/18>.

<sup>16</sup> See Federal Trade Commission Act, Pub. L. No. 62-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 51-58 (2000)) (establishing the FTC). In 1938, the consumer protection language was added. See also Wheeler-Lee Amendment of 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a) (1) (2006)).

<sup>17</sup> 15 U.S.C. § 45; see also ATRA (2013), *supra* note 14, at 7.

<sup>18</sup> See Butler & Johnston, *supra* note 15, at 20.

required the Commission to consider the public interest, and not merely an individual consumer's interest, in bringing suit. Congress recognized that some practices might occasionally harm individual consumers, yet prove broadly beneficial to consumers and commerce as a whole, and entrusted the FTC with this calculus in its enforcement discretion.<sup>19</sup> In short, the FTC Act sought to deter consumer harm by issuing a firm and broad pro-consumer prohibition against unfair practices while strictly constraining the procedures, remedies, and conditions under which that prohibition could be enforced to prevent consumer abuses through frivolous litigation.<sup>20</sup>

Though the Commission was initially quite popular, within a few decades it came to be perceived as ineffective, politically captured, poorly managed, poorly directed, and fundamentally confused about its consumer protection mission.<sup>21</sup> The FTC's alleged failure to protect consumers inspired states to revisit the FTC Act compromise.<sup>22</sup> Moreover, state-level officers also could respond to local constituencies more effectively than a national commission, and might understand the "public interest," in the words of the Commission's mandate, differently.<sup>23</sup>

Several states began to adopt their own consumer protection laws in the 1960s and early 1970s. The earliest state CPAs responding to these concerns resembled New Jersey's Consumer Fraud Act.<sup>24</sup> The consumer fraud acts tracked the FTC Act concerns both structurally and in spirit: they focused on preventing ongoing consumer fraud and providing restitution for victims, rather than on attorney's fees or punitive damages, and charged the State Attorney General with responsibility for enforcing the Act.<sup>25</sup>

Other early adopters of state CPAs that did not follow the New Jersey model generally had one of two responses. Some states adopted the Uniform Deceptive Trade Practices Act (UDTPA) developed by the National Conference of Commissioners on Uniform State Laws. The Act provided a "laundry list" model that enumerated twelve deceptive trade practices, such as false advertising and misleading trade identification, and included an open-ended prohibition against "any other conduct which similarly creates a likelihood of confusion or misunderstanding."<sup>26</sup>

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<sup>19</sup> See Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence*, 48 Geo. Wash. L. Rev. 521, 554 (1980).

<sup>20</sup> See Schwartz & Silverman, *supra* note 4, at 9.

<sup>21</sup> Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 & n.1 (1969).

<sup>22</sup> Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167-168 (2011) (citing EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 39 (1969)); ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 1 (1969); Posner, *supra* note 21, at 47.

<sup>23</sup> Butler & Johnston, *supra* note 15, at 8.

<sup>24</sup> See ch. 39, § 1-12, 1960 N.J. Laws 137.

<sup>25</sup> See generally *id.*

<sup>26</sup> COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM

Other states, like Missouri, modeled legislation directly on the FTC Act relying on broad, generalized prohibitory language. This parallel to the federal FTC Act led these state-level variants to earn the moniker “little FTC Acts,”<sup>27</sup> though many commentators now use the term “little FTC Act” to refer to consumer protection laws more generally<sup>28</sup>—a tribute to these laws’ origin.

Although the early state CPAs were more aggressive than the original FTC Act, they each sought to find a balance between the twin concerns underlying the FTC Act in light of the FTC’s perceived failure. Each of these early laws contained significant restrictions to prevent consumer and lawyer abuses through frivolous litigation as well. The earliest consumer fraud acts contemplated at least primary enforcement by the relevant state attorney general; the little FTC Acts tracked known FTC jurisprudence and provided some measure of predictability; the UDTPA enumerated specific forbidden acts, did not originally contain a general damages remedy, and narrowed attorney’s fees sharply to penalize only deliberate offenders.<sup>29</sup>

The development of state law in the consumer protection arena was inconsistent and uneven. Though the state laws each reflected a compromise between consumer protection and preventing excessive consumer litigation, they created a patchwork of wildly divergent laws. The FTC, chastened by its publicly poor reputation in the consumer protection sphere, sought to rehabilitate its position and standardize these state laws through the Model Unfair Trade Practices and Consumer Protection Law (UTPCPL).<sup>30</sup> “Less innovative than comprehensive,” the UTPCPL synthesized many of the various state acts into one model Act. The UTPCPL provided three liability formulations against unlawful practices that closely tracked the developments in then-current state law.<sup>31</sup> Like the state CPAs, the UTPCPL also empowered state attorneys general to enforce the consumer protection law through injunctions against

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STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 253, 262 (1964); see Butler & Wright, *supra* note 22, at 170; see also PRIDGEN & ALDERMAN, *supra* note 5, at § 2:10; see also Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 145 (2006).

<sup>27</sup> 29 COUNCIL OF STATE GOV’TS, 1970 SUGGESTED STATE LEGISLATION 142 (1969).

<sup>28</sup> See generally Butler & Wright, *supra* note 22, at 165; see also Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 438–39 (1991).

<sup>29</sup> See COMM’RS ON UNIF. STATE LAWS, *supra* note 26, at 262; COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIFTH YEAR 299 (1966); see also PRIDGEN & ALDERMAN, *supra* note 5, at § 2:10.

<sup>30</sup> This model was developed by the FTC and adopted by the Committee on Suggested State Legislation of the Council of State Governments. Butler & Wright, *supra* note 22, at 170 (citing NATIONAL ASSOCIATION OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE ATTORNEY GENERAL 390 (1971) [hereinafter ATTORNEY GENERAL REPORT]).

<sup>31</sup> 29 COUNCIL OF STATE GOV’TS, *supra* note 27, at 142, 146.



prohibited acts, disgorgement of any property gained by defrauding consumers, restitution to victims of forbidden acts, and civil monetary penalties against knowing violators.<sup>32</sup>

But the UTPCPL drastically deviated from state CPAs in its treatment of private suits and private remedies.<sup>33</sup> Early state CPAs evinced some hesitation against consumer suits for money damages, either by limiting consumer suits altogether, entrusting the state attorney general with enforcement discretion, or granting private rights of action without damages and with only equitable or injunctive remedies.<sup>34</sup> In contrast, the UTPCPL radically expanded potential vehicles for suit and available damages by authorizing class actions for consumer protection violations, granting an individual right of action for the greater of actual damages suffered or \$200, and providing attorney's fees at the court's discretion against any violator, not merely knowing violators.<sup>35</sup> Contrary to the FTC Act, the UTPCPL shifted balance away from restraint and towards much greater enforcement.

State responses to the UTPCPL recognized a need for restraint to prevent lawsuits that would harm the very consumers they were supposed to protect. Indeed, state attorneys general were warning early on about the potential for abuse. The National Association of Attorneys General warned that private class actions would "provide too great an opportunity for frivolous suits," and many states proved slow to adopt the UTPCPL's class action provision.<sup>36</sup> Many states also continued to require proof of actual injury to recover under these acts, even while relaxing other requirements from the common-law fraud standard. These restraints meant that early state CPAs provided a robust, even aggressive medium for consumers, while still remaining conscious of the potential consumer and business harms from abusive or frivolous state CPA lawsuits.

The FTC similarly retains a variety of structural precautions: for example, the Commission may still only bring suits that it considers in the "public interest," and the FTC Act still limits the Commission to largely equitable relief, including injunctions, cease and desist orders, and disgorgement of profits from prohibited practices.<sup>37</sup> Further, the

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<sup>32</sup> PRIDGEN & ALDERMAN, *supra* note 5, at § 2:10; *see also* 29 COUNCIL OF STATE GOV'TS, *supra* note 27, at 145-152; Butler & Wright, *supra* note 22, at 172.

<sup>33</sup> 29 COUNCIL OF STATE GOV'TS, *supra* note 27, at 148-49.

<sup>34</sup> *Id.* (listing section 8(a) as allowing for such private rights of action for only equitable or injunctive remedies).

<sup>35</sup> *Id.* at 149.

<sup>36</sup> ATTORNEY GENERAL REPORT, *supra* note 30, at 409.

<sup>37</sup> 15 U.S.C. § 45 (2006). Note that disgorgement is itself a traditionally equitable remedy. *See, e.g., SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991) ("The disgorgement remedy [the district court judge] approved in this case is, by its very nature, an equitable remedy. . ."); *see also* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (2013), <http://www.hblr.org/?p=3528>.

Commission's 1984 policy statement reintroduced restrictions on consumer protection claims, requiring proof of actual injury for both unfairness and deception, including a demonstration of materiality for deception (and substantiality for unfairness), and applying a "reasonableness" inquiry for both. The Commission recognized, as states did in the 1960s and 1970s—and Congress before them—that powerful, open-ended and less precise consumer protection laws required meaningful ties to actual consumer harms in order to protect against frivolous consumer litigation.<sup>38</sup>

Unfortunately, as federal consumer protection law grew more sophisticated and economical, state legislatures began to strip away many of the restraints that were meant to strike a balance between consumer protection and preventing excessive consumer litigation. This expansion has turned many state consumer protection statutes into consumer litigation statutes.

### III. MISSOURI'S MERCHANDISING PRACTICES ACT

Until 1967, Missouri consumers that had been victims of fraudulent or deceptive practices in commercial transactions could only seek redress under private legal remedies available under the common law of Missouri.<sup>39</sup> Missouri courts had defined nine distinct elements of a fraud claim, creating evidentiary hurdles that were difficult, if not impossible, for most plaintiffs to overcome with adequate proof.<sup>40</sup> Moreover, the small amount involved in most consumer transactions, and thus, the low potential compensatory damage award, meant that litigating many fraud claims was not economically justified.<sup>41</sup>

In 1967, the Missouri General Assembly initiated efforts to further protect consumers by enacting the Merchandising Practices Act (MPA), Chapter 407. The original MPA of 1967 contained only 14 sections and generally provided broad prohibitory language:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely on such concealment, suppression or omission in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice.<sup>42</sup>

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<sup>38</sup> See generally Butler & Johnston, *supra* note 15, at 2–3.

<sup>39</sup> Webster et al., *Combating Consumer Fraud in Missouri*, 52 Missouri L. Rev. 365, 367 (1987), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=2857&context=mlr>.

<sup>40</sup> *Yerington v. Riss*, 374 S.W.2d (Mo. 1964); *Williams v. Miller Pontiac Co.*, 409 S.W.2d 275 (Mo. Ct. App. 1966).

<sup>41</sup> Webster, *supra* note 39 at 368.

<sup>42</sup> MO. REV. STAT. § 407.020 (Supp. 1967).

Because the original MPA did not define the elements of unlawful practices— deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact—the type of conduct prohibited under the Act has been largely defined by enforcement actions and court decisions.<sup>43</sup> The original MPA empowered the Missouri Attorney General to enforce the Act through injunctions against any act prohibited by the relevant language.<sup>44</sup> It also allowed the Attorney General to seek restitution for consumers that suffered an economic loss as a result of any prohibited conduct.<sup>45</sup> Finally, the MPA entitled the Attorney General to recover the state’s litigation costs, but only if it could be proven that the defendant willfully violated the provisions of the Act.<sup>46</sup>

Subsequent amendments to the MPA dramatically expanded the Act into one of the most “all-encompassing consumer protection laws passed by a state.”<sup>47</sup> In 1973, the MPA was broadened to include, among other things, a private cause of action:

Any person who purchases or leases goods or services 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. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney’s fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.<sup>48</sup>

Punitive damages and attorney’s fees were allowed under the private cause of action section of the 1973 Act. Moreover, the 1973 amendments also allowed class actions to be brought under the MPA.<sup>49</sup>

The MPA was again amended in 1985, further broadening its scope.<sup>50</sup> One of the most significant changes to the Act was the declaration that an unlawful practice could be stopped whether it occurred in or from Missouri.<sup>51</sup>

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<sup>43</sup> Webster, et. al., *supra* note 39, at 369.

<sup>44</sup> MO. REV. STAT. § 407.100 (Supp. 1967).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 407.130.

<sup>47</sup> Webster et al., *supra* note 39, at 368.

<sup>48</sup> MO. REV. STAT. § 407.025(1) (Supp. 1973).

<sup>49</sup> *Id.* at § 407.025(2).

<sup>50</sup> Webster et al., *supra* note 39, at 383.

<sup>51</sup> *Id.* at 384 (internal citations omitted).

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 material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise in trade or commerce in or from the state of Missouri, is declared to be an unlawful practice. Any act declared unlawful by this subsection violates this subsection whether committed before, during or after the sale or advertisement.<sup>52</sup>

Thus, this section gave the Attorney General enforcement power over both fraudulent acts originating in Missouri and impacting consumers of other states and fraudulent acts originating from other states and impacting Missouri consumers. Moreover, the new language “whether committed before, during, or after the sale or advertisement” was intended to broaden the scope of protection from the previous language—“in connection with the sale or advertisement.”

The 1985 amendment also made knowing and willful violations of the consumer protection provisions under the MPA a class D felony. “Any person who willfully and knowingly violates the provisions of this section with the intent to defraud shall be guilty of a class D felony.”<sup>53</sup> This criminal provision, which was unique among states at the time, was intended to greatly enhance the protection of Missouri consumers.

These amendments to the Missouri MPA—the introduction of a private cause of action with punitive damages and attorney’s fees, the extraterritorial application of the law, and the criminal provision—expanded the Act far beyond its original scope. In turn, they threaten the original MPA’s careful balance between protecting consumers and preventing the proliferation of lawsuits that harm both consumers and businesses. Missouri courts have recognized the devolution of the MPA, explaining that the expanded Act covers “every practice imaginable and every unfairness to whatever degree.”<sup>54</sup>

Indeed, the indulgent provisions of the Missouri MPA are unusual in several respects. For example, only a handful of states allow punitive damages under their consumer protection acts.<sup>55</sup> Although many states allow double or treble damages, at least these exemplary damages are fixed to compensatory awards. In contrast, punitive damages under the MPA can far exceed an award of compensatory damages. In fact, Missouri courts have authorized punitive damage awards that are high multiples of the compensatory damage award.<sup>56</sup>

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<sup>52</sup> MO. REV. STAT. § 407.020(1) (Supp. 1985).

<sup>53</sup> *Id.* at § 407.020(3).

<sup>54</sup> *Ports Petroleum Company, Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

<sup>55</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 INC. 23 (Feb. 2009), available at [http://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

<sup>56</sup> *Lewellen v. Franklin*, 2014 WL 4425202 (Mo. banc Sept. 9, 2014).

Furthermore, Missouri allows punitive damage awards in class actions. Punitive damages in consumer fraud cases are premised on the notion that a large award provides incentives for attorneys to take cases they otherwise might decline because of the small monetary amounts involved in most consumer fraud actions.<sup>57</sup> However, this rationale does not apply to class actions; the high damage awards resulting from aggregated claims provide enough of a monetary incentive for attorneys. As a result, punitive damages in class actions are not only redundant and therefore unnecessary, they create an even greater incentive for lawyers to file claims that are not in the interests of consumers as a whole.

Missouri is also unusual in that it does not require plaintiffs to show that they relied upon any misrepresentation by the defendant. Many states require the plaintiff to show that the business engaged in an unfair business practice that caused the plaintiff to enter into a transaction that resulted in his or her harm.<sup>58</sup> In contrast, the MPA does not require the plaintiff to prove reliance or how the defendant's conduct influenced purchasing behavior: "both our case law and the governing regulations make clear that the consumer's reliance on an unlawful practice is not required under the MPA"; the MPA "does not require that an unlawful practice cause a 'purchase.'"<sup>59</sup> As a result, plaintiffs can recover even if they were unaware of the unfair business practice they are challenging.

Thus, while the Missouri MPA was initially celebrated as empowering consumers, the expansion of the original statute tipped the balance from protecting consumers to encouraging excessive consumer litigation. As explained in the next section, lenient provisions and interpretation of the MPA—punitive damages, the lack of a "reasonableness" inquiry, and no requirement that plaintiffs show reliance and causation—has inspired abusive and socially harmful litigation. The indulgent Missouri MPA has engendered professional consumer protection litigators: consumers and attorneys who aggressively seek out potential advertisements, labels, and products on which to bring an action.<sup>60</sup> Where consumer advocates under the common-law system worried about the perils of caveat emptor and under-incentivized consumers unable to bring claims, the modern consumer protection landscape more resembles caveat venditor: "let the seller beware."

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<sup>57</sup> Webster et al., *supra* note 39, at 379.

<sup>58</sup> Carter, *supra* note 55, at 7-10.

<sup>59</sup> *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 714 (Mo. App. 2009).

<sup>60</sup> AM. TORT REFORM ASS'N, PRIVATE CONSUMER PROTECTION LAWSUIT ABUSE: WHEN CLAIMS ARE DRIVEN BY PROFIT-DRIVEN LAWYERS AND INTEREST-GROUP AGENDAS, NOT THE BENEFIT OF CONSUMERS (2006) [HEREINAFTER ATRA 2006].

## IV. THE CONSEQUENCES OF MISSOURI'S MPA EXPANSION

Through a series of amendments over a period of years, the MPA has deviated substantially from its original balance of protecting consumers while preventing excessive litigation. These changes have greatly increased the amount of CPA litigation in the state. Both economic principles and empirical evidence affirm that excessive increases in litigation lead directly to consumer harms, including higher product prices. As explained below, the substantial increase in consumer protection litigation is a direct consequence of the perverse incentives this law now creates – incentives that reward trial lawyers for filing meritless cases while imposing real costs on consumers.

### A. The Flood of Consumer Protection Litigation

The deviation of state consumer protection acts from their original purposes has driven a surge of consumer protection litigation. Though state consumer protection litigation has increased steadily since adoption of these acts in the 1960s to 1970s, this trend continues apace in the era of consumer litigation acts. A 2009 study by the Northwestern University Searle Civil Justice Institute (the “Searle Study”) found that the number of reported CPA decisions increased by 119 percent from 2000 to 2007.<sup>61</sup> These increases in consumer protection litigation far exceed increases in either tort or general litigation over this same period.<sup>62</sup> This data indicates that the increase in consumer protection litigation is not likely the result of more dangerous products, more seller misrepresentations or demographic changes.

Missouri’s increase in consumer protection litigation has been especially pronounced. From 2000 to 2009, the number of reported decisions under the MPA increased by an astonishing 678 percent.<sup>63</sup> Missouri has experienced more growth in consumer protection litigation than all but three states. Figure 1 reports growth rates in reported consumer protection decisions from 2000-2009 for the ten fastest growing states. Moreover, because these data include only reported decisions, and not actions filed or filed and settled without generating a reported judicial decision, they necessarily underestimate the amount of consumer protection litigation. Nevertheless, the data reveal that Missouri’s MPA litigation has placed a significant burden on the state’s civil justice system and is costing consumers, workers and taxpayers real dollars.

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<sup>61</sup> The Study uses reported decisions as a proxy for total litigation levels. SEARLE STUDY, *supra* note 2, at 19.

<sup>62</sup> SEARLE STUDY, *supra* note 2, at 19.

<sup>63</sup> Missouri-specific data is from the original Searle Study updated to 2009.

**Table 1: Top-Ten States in Growth Rates of Reported Consumer Protection Decisions**

State Ranking	State	2000-2009 Growth Rate
1	Arkansas	1200.0%
2	Arizona	720.0%
3	Hawaii	700.0%
4	<b>Missouri</b>	<b>677.8%</b>
5	Utah	650.0%
6	California	619.8%
7	Nevada	600.0%
8	New Mexico	600.0%
9	Rhode Island	500.0%
10	Florida	482.8%

Source: Searle Study, *supra* note 2. Data is updated to 2009.

Missouri’s surge in consumer protection litigation is not surprising given the MPA’s devolution from a consumer protection act into a consumer litigation act. The Searle Study finds that CPA statutes that provide for a greater expected value of recovery—through punitive damages, attorney’s fees, etc.—invite more CPA litigation.<sup>64</sup> Consumers and fee-driven trial lawyers respond rationally to litigation incentives, and states that invite additional consumer protection litigation through imprecise standards, low burdens of proof, and more generous awards ought not be surprised when enterprising lawyers initiate more litigation, whether meritless or not.

### **B. The Social Costs of Increasing Consumer Protection Litigation**

State consumer protection laws that were initially praised for safeguarding consumers are now routinely condemned for inspiring abusive and socially harmful litigation.<sup>65</sup> The surge in consumer protection claims under the MPA inflicts certain costs—higher prices and an overburdened justice system—in exchange for speculative benefits. Experience with the statutes, the academic literature, and common sense demonstrate that this increase does not consist of individual consumers finally vindicating economically-small but important claims against deceptive businesses. Rather, sophisticated litigants predictably exploit

<sup>64</sup> SEARLE STUDY, *supra* note 2, at xii.

<sup>65</sup> Butler & Johnston, *supra* note 15, at 4, 7. See also ATRA 2006, *supra* note 60.

low burdens of proof and generous remedial provisions to extract rents from businesses, raising prices and ultimately harming local consumers. Indeed, modern experiences with Missouri's MPA suggest that new cases brought under more expansive provisions are of dubious social value.

Consumer protection actions—whether litigated or threatened—impose significant costs on businesses. Protracted adversarial litigation often results in expensive attorney's fees, or otherwise often induces a quick but expensive settlement. Though the Missouri MPA offsets these attorney's fees for plaintiffs, businesses must foot the costs of defending against, settling, and paying these claims, whether meritorious or not. Even the possibility of a consumer protection action under an indulgent MPA law forces businesses to incur litigation expenses to determine the scope of the law and identify acceptable behavior. Moreover, litigation and the threat of litigation impose time costs that are not so easily shifted, and which all parties must bear.<sup>66</sup> Although these costs are initially borne by businesses, they are ultimately passed on to consumers through increased prices, fewer innovations, lower product quality, lower wages, and ultimately lower employment. Economic research confirms this theoretical understanding; a 2011 study, for example, confirms that state CPA statutes inflict substantial economic harm on consumers through increased prices, especially when state CPAs assign broad liability with indulgent damages provisions.<sup>67</sup>

The severe increase in litigation under Missouri's MPA also burdens the state's civil justice system. These cases generally slow state and federal dockets in non-consumer protection cases as well, increasing the delay and cost of unrelated litigation.<sup>68</sup> These delays impose a cost-increasing, threat-inducing cycle: an increase in filings increases court dockets, which leads to lengthier times to final disposition, which increases the value of the threat of a frivolous lawsuit, which encourages additional filing.<sup>69</sup> The additional value from frivolous lawsuits encourages additional frivolous threats, and the cycle perpetuates itself.

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<sup>66</sup> See generally Butler & Johnston, *supra* note 15.

<sup>67</sup> SEARLE CIVIL JUSTICE INSTITUTE TASK FORCE ON STATE CONSUMER PROTECTION ACTS AND CONSUMER WELFARE, STATE CONSUMER PROTECTION ACTS AND COSTS TO CONSUMERS: THE IMPACT OF STATE CONSUMER ACTS ON AUTOMOBILE INSURANCE PREMIUMS (PRELIMINARY REPORT) 4 (2011), available at [http://www.masonlec.org/site/rte\\_uploads/files/CPA-Costs-Body-Sept-2011.pdf](http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf). In looking at automobile insurance cases and insurance premiums in general, the Task Force found that the expanding liability of state CPAs led to higher automobile insurance premiums.

<sup>68</sup> See, e.g., Judicial Council of Cal., *Statewide Caseload Trends 2002–2003 Through 2011–2012*, 2013 CT. STAT. REP. 40–42, available at [www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf](http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf). In California State Superior Courts, as the general trend in filing of Civil Unlimited (driven mostly by civil complaints) and Civil Limited cases has been increasing from Fiscal Year 2003 ("FY03") to Fiscal Year 2012 ("FY12"), the percentage of cases disposed of within 24 months has been decreasing.

<sup>69</sup> *Id.* at 41. Until Fiscal Year 2011 ("FY11"), the clearance of dispositions to filings was less than 100 percent, indicating that more cases were being filed than those of which were being disposed. At the end of FY12, the clearance rate was once again sliding towards a sub-100 percent value.



Indeed, existing data suggest that this cycle has encouraged frivolous consumer protection lawsuits. Although actual data on the number of frivolous cases is nonexistent, available data does compel several troubling conclusions. First, Missouri MPA reported decisions are regularly increasing; from 2000 to 2009, the number of reported decisions increased by an astonishing 678 percent. Yet it appears over this period, bench and jury trials have steadily declined.<sup>70</sup> This suggests that not only are more Missouri consumer protection claims being filed, but a greater proportion of those cases are settled without a reported decision. In other words, the 678 percent increase between 2000 and 2009 probably understates the growth of consumer protection litigation. Furthermore, if one expects that weak claims are likely to be overrepresented in settled claims, as opposed to actually litigated claims, even this extraordinary number probably understates the amount of frivolous litigation taking place under the guise of consumer protection legislation. This fact also understates the sweeping, in *terrorem* effect of class action lawsuits, which undoubtedly magnify the problem further.<sup>71</sup>

Thus, both data and economic theory demonstrate the costs of increasing MPA litigation—higher consumer prices, overburdened courts, and socially-harmful frivolous litigation. In contrast, the potential benefits from this additional litigation are deeply speculative. There is no evidence showing that Missouri consumers reap any tangible benefits from the expansion of the MPA. Indeed, tangible benefits would not be expected if much of the increase in consumer litigation derives from socially-valueless cases – cases that largely benefit class-action lawyers and professional litigants acting as consumers. And there are numerous examples of cases with seemingly little social value that are brought under the MPA. For example, a Missouri resident recently brought a class action against several retail gasoline stores claiming that an unfair practice occurs every time a consumer buys higher octane fuel from single-hose gas pump and incidentally receives a residual amount of lower octane fuel lingering in the hose from a prior fueling.<sup>72</sup> Another class action was brought against a Bridgestone tire shop for a “shop supplies fee” of \$1.20 that, although it was properly included on the itemized initial estimate and final invoice, was allegedly deceptive because its name didn’t indicate that the fee covered both costs and

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<sup>70</sup> Nat’l Ctr. for State Courts, *Examining the Work of State Courts*, 11 CASELOAD HIGHLIGHTS 1, 3 (2012) (showing that while total dispositions increased by about 46 percent from 1984 through 2002, that the rate of jury or bench trial has been decreasing by about 49 percent across 22 states).

<sup>71</sup> Butler & Johnston, *supra* note 15, at 66 (suggesting that the economic harms caused by class actions are even more magnified than those presented by private lawsuits, and therefore there should be separate rules for consumer class actions under state CPAs to help mitigate these additional costs, such as removal of statutory damages, damage multipliers, and punitive damages).

<sup>72</sup> *Johnson v. MFA Petroleum Co.*, 2014 WL 1292453 (W.D. Mo. Mar. 28, 2014).

profits.<sup>73</sup> Another example of a claim with questionable social value is a class action brought by customers of an internet service provider who claimed that a “free” upgraded internet service didn’t deliver the speeds promised.<sup>74</sup> Similarly, a class action brought by a Home Depot customer six years after renting a piece of equipment claimed that an optional damage fee waiver with a \$2.50 charge in the equipment rental contract she signed six years earlier was “automatically imposed” and “worthless.”<sup>75</sup> If these marginal cases offer little or no social benefits, but impose tangible social costs, then expansive consumer protection litigation harms consumers instead of helping them as intended.<sup>76</sup>

The filing of these seemingly socially-valueless cases is no surprise given the continued expansion of the Missouri MPA. In standard civil cases, a private plaintiff weighs his costs of litigation against his prospective benefits when determining whether to file suit; typically, these costs are significant enough that they discourage plaintiffs from needlessly exposing the public to the negative externalities accompanying frivolous litigation.<sup>77</sup> However, regular attorney’s fees awards under the MPA reduce plaintiffs’ costs to bring suit, subsidizing additional, often frivolous, claims. Moreover, the potential for large punitive damage awards further increases the filing of marginal claims. In fact, threatening these asymmetrical costs against businesses is used as a force to extract concessions through excessive settlements.<sup>78</sup>

Thus, frivolous consumer litigation derives directly and sensibly from the costs and benefits to filing these cases; there are few risks and little costs to plaintiffs and their attorneys, but substantial costs to defendant businesses. Unfortunately, businesses ultimately pass on these litigation costs to consumers through increased prices, lower wages, or reductions in the number of employees.<sup>79</sup>

These perverse incentives hint at the true beneficiaries of expansive consumer protection legislation— professional consumer litigators. Many such suits come at the behest of professional trial lawyers pressuring or

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<sup>73</sup> *Toben v. Bridgestone Retail Oper., LLC*, 2013 WL 5406463 (E.D. Mo. Sept. 25, 2013).

<sup>74</sup> *Grawitch v. Charter Communications, Inc.*, 2013 WL 253534 (E.D. Mo. Jan. 23, 2013).

<sup>75</sup> *Chochorowski v. Home Depot USA*, 404 S.W.3d 220 (Mo. 2013).

<sup>76</sup> See Butler & Johnston, *supra* note 15, at 65 (suggesting through an empirical analysis of case law brought under state CPAs that the state CPAs are actually harming consumers and decreasing consumer welfare).

<sup>77</sup> Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333 (1982).

<sup>78</sup> See Butler & Johnston, *supra* note 15, at 36.

<sup>79</sup> Frank Furedi & Jennie Bristow, Ctr. for Policy Studies, *The Social Cost of Litigation* (2012), available at <http://www.frankfuredi.com/images/uploads/120905122753-thesocialcostoflitigation.pdf>. While this study specifically looks at the costs of medical services as a result of increasing litigation, the analyses drawn from increased litigation to increased costs in services carry over to other fields of consumer protection as well. See also Jeff Govern, *Toward a New Model of Consumer Protection Statutes: The Problem of Increased Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1705–09 (2006) (stating that state CPAs may increase transaction costs that firms may then pass onto consumers and arguing for regulation that would prevent such a result).

even recruiting individual clients to file suits, especially with nationwide class actions available under the Missouri MPA. These attorneys seek a large payday through court-ordered attorney's fees, settlements, or both.<sup>80</sup> These actors are merely rationally responding to perverse incentives; the true problem is not rent-seeking attorneys and plaintiffs of convenience, but the unbalanced legal regime created by the MPA that encourages plaintiffs to create (or imagine) harmless misunderstandings in order to financially benefit from litigation without regard to merit or real harm.

## V. CONCLUSIONS AND MOVING FORWARD

American consumer protection law was premised on the understanding that protecting consumers must be balanced with preventing excessive consumer litigation. Unfortunately, ever-expanding state legislation, like the Missouri MPA, invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation. Fighting these potential abuses is key to ensuring that consumers at large, rather than merely specific litigants and enterprising litigators, benefit from consumer protection acts. Consumers need not be harmed by the very laws that were intended to protect them. Restoring a proper balance of interests will preserve consumer protection and prevent unwanted, hidden costs on consumers.

Empirical scholarship, economic theory, and common sense suggest that certain reforms could mitigate or reverse Missouri's MPA devolution from consumer protection act to a consumer litigation act. These include the following:

- **Including a "reasonableness" inquiry** for MPA claims will ensure that the Act protects and compensates deserving consumers that were harmed through no fault of their own. Without this requirement, businesses must incur costs to protect against unreasonable and unpredictable consumer reactions to a business practice. Similarly, the absence of a reasonableness requirement encourages speculative claims brought by consumers and attorneys that went in search of business practices that might mislead the most unsophisticated consumer. Requiring proof of reasonableness will discourage unworthy plaintiffs and "plaintiff-seeking" attorneys from abusing consumer protection acts.
- **Requiring plaintiffs to prove that they relied on the unfair business practice** that caused them to enter into the transaction that injured them will ensure that compensation reaches those

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<sup>80</sup> Brian P. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 4 (2010) (stating that prior empirical studies have found that the average attorneys' fee award is between 25 and 30 percent for class action settlements, and that the percentage is often highly and inversely associated with the size of the settlement and the duration of the case).

consumers that are actually misled and harmed by an unfair business practice. Plaintiffs should be able to minimally demonstrate that they relied on the misrepresentation they challenge, and this reliance caused their harm. Requiring meaningful ties to actual consumer harms is essential to protect against frivolous consumer litigation under the MPA.

- **Prohibiting punitive damages in class actions** will prevent many of the most frivolous and socially harmful suits. Punitive damage awards are premised on the idea that consumers suffering small harms and their attorneys may be unwilling to incur the expense to bring legitimate claims without the prospect of a larger punitive damage award. However, this additional incentive is unnecessary in class action cases. Class actions enable consumers and attorneys to spread litigation costs over numerous claims, and the aggregation of damages gives attorneys plenty of incentive to litigate cases. The prospect of a large punitive damage award on top of aggregated compensatory damages provides a redundant and unnecessary incentive. Worse still, it encourages fee-driven plaintiffs attorneys to bring cases with minimal benefit to class members: lawyers earn millions in fees, while class members earn dollars, or even cents, in rebates.

The Missouri MPA was originally enacted to prevent consumer abuses from unfair and deceptive commercial conduct. But as presently constituted and construed by the courts this law also harms consumers, employers, and businesses through a dramatically increasing number of excessive, meritless and socially valueless lawsuits that enrich a few consumers and many lawyers at the expense of higher prices and slower judicial dockets. Fortunately, a solution is simple: restoring the original purpose of consumer protection acts is as easy as enacting a few reforms to prevent abuse of the MPA. With these protections, Missouri lawmakers can be confident that the MPA will protect consumers instead of harm them.



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