

SECOND REGULAR SESSION

# HOUSE BILL NO. 2241

## 94TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE STEVENSON.

Read 1st time February 21, 2008 and copies ordered printed.

D. ADAM CRUMBLISS, Chief Clerk

5083L.02I

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### AN ACT

To repeal sections 407.025, 490.065, and 538.225, RSMo, and to enact in lieu thereof four new sections relating to court procedure.

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

Section A. Sections 407.025, 490.065, and 538.225, RSMo, are repealed and four new  
2 sections enacted in lieu thereof, to be known as sections 407.025, 407.026, 490.065, and  
3 538.225, to read as follows:

407.025. 1. Any person who purchases or leases merchandise primarily for personal,  
2 family or household purposes and thereby suffers an ascertainable loss of money or property, real  
3 or personal, as a result of the use or employment by another person of a method, act or practice  
4 declared unlawful by section 407.020, may bring a private civil action in either the circuit court  
5 of the county in which the seller or lessor resides or in which the transaction complained of took  
6 place, to recover actual [damages] **out-of-pocket loss**. **As used in this section, "out-of-pocket**  
7 **loss" means an amount of money equal to the difference between the amount paid by the**  
8 **consumer for the good or service and the actual market value of the good or service that**  
9 **the consumer actually received. In order to recover damages in an individual action under**  
10 **this section, each person shall be required to prove that the method, act, or practice**  
11 **declared unlawful by section 407.020 caused such person to enter into the transaction that**  
12 **resulted in such person's damages.** The court may, in its discretion, award punitive damages  
13 [and] . **The court may, in its discretion,** award to the prevailing party attorney's fees, based on  
14 the amount of time reasonably expended, and may provide such [equitable] **injunctive** relief as

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

15 it deems necessary or proper **to protect the prevailing party from the methods, acts, or**  
16 **practices declared unlawful by section 407.020.**

17         2. Persons entitled to bring an action pursuant to subsection 1 of this section may, if the  
18 unlawful method, act or practice has caused similar injury to numerous other persons, institute  
19 an action as representative or representatives of a class against one or more defendants as  
20 representatives of a class, and the petition shall allege such facts as will show that these persons  
21 or the named defendants specifically named and served with process have been fairly chosen and  
22 adequately and fairly represent the whole class, to recover damages as provided for in subsection  
23 1 of this section. The plaintiff shall be required to prove such allegations, unless all of the  
24 members of the class have entered their appearance, and it shall not be sufficient to prove such  
25 facts by the admission or admissions of the defendants who have entered their appearance. **In**  
26 **order to recover damages in a class action under this section, each class member shall be**  
27 **required to prove that the method, act, or practice declared unlawful by section 407.020**  
28 **caused the class member to enter into the transaction that resulted in such class member's**  
29 **damages.** In any action brought pursuant to this section, the court may in its discretion [order,  
30 in addition to damages, injunction or other equitable relief and reasonable attorney's fees] **enjoin**  
31 **the methods, acts, or practices declared unlawful by section 407.020. The court may also**  
32 **determine a proposed award of reasonable attorney's fees for the counsel to the class.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63 4. (1) As soon as practicable after the commencement of an action brought as a class  
64 action, the court shall determine by order whether it is to be so maintained. An order pursuant  
65 to this subdivision may be conditional, and may be altered or amended before the decision on  
66 the merits. **An order permitting a class action shall specifically state how the class claims  
67 and any issues affecting only individual members, raised by the claims or defenses asserted  
68 in the pleadings, shall be tried in a manageable time-efficient manner.**

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

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

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

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

79 (3) **Prior to the entry of a judgment against a defendant in an action maintained as  
80 a class action under subsection 3 of this section, the court shall require each member of the  
81 class who claims to be entitled to monetary relief to submit a statement in a form  
82 prescribed by the court requesting a specific dollar amount and providing information  
83 regarding the nature of the class member's loss, injury, claim, or damage. No award of  
84 damages under this section shall be made without proof that the person or persons seeking**

85 **damages suffered an actual out-of-pocket loss. No judgment shall be entered until the trier**  
86 **of fact has determined the amount of money, if any, owed to each class member based upon**  
87 **the class member's individual proof. The amount of judgment shall not exceed the sum of**  
88 **money owed to each class member. The judgment shall identify each member of the class**  
89 **and each member's individual monetary award.** The judgment in an action maintained as a  
90 class action pursuant to subdivision (5) of subsection 3 of this section or subdivision (6) of  
91 subsection 3 of this section, whether or not favorable to the class, shall include and describe  
92 those whom the court finds to be members of the class. The judgment in an action maintained  
93 as a class action pursuant to subdivision (7) of subsection 3 of this section, whether or not  
94 favorable to the class, shall include and specify or describe those to whom the notice provided  
95 in subdivision (2) of this subsection was directed, and who have requested exclusion, and whom  
96 the court finds to be members of the class.

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

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

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

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

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

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

113 (5) Dealing with similar procedural matters.

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

117 7. Upon commencement of any action brought pursuant to subsection 1 of this section,  
118 the plaintiff or plaintiffs shall inform the clerk of the court in which such action is brought, on  
119 forms to be provided by such clerk, that the action is brought pursuant to this section. The clerk  
120 of the court shall forthwith inform the attorney general of the commencement of such action,

121 together with a copy of the complaint or other initial pleading, and, upon entry of any judgment  
122 or decree in the action, the clerk shall mail a copy of such judgment or decree to the attorney  
123 general.

124 8. Any permanent injunction, judgment or order of the court made pursuant to section  
125 407.100 shall be prima facie evidence in an action brought pursuant to this section that the  
126 respondent used or employed a method, act or practice declared unlawful by section 407.020.

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

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

490.065. 1. [In any civil action,] **The provisions of this section shall apply in all civil  
2 actions. The opinion of a witness qualified as an expert under this section may be given on  
3 the facts as proved by other witnesses. The facts or data in the particular case upon which  
4 an expert bases an opinion or inference may be those perceived by or made known to the  
5 expert at or before the hearing or trial. If such facts or data are of a type reasonably relied  
6 upon by experts in a particular field in forming opinions or inferences upon the subject,  
7 the facts or data do not have to be admissible in evidence in order for the opinion or  
8 inference to be admitted. Facts or data that are otherwise inadmissible shall not be  
9 disclosed to the jury by the proponent of the opinion or inference unless the court  
10 determines that the probative value in assisting the jury to evaluate the expert's opinion  
11 substantially outweighs the prejudicial effect.**

12 **2. If scientific, technical or other specialized knowledge will assist the trier of fact in any  
13 cause of action to understand the evidence or to determine a fact in issue, a witness qualified as  
14 an expert by knowledge, skill, experience, training, or education may testify thereto in the form  
15 of an opinion or otherwise[.] if:**

16 **(1) The testimony is based upon sufficient facts or data which are or will be  
17 admitted into evidence at the hearing or trial;**

18 **(2) The testimony is the product of reliable principles and methods; and**

19 **(3) The witness has applied the principles and methods reliably to the facts of the  
20 case.**

21 **3. Notwithstanding the provisions of subsection 2 of this section or any other  
22 provision of law to the contrary, in professional malpractice actions, the opinions of an  
23 expert who is otherwise qualified as to the acceptable standard of conduct of the**

24 professional whose conduct is at issue shall be admissible only if, at the time the act or  
25 omission is alleged to have occurred, such expert:

26 (1) Was licensed by an appropriate regulatory agency to practice his or her  
27 profession in the state in which such expert was practicing or teaching in the profession at  
28 such time; and

29 (2) In the case of a medical malpractice action:

30 (a) Had actual professional knowledge and experience in the area of practice or  
31 specialty in which the opinion is to be given as the result of having been regularly engaged  
32 in:

33 a. The active practice of such area of specialty of his or her profession for at least  
34 three of the last five years and with sufficient frequency to establish an appropriate level  
35 of knowledge, as determined by the court, in performing the procedure, diagnosing the  
36 condition, or rendering the treatment which is alleged to have been performed or rendered  
37 negligently by the defendant whose conduct is at issue; or

38 b. The teaching of his or her profession for at least three of the last five years as an  
39 employed member of the faculty of an educational institution accredited in the teaching of  
40 such profession and with sufficient frequency to establish an appropriate level of  
41 knowledge, as determined by the court, in teaching others how to perform the procedure,  
42 diagnose the condition, or render the treatment which is alleged to have been performed  
43 or rendered negligently by the defendant whose conduct is at issue; and

44 c. Except as provided in paragraph (b) of this subdivision:

45 (i) Is a member of the same profession;

46 (ii) Is a medical doctor testifying as to the standard of care of a defendant who is  
47 a doctor of osteopathy; or

48 (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant  
49 who is a medical doctor; and

50 (b) Notwithstanding any other provision of this section, an expert who is a  
51 physician and as a result of having supervised, taught, or instructed nurses, nurse  
52 practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants,  
53 physical therapists, occupational therapists, or medical support staff during at least three  
54 of the last five years immediately preceding the time the act or omission is alleged to have  
55 occurred has knowledge of the standard of care of such health care provider under the  
56 circumstances at issue shall be competent to testify as to the standard of such health care  
57 provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist,  
58 nurse midwife, physician assistant, physical therapist, occupational therapist, or medical  
59 support staff shall not be competent to testify as to the standard of care of a physician.

60 [2.] 4. Testimony by such an expert witness in the form of an opinion or inference  
61 otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by  
62 the trier of fact.

63 [3. The facts or data in a particular case upon which an expert bases an opinion or  
64 inference may be those perceived by or made known to him at or before the hearing and must  
65 be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon  
66 the subject and must be otherwise reasonably reliable.

67 4.] 5. If a reasonable foundation is laid, an expert may testify in terms of opinion or  
68 inference and give the reasons therefor without the use of hypothetical questions, unless the court  
69 believes the use of a hypothetical question will make the expert's opinion more understandable  
70 or of greater assistance to the jury due to the particular facts of the case.

71 **6. It is the intent of the general assembly that, in all civil cases, the courts of the**  
72 **state of Missouri not be viewed as open to expert evidence that would not be admissible in**  
73 **other states. Therefore, in interpreting and applying this section, the courts of this state**  
74 **may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow***  
75 ***Pharmaceuticals, Inc.*, 509 U.S. 579; *General Electric Co. v. Joiner*, 522 U.S. 136; *Kumho***  
76 ***Tire Co. Ltd. v. Carmichael*, 526 U.S. 137; and other cases in federal court applying the**  
77 **standards announced by the United States Supreme Court in such cases.**

538.225. 1. In any action against a health care provider for damages for personal injury  
2 or death on account of the rendering of or failure to render health care services, the plaintiff or  
3 the plaintiff's attorney shall file an affidavit with the court stating that he or she has obtained the  
4 written opinion of a legally qualified health care provider which states that the defendant health  
5 care provider failed to use such care as a reasonably prudent and careful health care provider  
6 would have under similar circumstances and that such failure to use such reasonable care directly  
7 caused or directly contributed to cause the damages claimed in the petition.

8 2. As used in this section, the term "legally qualified health care provider" [shall mean  
9 a health care provider licensed in this state or any other state in the same profession as the  
10 defendant and either actively practicing or within five years of retirement from actively  
11 practicing substantially the same specialty as the defendant] **means a person qualified to testify**  
12 **as an expert under subsection 3 of section 490.065, RSMo.**

13 3. The affidavit shall state the name, address, and qualifications of such health care  
14 providers to offer such opinion.

15 4. A separate affidavit shall be filed for each defendant named in the petition.

16 5. Such affidavit shall be filed no later than ninety days after the filing of the petition  
17 unless the court, for good cause shown, orders that such time be extended for a period of time  
18 not to exceed an additional ninety days.

19           6. If the plaintiff or his attorney fails to file such affidavit the court shall, upon motion  
20 of any party, dismiss the action against such moving party without prejudice.

21           7. Within one hundred eighty days after the filing of the petition, any defendant may file  
22 a motion to have the court examine in camera the aforesaid opinion and if the court determines  
23 that the opinion fails to meet the requirements of this section, then the court shall conduct a  
24 hearing within thirty days to determine whether there is probable cause to believe that one or  
25 more qualified and competent health care providers will testify that the plaintiff was injured due  
26 to medical negligence by a defendant. If the court finds that there is no such probable cause, the  
27 court shall dismiss the petition and hold the plaintiff responsible for the payment of the  
28 defendant's reasonable attorney fees and costs.

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