

**CONSUMER CLAIMS BASED ON MOTOR VEHICLE  
FRAUD OR DECEPTIVE OR UNFAIR PRACTICES**

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## **CONSUMER CLAIMS BASED ON MOTOR VEHICLE FRAUD OR DECEPTIVE OR UNFAIR PRACTICES**

The purchase of a car, new or used, is one of the most significant purchases consumers make. With millions of new and used cars sold in the United States each year the effect and exposure to consumers is staggering. In 2014 over 17 million new cars and twice that for used cars were sold in the United States. Advertising for sale of cars reaches thousands of consumers based on billions of dollars of advertising plans and promotions. Cars are a necessary and essential part of a consumer's life and consumers may own multiple cars and purchase multiple cars in short periods of time. The purchase of a car is as significant as the purchase of a home. This all leads to potential issues: used car sales and new car sales with warranty problems, misleading promotions with buyers often not knowing what they are buying, cars' histories misrepresented or kept hidden, consumers often not knowing the used cars' real values, title problems with consumers not given title to the car, and undisclosed wreck or property damage are all frequent issues consumers face in buying a new or used car.

The most prevalent complaints consumers have on the purchase of a new or used vehicle are:

- undisclosed wrecked or property damage
- no title
- impairment of title
- misrepresentations in the sale or lease

- flood damaged
- salvaged title
- warranty claims
- misrepresentation in the type of vehicle – rental, brass hat, executive car, program car, or lemon buy back, or finance or service plans

To remedy these prevalent problems consumers face in the purchase of a car, the following case law and statutory remedies are available:

- common law fraud
- state and federal odometer fraud
- state and federal warranty claims
- negligent misrepresentation
- Missouri Merchandising Practices Act and similar UDAP (Unfair and Deceptive Act Practice) statutes

1. Fraud is an excellent theory of recovery for the consumer, but is also the most stringent in order to recover under. See *Jones v. West Side Buick Auto*, 93 S.W.2<sup>nd</sup> 1083 (Mo. App. 1936), and *John T. Brown, Inc. v. Weber Implement & Auto. Co.*, 260 S.W.2d 751 (Mo. 1953). The MAI instruction for fraud, MAI 23.05, sets forth the essential elements that one must prove in a fraud case.

The required elements for a submissible case of common law fraudulent misrepresentation are: (1) a representation; (2) its falsity; (3) its materiality; (4) the

speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

Many misrepresentations, half-truths, reckless, or false statements of fact, representations of one owner, well maintained vehicle, never wrecked, minor damage, good condition, or executive car can lead to actionable fraud.

Proof of intent can be shown by circumstantial evidence. See *Rice v. Lammers*, 65 S.W.2d 151 (Mo. App. 1933). And silence or concealment is actionable on a showing of the seller's superior knowledge or the seller giving partial information.

Evidence of other acts of those for which damages are sought, both preceding as well as following the act which is the subject of claim, are admissible if connected with the particular acts as tending to show the seller's disposition, intention or motive in commission of the particular acts for which the damages are claimed. See *Charles F. Curry and Company vs. Hedrick*, 378 S.W.2d 522 (Mo. 1964), *Rice vs. Lammers*, 65 S.W.2d 151 (Mo. App. 1933), *Blakeley vs. Bradley*, 281 S.W.2d 835 (Mo. 1955), *Hobbs vs. Boatright, et al.*, 93 S.W. 934 (Mo. 1906), *Osterberger vs. Hites Construction Company*, 599 S.W.2d 221 (Mo. App. 1980), and *Ball vs. Grismore*, 239 S.W. 524 (Mo. App. 1922).

The "benefit of the bargain" rule as embodied by MAI 4.03 is ordinarily the

correct measure of damages in a case of fraudulent misrepresentation. However, Missouri permits the use of other measures of damages where the particular circumstances of the fraud make the benefit of the bargain rule an inadequate measure of damages. *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281, 285 (C.A.8 (Mo.), 1984). An alternate measure of damages is permitted where the bargain theory would not accurately measure the loss sustained. *Glass Design Imports, Inc. v. Imports Specialties*, 867 F.2d 1139, 1143 (C.A.8 (Mo.), 1989).

“The general rule, in cases of fraud or deceit, is that defendant is responsible for those results, injurious to plaintiff, which must be presumed to have been within his contemplation at the time of the commission of the fraud, and plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations.” *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 182 (Mo. App., 2006). Where plaintiff has evidence of other damages the “such sum as you believe will fairly and justly compensate plaintiff for any other damages plaintiff sustained as a direct result of the occurrence submitted in the evidence” of MAI 4.01 can be used in addition to the difference in value instruction found in MAI 4.03.

Plaintiffs can also submit evidence of consequential damages; damages which are the direct and natural consequence of the buyers' acting on the faith of sellers' representations. A verdict director including consequential damages is permitted in cases of fraudulent misrepresentation. *See Scott* at 181. The plaintiff in *Scott* sought consequential damages for the misrepresentation of prior accident damage in the sale of a

Ford Explorer motor vehicle. In *Scott*, the court approved of the use of the following verdict director:

If you find in favor of plaintiff against defendant Blue Springs Ford Sales, Inc., or defendant Robert Balderston, then you must award plaintiff such sum as you believe was the difference between the actual value of the Ford Explorer on the date it was sold to the plaintiff and what its value would have been on that date had the vehicle been as represented by defendant Blue Springs Ford Sales, Inc., *and* such sum as you believe will fairly and justly compensate plaintiff for any other damage's plaintiff sustained as a direct result of the occurrence submitted in the evidence. *Scott* at 178 (emphasis added).

This instruction is “patterned after a modified version of MAI 4.03 [1969 New], the mandatory instruction for submitting compensatory damages for misrepresentation, and MAI 4.01 [2002 Revision]. . .” *Id. Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397 (Mo. App. 1985), is a case that addresses convenience as an element of damages.

The drawback of fraud is the strict pleading requirement and proof of reliance and intent. This makes fraud a good alternative submission but other claims are easier to prove.

Punitive damages are recoverable under a fraud claim on a proper submission and are not subject to any cap or limitation in Missouri. See *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014). Punitive damages may be awarded for conduct that is outrageous because of the defendant's evil motives or reckless indifference to the rights of others. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo. App. E.D.) 1993; *see also* MAI 10.01 (1990 Revision). For an award of punitive damages, there must be an award

of actual damages. *Koenig v. Skaggs*, 400 S.W.2d 63, 68 (Mo. 1966). Even a nominal award of \$1.00 meets this requirement. *Terry v. Houk*, 639 S.W.2d 897, 900 (Mo. App. W.D. 1982).

Punitive damages may also be awarded if the Defendants' conduct was outrageous because of the Defendant's evil motive or reckless indifference to the rights of others. See MAI 10.01 (1990 Revision). There are no hard-and-fast rules for measuring or determining exemplary damages. *Sperry v. Hurd*, 185 S.W. 170 (Mo. 1916). There does not need to be a fixed relation between the amount of actual damages and punitive damages. *Labrier v. Anheuser Ford, Inc.* 621 S.W.2d 51, 58 (Mo. banc 1981). Rather, punitive damages are a measure of the actor's malice. *Boyer v. Grandview Manor Care Ctr., Inc.*, 759 S.W.2d 230, 235 (Mo. App. W.D. 1988).

2. Missouri warranty statutes provide some relief for consumers. Express warranties are found in §400.2-313 RSMo. and implied warranties are found in §400.2-314, 315. Damages recoverable are §400.2-714 RSMo. and §400.2-715 RSMo. which provide for incidental and consequential damages but do not include attorney's fees. Warranty claims can be difficult to pursue in that attorney's fees are not available and may not be practicable. Federal warranty claims under the Magnuson-Moss Act Title 15 U.S.C. 2310 can provide attorney's fees.

3. Negligent misrepresentation. A theory of negligent misrepresentation can lead to insurance coverage and expanding the scope of recovery. See MAI 31.26 for elements of negligent misrepresentation.

A negligent misrepresentation brings about a separate cause of action in Missouri. However, mere negligence of interference with a contract right is not sufficient for a cause of action; the misstatements must rise to the level of a misrepresentation.

4. State and federal odometer statutes, §407.546 RSMo. Damages of three times actual damages or \$2,500.00 and attorney's fees.

5. Missouri Lemon Law, §407.560 RSMo. is the statutory law relating to Lemon Law and only applicable to new cars.

6. Missouri Merchandising Practices Act. This Act provides consumers the best relief on a consumer claim and therefore, the greater discussion.

The most potential remedy consumers have is the Missouri Merchandising Practice Act (MMPA), Chapter 407 of the Revised Statutes of Missouri (RSMo), which was adopted in 1967 to supplement the common-law action for fraud and create a distinct statutory fraud action and provide consumers with a means to seek relief for deceptive and unfair practices. The MMPA serves as "an attempt to preserve fundamental honesty, fair play and right dealings in public transactions." The MMPA is similar to many other Unfair Deceptive Act Practices (UDAP) statutes adopted in other states for the protection of consumer rights.

Because of the definition of deceptive and unfair practice, the MMPA gives consumers a remedy for no titles, misrepresentation in the condition, sale or quality, ownership of vehicles. The MMPA applies to acts committed "before, during or after the sale, advertisement or solicitation" of merchandise. It provides a cause of action for "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.”

Section 407.010 sets out the definitions applicable to the MMPA, defining terms such as “advertisement,” “merchandise,” “sale,” and “commerce.” The regulations issued by the Attorney General also supplement the definitions to provide guidance as to what is a deceptive and unfair practice. Sections 407.010-.943 contain specific provisions relating to odometer fraud, pyramid schemes and other unlawful merchandising practices. Remedies for automobile fraud including odometer fraud are also included in the Act.

The scope of the act is set forth in section 407.020.1, which provides that it is unlawful to act, use or employ “deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce...in or from the state of Missouri.”

The MMPA’s scope is based on the legislature’s clear policy to protect consumers. Section 407.020 is intended to supplement the definitions of common law fraud to “preserve fundamental honesty, fair play and right dealings in public transactions.” Since the MMPA was enacted it has been viewed by the courts as a way to protect consumers fundamentally.

The MMPA is designed to regulate the market place to the advantage of those traditionally thought to have unequal bargaining power, as well as those who may fall victim to unfair business practices. The Missouri legislature enacted paternalistic legislation to protect those consumers that could not otherwise protect themselves, signifying it would not want the protection of chapter 407 to be waived by those deemed in need of protection. This very fact indicates that it is a fundamental policy embodied in a statute which is designed to protect persons against the “oppressive use of superior bargaining power.” *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 726 (Mo. banc 2009).

The consumer who receives the product or service through a third party is included within the meaning of the statute as one for whom restitution shall apply, in accordance with the fundamental purpose of the MMPA, which is to protect consumers. The broad language of the statute, “any person who has suffered a loss” contemplates that other parties, besides the direct purchaser or contracting party are eligible to receive restitution, which helps serve the fundamental purpose of the MMPA – the protection of consumers.

Any person, firm or corporation employing deceptive merchandising practices in connection with sales or leases of merchandise for personal or household use may be a defendant in an action under the MMPA. Privity of contract between the plaintiff and the defendant is not required. A wholesaler or manufacturer can be sued by a plaintiff

consumer as long as the consumer can allege a prohibited act occurred and prove the elements of a claim under the MMPA.

Corporate officers, agents, or employees can be liable individually under the MMPA, but only for their own conduct in violation of Section 407.020. Real estate brokers are subject to the MMPA if they provide services in a manner that violates the Act.

Sections 407.020 and 407.025 provide four elements to a MMPA claim: (1) the use or employment of a “deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression or omission of any material fact,” (2) the unlawful act must occur in connection with the sale or advertisement of merchandise, (3) the unlawful act must result in an ascertainable loss of money or real or personal property, and (4) the loss must occur to a person who purchases or leases merchandise primarily for personal, family or household purposes.

While, the purpose of the MMPA is to “supplement the definitions of common law fraud in an attempt to preserve fundamental honesty [and] fair play” in consumer transactions, the MMPA does not require proof of all the elements of common law fraud.

Section 407.020 prohibits unfair and deceptive practices, but does not define the term “unfair practice.” The term, however, is construed broadly to reach any deceptive or unfair practice, including the concealment of facts. In turn, the courts are left to determine what constitutes a deceptive practice on a case-by-case basis. Regulations issued by the Attorney General define an “unfair practice” broadly to include any practice

that “[p]resents a risk of, or causes, substantial injury to consumers.” Nevertheless, in *Ports Petroleum, Co. of Ohio v. Nixon*, the Supreme Court held that a sale of gasoline below cost was not an unfair practice within the meaning of the MMPA because such a sale causes no harm to the direct consumer, even though it was required by the Missouri Motor Fuel Marketing Act. Section 416.600 *et seq.* This stands for the proposition that an actionable unfair practice under the MMPA must actually mislead a consumer to the consumer’s detriment.

Some examples of deceptive acts include actions for false representations concerning the value of goods sold to a consumer, false statements concerning “sale” prices or false representations and deceptive practices in the sale and advertisement of a car, no title, misrepresentation in the sale or lease of a car, or financial services.

The plaintiff must suffer an “ascertainable loss of money or property, real or personal” as a result of the defendant’s unlawful conduct. If the plaintiff never pays anything to the defendant, the plaintiff cannot plead the essential element of ascertainable loss necessary to bring an action under the MMPA. Merely incurring an obligation to pay does not amount to an ascertainable loss; the plaintiff must part with at least some of the consideration. “Someone who seeks to purchase but never receives the goods nor pays value, cannot claim to have been damaged by any unlawful practice.”

An essential element of a claim under the MMPA is that the plaintiff must have purchased or leased goods or services. An action for damages under the MMPA is permitted in connection with the purchase or lease of merchandise. Merchandise is

broadly defined in section 407.010 to include goods, services, real estate, commodities, etc. The former exclusion of real estate transactions from private actions no longer exists.

An attempted purchase, that was never consummated, does not give rise to a claim. It should be noted, however, that the defendant's violation of the MMPA can occur before, during or after the sale or lease of goods or services.

The purpose to which goods or services are put is largely a factual issue, but it seems fairly clear that purchases or leases for direct use by a consumer, compared to purchases for commercial resale, are within the purview of the MMPA.

The venue for a violation of the MMPA is in the circuit court of the county where either the seller or lessor resides or where the transaction took place. Section 508.010 provides that in tort actions, when the plaintiff is injured in the state of Missouri, the county where the action must be brought is "where the plaintiff was first injured by wrongful acts or negligent conduct alleged in the action."

When a private party brings an action for a violation of the MMPA, the petition claiming the violation should contain the allegations and facts showing conduct sufficient to support a claim under the MMPA (*i.e.* a transaction subject to the MMPA and that meets all the elements of a claim) and additional claims if punitive damages are applicable. The petition should also show the expense of the legal action and attorney's fees. The petition does not need to cite section 407.025 to be sufficient as long as it sets forth facts adequate to bring it within the statute and it is clear the plaintiff is invoking the

statute. The specific requirements for pleading common law fraud are inapplicable to MMPA actions.

The petition under the MMPA should contain:

- A description of the plaintiff and defendant;
- An allegation regarding jurisdiction and venue;
- An allegation showing that the plaintiff purchased or leased merchandise primarily for personal or household use;
- An allegation showing a deceptive or unfair practice by the defendant, *e.g.*, a false statement or promise in connection with the sale or lease or concealment of a defect in goods sold or leased;
- An allegation showing that, as a result of the deceptive practice of the defendant, the plaintiff sustained an ascertainable loss of money or property, *e.g.*, the plaintiff paid money to the defendant as a result of the defendant's false claim that an item was on sale and was really worth far more than the purchase price;
- An allegation showing actual damages, computed by determining, for example, the difference in value between purchased goods as represented and their actual fair market value or expensive repairs made as a result of the defendant's failure to make repairs in accordance with guarantee given.

The MMPA provides for actual damages, punitive damages, attorney's fees and equitable relief. Claims for damages, actual or punitive, under section 407.025 are subject to trial by jury. A plaintiff need not elect between remedies under the MMPA and common law fraud or other statutory remedies before submitting claims to the jury. The only limitation is that the plaintiff cannot seek inconsistent remedies such as rescinding a contract and at the same time enforcing it by recovering damages for breach. The plaintiff also cannot secure a double recovery.

Section 407.025 specifically authorizes recovery of actual damages by a plaintiff who has suffered an ascertainable loss as a result of deceptive or unfair merchandising practices. The “benefit of the bargain” rule is applied to measure damages unless the plaintiff elects to rescind the transaction and seek restitution. For example, an automobile dealer allows the plaintiff to recover the difference between the actual value of the property and what the value would have been if it had been as represented.

Actual damages may include:

- The cost of repairing the defective goods;
- The difference in value between the goods as received and as represented; and
- Any other losses directly attributable to the defendant’s deceptive or unfair practices, including consequential damages.

While MAI 4.03 is ordinarily the correct measure of damages in a case of fraud, Missouri law does permit the use of other damage measures when the particular circumstances of fraud make the “benefit of the bargain” rule an inadequate measure of damages.

The MMPA is designed to protect Missouri consumers from fraudulent business practices. To remedy violations and to deter future prohibited conduct, the statute allows for injunctive relief, payment to the state for the cost of prosecution, punitive damages, restitution to injured consumers, and attorney’s fees.

Punitive damages may be awarded to the plaintiff in actions under section 407.025.1. The well established purpose of punitive damages is to inflict punishment and

to serve as an example and a deterrent to similar conduct. At times it may be necessary to award significantly higher punitive damages than compensatory damages to have a sufficient deterrent effect. To recover punitive damages, the plaintiff must prove by clear and convincing evidence the defendant's culpable mental state by showing either a "wanton, willful, or outrageous act or reckless disregard for an act's consequences (from which evil motive is inferred)." The punitive damages awarded are subject to limitations set by § 510.265 and constitutional due process constraints.

In *Krysa v. Payne*, the Court undertook an extensive analysis of the due process standards enunciated by the Supreme Court in affirming an award of \$500,000.00 punitive damages in a case in which the jury found that the plaintiff had suffered economic damages of \$18,449.53. Although the court stated that its review was *de novo*, the court nevertheless applied the standard rule of deference to a jury's factual findings and emphasized the "financial vulnerability" of the plaintiffs. *Krysa* also noted that punitive awards are reviewable for abuse of discretion, independent of constitutional claims. See *Heckadon v. CFS Enterprises, Inc., et al.*, 400 S.W.3d 372 (Mo. App. 2013).

In *Estate of Max E. Overbey v. Chad Franklin National Auto Sales North, LLC*, the Missouri Supreme Court addressed the punitive damage limitation under § 510.265. The Court found in reviewing a \$1,000,000.00 punitive damage award on an MMPA claim that was reduced to \$500,000.00, pursuant to section 510.265, that the punitive damage cap of \$500,000.00 did not violate the separation of powers, the right to trial by jury or due process because the MMPA is a statutorily created cause of action and the



legislature has the power to define the right it has created. The Court further held that the purchasers had presented sufficient evidence to permit claims under the MMPA and that a corporate officer can be held liable under the MMPA if they have actual constructive knowledge of the actionable wrong. The Court further examined the due process requirements of a punitive damage award and found the \$500,000.00 did not violate due process constraints.

Section 510.265.1 sets forth the guidelines for punitive damages in Missouri:

1. No award of punitive damages against any defendant shall exceed the greater of:

a. (1) Five hundred thousand dollars; or

b. (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

Such limitation shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.

2. The provisions of this section shall not apply to civil actions brought under § 213.111, that allege a violation of § 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of § 213.070 relates to or involves a violation of section 213.040, 213.045, or 213.050, or subdivision (3) of section 213.070, as it relates to housing.

Section 510.265.2 expressly provides that the statute does not apply to actions under specific anti-discrimination laws, suggesting that the General Assembly intended that § 510.265.1 would apply to all other actions involving punitive damages. *Estate of Overbey*, addressed the issue of punitive damages and the limitations of punitive

damages, and ultimately held that the legislature may set limits on statutory damages in statutory causes of action.

In MMPA cases, evidence of the defendant's conduct after the act that caused the alleged injury may be admissible for punitive damages if the act is "so connected with the particular act as tending to show the defendant's disposition, intention, and motive in the commission of the particular acts for which damages are claimed." Evidence of other suits involving fraud claims against a defendant is inadmissible absent a foundation showing a connection between the fraud or prior suit and the facts of the case at issue.

Attorney fees can be recovered in actions under § 407.025.1, based on the amount of time reasonably expended. However, if the plaintiff elects to submit a fraud claim to a jury rather than an MMPA claim to the Court, attorney's fees cannot be recovered. Attorney's fees are not automatically awarded under § 407.025.1, as the trial court has discretion to refuse an award. Denial of fees can be based on the consideration of actual and punitive damages awarded.

Actual proof of attorney's fees does not need to be elaborate because the trial court is deemed to be an expert on the matter. However, the best practice is to present a detailed time record and hourly rate in affidavit form to the Court.

There are now MAI approved instructions for claims under the MMPA. See MAI 39.01 [2013], which provides as follows:

Your verdict must be for plaintiff if you believe:  
First, plaintiff ["purchased", "leased"] (*here identify merchandise afforded protection under the statute*), and

Second, such [“purchase”, “lease”] was primarily for [“personal”, “family”, “household”] purposes, and

Third, in connection with the [“sale”, “lease”, “advertisement”] of (*here identify merchandise*) defendant (*here insert the alleged method, act or practice declared unlawful by §407.020, RSMo, such as “misrepresented the (here repeat the identification from Paragraph First)” or “concealed a material fact”*), and

Fourth, as a direct result of such conduct, plaintiff sustained damage.

An MMPA claim is commonly joined with common law fraud claims and breach of warranty claims. The plaintiff may choose between the MMPA and common law fraud in submitting the case to the jury. Reported cases do not reveal which affirmative defenses, other than the statute of limitations, are available in actions under the MMPA, but it would appear that the standard affirmative defenses are available. However, due to the requirement that malice, intent, and reliance are not required under the Act, those cannot be raised as affirmative defenses in MMPA claims.

“Unfair practices do not have to be proven by the establishment of the elements of common law fraud.” The MMPA does not require a showing of intent; and intent is not “determinative” of an MMPA action. However, counsel, to be safe, may wish to plead both statutory and common law fraud in separate counts when applicable, but by pleading common law fraud, the plaintiff may be assuming an unnecessary burden of proof.

Reliance, like other common law fraud elements, is not required to be proven for a seller to be liable under the MMPA. Sellers in fraud cases often attempt to introduce evidence of statements or representations made outside of the written purchase order or service agreement to limit liability, but those statements do not apply in the context of the

MMPA. Regulations promulgated under the MMPA and by the Attorney General include definitions that confirm the standards under the MMPA are less rigorous than the standards of proof of fraud. Consequently, proof of common law fraud necessarily establishes liability under the MMPA for the same conduct if the plaintiff further establishes that the purchase or lease in question was for personal or household use.

Although fraud or intentional misrepresentation may not be present, an unlawful pyramid scheme or repeated breaches of similar contracts is evidence of a statutory violation of the MMPA. For common law fraud, the damages recoverable are determined by the “benefit of the bargain” rule. See MAI 4.03 [1969 New], which provides as follows:

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe was the difference between the actual value of the (*describe property, such as “the furnace”*) on the date it was sold to plaintiff and what its value would have been on that date had (*describe property*) been as represented by defendant.

The courts have interpreted the statutory language of Chapter 407 in many cases which have provided further guidance on the scope of the MMPA.

In *Gibbons v. J. Nuckolls, Inc.*, Gibbons purchased a vehicle from an automobile dealership and sued the wholesaler for violating the MMPA. The wholesaler improperly claimed that privity of contract is required. Gibbons urged the court to find that the MMPA does not require privity in a contract and the act should apply to automobile wholesalers. The Court agreed and held that no privity was required under the Act; however in 2008, the General Assembly enacted section 407.558, which provides:

Notwithstanding any other provision of law to the contrary, no person, as defined in section 407.010, may bring a private civil action seeking monetary damages or other relief against any licensed motor vehicle dealer with whom such person did not have a commercial relationship. For purposes of this section, “commercial relationship” shall mean a relationship between a person and a licensed motor vehicle dealer which thereby directly results in the retail sale or lease of a motor vehicle or other related merchandise from that motor vehicle dealer to the retail purchaser or lessee but shall not include any motor vehicle dealer in the chain of commerce with whom the purchaser or lessee did not directly and personally negotiate or communicate. No provision in this section shall prohibit a person from pursuing against a manufacturer or seller of a new or used automobile any claim not arising under this chapter.

In *Huch v. Charter Communications*, the court held that the legislature intended the declaration of unfair, deceptive practices to supplement the definition of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions. This was done to give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions and leave it to the court in each instance to determine whether fair dealing has been violated. Because of the MMPA’s broad scope and the clear legislative policy to protect consumers, certain legal claims are not available to defeat claims authorized by the Act. This was an act of paternalistic legislation to protect those who cannot otherwise protect themselves.

*Hess v. Chase Manhattan Bank* was a decision in which the Court held that the admission or concealment of material facts under the MMPA required less proof than what was required to prove comparable elements of common law fraud.

In *Zmuda v. Chesterfield Valley Power Sports, Inc.*, the Court held the plaintiff sufficiently pleaded a cause of action for a violation of the MMPA. The petition alleges

that charging a document preparation fee is a “deception and unfair practice” under the terms provided in the MMPA.

In *Estate of Max E. Overbey vs. Chad Franklin National Auto Sales North, LLC*, the Court held that the statutory punitive damages limitation did not violate the separation of power doctrine, the right to a trial by jury or the due process clause. The Court also held that a corporate officer may be held liable under the MMPA if it is shown by evidence of probative force that he had actual or constructive knowledge of the actionable wrongs and participated therein.

The MMPA is broadly applied and a violation occurs “as long as it [unlawful practice] was made in connection with the sale.” *Watson v. Wells Fargo Home Mortgage*, 438 S.W.3d 404, 407 (Mo. banc 2014); section 407.020.1. The violation can occur “before, during or after the sale.” *Id.* There have been other MMPA cases against lenders and financial institutions, including *Watson v. Wells Fargo Home Mortgage*, 438 S.W.3d 404 (Mo. banc 2014) (a wrongful foreclosure was in connection with the sale of a loan) and *Conway v. Citimortgage*, 438 S.W.3d 410 (Mo. banc 2014) (a loan servicer was in connection with the sale of a loan). See also *Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. App. W.D. 2013).

## INVESTIGATION OF A CAR FRAUD CASE

It is imperative when pursuing a car fraud case to thoroughly investigate the car's history. To do so:

1. Obtain a CarFax on the vehicle.
2. Complete certified title history of every state in which the vehicle has been registered.
3. Contact prior owners to inquire of use or damage.
4. Contact prior insurance companies of claims made.
5. Accident reports from CarFax reports
6. Case.Net review of dealer
7. Attorney General complaints under Freedom of Information request
8. Better Business Bureau complaints
9. Have the vehicle inspected
10. Allow the client to go back and talk to the dealer to try to get information and see if the dealer will do the right thing. Sometimes cases go no further than this, but the consumer gets the relief they requested, maybe it is get out of the sale, return the vehicle, and buy another vehicle.

## FILING SUIT

More often filing suit is necessary to maximize the client's recovery. When filing a petition, do so with alternate theories, use of discovery, interrogatories and request documents for tax income information and to obtain information for pattern evidence and information on policy and procedures of dealers. A corporate representative deposition is often helpful for specific subject matters.

## TRIAL OF A CONSUMER MOTOR VEHICLE FRAUD CASE

1. Voir dire use to focus on conduct and punitive damages
2. Use of motions *in limine* to limit harmful evidence
3. Pattern evidence of defendants is crucial to determine damages
4. Instructions
5. Verdict
6. Judgment
7. Amended judgment seeking attorney's fees under MMPA
8. Appeal
9. Attorney's fees on appeal



## CONCLUSION

Because of the enormous sale of cars in this country and the importance that a car purchase has for a consumer, consumer claims relating to fraud and unfair and deceptive act practices are prevalent and life changing for many consumers. Using common law theories, statutory provision, and the wide range and scope of the Missouri Merchandising Practices Act can all provide consumers with adequate remedies to address their consumer complaints for the sale of cars.