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## ANALYSIS OF MO. S.B. No. 591 March 11, 2020

S.B. 591 would amend the Missouri Merchandising Practices Act (the MMPA) to strip away Missourians' protections against unfair, abusive, deceptive, and predatory practices. The MMPA is Missouri's primary consumer protection law, and would be greatly weakened by this bill.

***S.B. 591 would abandon vulnerable consumers.*** One of the primary goals of consumer protection statutes like the MMPA is to protect vulnerable consumers such as the elderly, those in poor physical or mental health, the uneducated, or those who are just plain trusting. S.B. 591 would deny a consumer any refund or other damages unless the consumer demonstrates that the unfair or deceptive practice "would cause a reasonable person to enter into the transaction that resulted in damages." Allowing fraudsters to escape liability by blaming consumers (for acting so unreasonably as to believe what they are told) would simply invite scammers to keep targeting vulnerable Missourians. Missouri would be alone among the states if it adopted a "reasonable consumer" standard that is so explicitly structured to disregard the vulnerabilities of elderly and disabled consumers.

***S.B. 591 would gut the MMPA's protections for homeowners.*** A home is the largest investment most Americans make in their lives. Yet S.B. 591 would gut the MMPA's protections for homeowners. First, it would completely exempt any sale of a new home from the MMPA if the sale included a new home warranty. But home warranties may be empty promises, offering very limited coverage, and generating high numbers of consumer complaints.<sup>1</sup> And, under this bill, a buyer who received any home warranty, no matter how limited, would be completely excluded from the MMPA's protections, even if the fraud or unfair practice involved something other than a warranty problem - for example, appraisal fraud, concealment that the home was built on a toxic waste dump, or fraud in the financing of the home.

The bill's abandonment of homeowners when they buy a home is compounded by abandonment of them after the purchase. The bill is structured to prevent any relief except for unfair or deceptive practices that lead to the sale of the home. Homeowners would be unable to invoke the MMPA for wrongful foreclosure, overcharging of interest, or even lockouts by "property preservation services" working for mortgage lenders. This would be true for all homeowners, not just those who buy a new home.

***S.B. 591 would deny consumers relief for post-sale abuses.*** Much consumer fraud, such as refusal to make repairs, overcharges of interest or fees, wrongful repossession, or wrongful foreclosure, occurs after the point of sale. S.B. No 591 would confine consumers' rights under the MMPA to practices that occurred before the sale and that caused the consumer to enter into the transaction. For example, a consumer would have no MMPA claim against a contractor who abandoned a job after being paid in full, or against a debt collector who was harassing the wrong person for a debt.

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<sup>1</sup> See, e.g., USA Today, *Pricey Warranties Don't Always Bring Peace of Mind* (June 22, 2013), <https://www.usatoday.com/story/money/personalfinance/2013/06/22/home-warranties-peace-of-mind/2434725/>.

***S.B. 591 would prevent consumers from joining together to seek relief.*** A business that descends to unfair and deceptive tactics usually does not single out just one consumer for this treatment. When a business follows a practice of deceiving its customers or treating them unfairly, it is important for consumers to be able to join together to bring suit. Ferreting out proof of the business's practices is often so time-consuming and expensive that consumers are priced out of the courthouse if they are relegated to individual suits. S.B. 591 would make it difficult or impossible for consumers to join together to bring suit. The bill accomplishes this by, among other things, requiring each member of a class action to establish individual damages.

***S.B. 591 would bring Missouri farther out of line compared to other states.*** The MMPA already suffers from several weaknesses in comparison to other states. It is ambiguous as to the extent that it protects consumers from unfair and deceptive practices by lenders and insurers. The civil penalty that the Attorney General can invoke for violations is just \$1000 per violation, lower than all but five other states. Unlike a majority of states, the MMPA gives consumers a remedy for violations only if they have suffered "an ascertainable loss of money or property," so it denies consumers a remedy when a business invades their privacy or verbally abuses them. Many other states avoid these weaknesses and have considerably more effective UDAP statutes. S.B. 591's rollbacks would be layered on top of these existing weaknesses.

***S.B. 591 would undermine the role of punitive damages in punishing and deterring fraud.*** The rollbacks to consumer protection that S.B. 591 would accomplish are heightened by the bill's erosion of the right to seek punitive damages. The purposes of punitive damages are to punish the wrongdoer and deter similar conduct by the defendant and by others. Under current law, punitive damages may be assessed against a wrongdoer who acts intentionally, wantonly, willfully and outrageously without justification *or* with reckless indifference to the injured party's rights and interests.

Allowing punitive damages for acts done with reckless indifference is particularly important for consumer fraud cases. Companies that cheat or abuse consumers often do so because of an overall culture of abuse and the lack of controls from the top. A person's state of mind is always hard to prove, and proving that a company had the specific intent to harm a particular consumer is often impossible. Yet S.B. 591 would replace the punitive damages standard with a requirement that the consumer prove that the business "*intentionally* harmed the plaintiff without just cause or acted with *deliberate* and flagrant disregard for the *safety* of others." The requirement to prove that the business acted intentionally or deliberately means that it would always be necessary to prove the defendant's state of mind. Restricting the second part of the standard to disregard of the *safety* of others means that it would not subject businesses that merely cheat consumers out of their savings to punitive damages.

***About NCLC.*** The National Consumer Law Center (NCLC) is a non-profit research and advocacy organization that focuses on consumer justice and economic security for low-income people. This analysis was prepared by Carolyn Carter, NCLC's Deputy Director. She is one of the two co-authors of NCLC's 956-page treatise *Unfair and Deceptive Acts and Practices* (9<sup>th</sup> ed. 2016), which analyzes the statutory provisions and judicial decisions interpreting each state's equivalent of the MMPA. She is also the author of the report [\*Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws\*](#) (March 2018), which surveys and evaluates the strength of UDAP statutes in every state.