IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 14-2892

RONALD PERRAS, on behalf of himself and
all others similarly situation,

Plaintiff-Appellant,

v.

H&R BLOCK, INC., HRB TAX GROUP, INC.,
And HRB TECHNOLOGY LLC,

Defendants-Appellees.

Appeal from an Order Denying Class Certification
United States District Court for the Western District of Missouri
The Honorable Beth Phillips

BRIEF OF AMICUS CURIAE THE MISSOURI ATTORNEY GENERAL IN SUPPORT OF APPELLANT'S PETITION FOR PANEL REHEARING AND/OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF THE AMICUS

The Missouri Attorney General submits this amicus brief on behalf of the State of Missouri under Fed. R. App. Pro. 29(a) in support of appellant's Motion for Rehearing or Rehearing En Banc. The panel's decision interprets the Missouri Merchandising Practices Act (the "MMPA"). Sec. 407.010 et seq., (RSMo. 2010). The MMPA charges the Attorney General with the duty to police the marketplace in order "to preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Danforth v. Indep. Dodge, Inc*., 494 S.W.2d 362, 368 (Mo. App. 1973). Decisions that interpret provisions of the Act in the context of a private plaintiff may affect the scope of future enforcement actions by the Attorney General. *See Gibbons v. J. Nuckolls, Inc*., 216 S.W.3d 667, 670 (Mo. banc 2007).

Additionally, the Attorney General is granted rulemaking authority to define the meaning of the terms within the MMPA, including several that are placed at issue in this appeal. *See Huch v. Charter Comm., Inc*., 290 S.W.3d 721, 725 (Mo. banc 2009) (*citing* Sec. 407.145, RSMo.). Given this rulemaking authority and experience enforcing the act, the Attorney General is able to provide unique insight into the legal and practical effects of the panel's decision.

ARGUMENT

For the first time, a published opinion has found a territorial restriction in the statutory text of the Missouri Merchandising Practices Act, barring out of state plaintiffs from accessing the protection of the Act against Missouri corporations. If this decision was handed down from the Missouri Supreme Court, it would be a dramatic change to the Act, contrary to its traditional, broad application. But this decision came from a federal appellate court sitting in diversity, attempting to predict what the Missouri Supreme Court would decide—a prediction made on an issue not relied on by the district court or otherwise raised in the briefing of the parties or the several amici before it. While rehearing is proper for this reason alone, the unsettling implications of the panel's decision to the law enforcement interests of the State of Missouri (and other states whose Unfair and Deceptive Practices statutes mirror the MMPA) make the need for rehearing critical.

The district court had originally couched its decision purely on the constitutional application of the MMPA to class members under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The matter of the statutory reach of the MMPA was left largely untouched as the pure question was whether the MMPA may be applied constitutionally to the defendants.[1] While the briefing

[1] The Slip Opinion characterizes the Attorney General's amicus argument as Missouri having such "a compelling interest in policing the conduct of its domestic corporations [so as to] justif[y] certifying the class and giving the foreign class

focused on this aspect, the panel instead focused on the language of the MMPA itself, specifically the phrase "in and from the state of Missouri" found within Sec. 407.020, RSMo.;

> The act, use or employment by any person of any [unlawful act] in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, *in or from the state of Missouri,* is declared to be an unlawful practice.

(Emphasis Added)

The panel took the phrase "in or from" to modify the sale of merchandise, looking to whether parts of the "transaction" or sale occurred in Missouri. *Perras v. H & R Block*, ___F.3d___, 2015 WL 3775418, *4 (June 16, 2015) ("But every part of the transactions—the activity for which the class action seeks relief—occurred in each class member's home state"). Even if this was the proper standard (and it is not) the opinion assumes that a "transaction" consists of where the forms are signed, but not where the content of those forms are conceived,

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members a legal avenue for bringing their purportedly common claims against these Missouri defendants." Slip Op. at 4. This was not the case. Rather the Attorney General simply urged that the "Due Process and the Full Faith and Credit Clauses" of the U.S. Constitution were not offended by the application of the MMPA to out of state plaintiff class members. Amicus Brief of the Attorney General at Pg. 3.

printed and distributed. The opinion posits that a "transaction" includes where a consumer's money is initially collected, but not the ultimate destination to which that money is remitted. Most importantly, the panel finds a "transaction" only includes low level employees implementing an unlawful practice, but does not extend into the offices of the executives and managerial agents that created and ordered that the scheme be carried out. Even under the opinion's own standard, the boundaries of a "transaction" are artificially limited in such a way that ignores the reality of how the transactions in this case were actually alleged to have been carried out.

But this presupposes that the opinion's new territorial standard is in fact the proper standard under the Sec. 407.020, RSMo. It is not. As *State ex rel. Nixon v. Estes*, the only controlling authority cited by opinion, counsels, "in and from the state of Missouri" actually modifies "trade and commerce," and not the "sale of merchandise." 108 S.W.3d 795, 801 (Mo. App. 2003). This is not an oversight without consequence, as these terms have specific statutory definitions contained in Sec. 407.010, RSMo.:

> Trade" or "commerce", the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or

> thing of value wherever situated. The terms "trade" and "commerce" include any trade or commerce directly or indirectly affecting the people of this state.

Based on this definition, the required inquiry for the panel was not whether some portion of the nominal transaction physically occurred in Missouri or was carried out in another state. Indeed, Sec. 407.010(7) expressly disclaims this standard, as the MMPA applies to *any* sale of a service "*wherever* situated." The statute expressly contemplates sales that are consummated and transacted in other states giving rise to a claim under the MMPA, so long as the conduct emanates from Missouri. *Estes* recognized this facet of the statute twelve years ago.

As *Estes* counsels, the statute applies when that trade or commerce "directly or indirectly affect[s] the people of the state." *Estes*, 108 S.W.3d at 798-99. The panel's opinion overlooked this line of inquiry— that the statute is sufficiently satisfied if a deceptive scheme regardless of where situated has "direct or indirect" consequences to the state of Missouri. This standard was satisfied by the facts presented to the Court. If the parties were so apprised, the Missouri Attorney General would have been able to brief how deceptive schemes projected wholly out of the state inevitably have domestic consequences.

For instance, when a domestic business engages in unfairness or deception with the citizens of other states, it casts a cloud over all other Missouri businesses

in the state, as out-of-state consumers assume other corporations' guilt by geographical association. Policing the conduct of a corporation is a strong state interest precisely because it has "direct and indirect" consequences for the business community of a state. Moreover, successful frauds often attract other unscrupulous imitators, who may migrate to Missouri after observing the success of another. That interest is encapsulated by the broad language chosen by the Missouri General Assembly in drafting Sec. 407.010 and Sec. 407.020.

This change to the MMPA brought on by the panel's decision risks "direct and indirect" consequences to the state of Missouri's law enforcement interest. The MMPA is not just a civil statute; it is the primary felony enforcement mechanism for the Missouri Attorney General. Criminal fraud is naturally (and most effectively) prosecuted at its source—the command and control apparatus that conceives and directs a scheme and is the final destination for the scheme's profits. By building its decision into Sec. 407.020, the panel's opinion is not constrained to only private class actions under Sec. 407.025, but risks spilling over into future felony prosecutions by the Attorney General.[2] Given that the two largest Missouri metropolitan areas are bisected by state lines, this is not a remote possibility. A company may be headquartered on one side of the state line, train its sales staff at its headquarters in its fraudulent or deceptive scheme, and then send

[2] Indeed, as briefly mentioned in *Estes*, the defendant in that civil case was also criminally prosecuted under the MMPA for the same conduct.

that staff to the neighboring state to go door-to-door to implement this scheme. Prior to the panel's opinion, the Attorney General or a local prosecutor would be able to bring felony charges under Sec. 407.020 for this type of conduct, but now the validity of such a prosecution has been placed in doubt.

Given these stakes, the Court should hear this matter *en banc* and allow the parties to present this issue of the statutory reach of the MMPA, fully-briefed and argued.

CONCLUSION

The appellant's petition for rehearing or rehearing *en banc* should be granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Appellate Rule 37(a)(7)(B) and Rule 29(d), I certify that the foregoing brief is printed in 14 point proportionally spaced serif typeface (Century Schoolbook 14 pt.). I further certify that according to the software used to prepare it, the brief contains 1,295 words, which is less than half the length authorized for the motion for rehearing of the Appellant-Plaintiff, the party to whom this amicus curiae supports.

/s/ Brian T. Bear
BRIAN T. BEAR
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2015, the foregoing Amicus Curiae Brief in Support of Appellant's Petition for Panel Rehearing and/or Rehearing En Banc was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Brian T. Bear
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