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 PLAINTIFF-APPELLANT'S REQUEST FOR REVERSAL

CHRIS KOSTER
Attorney General

JAMES R. LAYTON (Mo. Bar 45631)
Solicitor General

BRIAN T. BEAR (Mo. Bar 61957)
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-7007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

OTHER AUTHORITIES

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). At issue in this case is the scope and meaning of 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). 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 district court's decision.

ARGUMENT

Introduction

Most constitutional questions regarding the territorial reach of a state law are initiated by a party who resists being subjected to foreign laws in an unfamiliar, unforeseeable forum. This appeal presents the opposite. Here a domestic corporation seeks to prohibit out-of-state consumers from accessing the fundamental consumer protection act of the corporation's home state, the Missouri Merchandising Practices Act, Sec. 407.020, RSMo. The district court agreed, holding that allowing such a suit would offend the Due Process and Full Faith and Credit clauses of the United States Constitution. Concerned that the parties may not have foreseen the possibility of being sued under Missouri's laws, even though at least part of the transaction was governed by a Missouri choice-of-law provision, the district court denied class certification. In doing so, the district court's order threatens to go beyond interpreting the contours of a permissible national class under Rule 23 and read a territorial restriction into the class of persons who may receive relief under the MMPA.

The MMPA's territorial flexibility was well-settled in Missouri

courts prior to the district court's ruling. In *State ex rel. Nixon v. Estes,* the Missouri Court of Appeals held that a Missouri corporation is liable under the statute even if the affected consumers reside in another state. 108 S.W.3d 795 (Mo. App. 2003). In *Estes*, the court upheld the Attorney General's authority to seek restitution for out-of-state consumers under Sec. 407.100, even if nearly all the affected consumers reside out-of-state. *Id.* at 797-80.

Estes calls for the same result here, given that the same general legal framework applies to an MMPA action regardless of whether brought by the Attorney General under Sec. 407.100 or a private plaintiff under Sec. 407.025. *See Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 (Mo. banc 2007). Therein lies the danger of the district court's decision. The statutory definition for consumers eligible for restitution under an Attorney General action under Sec. 407.100[1] is nearly identical to the statutory standing requirements for private suit

[1] "The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to *any person who has suffered any ascertainable loss, including, but not limited to, any moneys or property, real or personal*, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter." Sec. 407.100 (emphasis added).

under Sec. 407.025.[2] While recent Supreme Court precedent suggests that a state's *parens patrae* action is distinct from a class action, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 34 S.Ct. 736, 740 (2014), the threat presented by the district court's decision remains. Were this Court, like the district court below, to couch its decision as a constitutional interpretation, future courts may erroneously interpret the decision as limiting the scope of restitution properly ordered and affirmed in *Estes*.

Such a result would be a profound departure from the normal functioning of state consumer protection laws. Courts have routinely upheld the ability to obtain relief for affected consumers outside a state's borders. *State ex rel. Miller v. New Womyn, Inc.*, 679 N.W.2d 593 (Iowa 2004); S*tate ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Ariz. 1983); *People ex rel. Spitzer v. Telehublink Corp.* 301 A.D.2d 1006, 1009 (N.Y. A.D. 2003); *Palladio v. Diamond*, 321 F.Supp. 630 (S.D.N.Y. 1970); *Kugler v. Haitian Tours, Inc.*, 120 293 A.2d 706 (N.J. 1972). There is no need to go down such a path. The district court found a

[2]"*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, may bring a private civil action…" Sec. 407.025 (emphasis added).

constitutional defect where one need not arise. The United States Constitution is not offended when a state provides a ready forum, cause of action, and remedy for out-of-state consumers when injured by its domestic businesses.

This Court should reverse the district court's finding of a constitutional violation for three reasons. First, an out-of-state consumer's voluntary decision to sue under the MMPA does not offend the interests of his or her respective home state, even though that consumer may have brought a claim under its domestic consumer protection law. Second, Missouri has a significant, foreseeable interest in policing its domestic corporations so as to satisfy the constitutional demands of *Phillips Petroleum Co. v. Shutts***,** 472 U.S. 797 (1985). Third, affirming the district court's ruling as written may frustrate the ability of state attorneys general to cooperate in consumer enforcement.

I. The MMPA's protection of out-of-state consumers does not offend the interests of their respective domicile states.

As a threshold matter, the district court appeared to accept the fact that the MMPA allows out-of-state consumers to bring suit under

Sec. 407.025. This is the correct understanding of the statutory language, which places no territorial or geographical restriction on who may sue under the act so long as the defendant's conduct takes place "in or from the state of Missouri." Sec. 407.020.1. This means that if a defendant is a resident of Missouri or carries out an "unlawful act" "from the state of Missouri" the consumer may initiate suit even if he or she is a resident of another state. In many cases, this may give the plaintiff two causes of action, under the consumer protection laws of his own state and that of defendant's state, from which to sue. National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, Sec. 2.4.4 (8th ed. 2013).

The fact that a plaintiff may be granted the choice of suing under the statutes of two states is not uncommon and certainly does not lend itself to a constitutional defect. For instance, it is a common feature of blue sky laws, where a defendant may be sued under the laws of its own locality or those of the domicile of the plaintiff. Jack McClard, *The Applicability of Local Securities Acts to Multi-State Securities Transactions*, 20 U. RICHMOND L. REV. 139, 140 (Fall 1985) ("The plaintiff, of course, cannot accumulate remedies, but he should be

permitted to choose among them."). Indeed, the Supreme Court recognized this possibility in *Alaska Packers Ass'n v. Industrial Acc. Com'n*, noting that the plaintiff in that case who sought to sue under California's workman's compensation statute "could have claimed the benefits of the Alaska statute" despite being a citizen of neither state. 294 U.S. 532, 540 (1935). Indeed, as shown in *Alaska Packers,* when a plaintiff elects to claim the benefits of one state's statute rather than another state's statute, the court's enforcement of that law does not offend the "Full Faith and Credit" of the other state. *Id.* at 544.

This is not to say that this Court's constitutional concerns expressed *In re: St. Jude Medical Inc.* are unfounded. 425 F.3d 1116 (8th Cir. 2005). Rather it would appear that the district court misconstrued the opinion by finding a due process violation in the abstract without articulating the specific constitutional injury of each party. The "due process clause" protects individuals, and as such, a due process violation cannot be analyzed without understanding *whose* rights are implicated. *See e.g. Boddie v. Connecticut,* 401 U.S. 371, 380 (1971) (The obligations under due process "are not simply generalized ones; rather, [the question centers on what] the State owes to each

individual…"). In *St. Jude,* this Court mandated a review of the individual plaintiff's claims in order to discern "whether there would be constitutional injury *to out-of-state plaintiffs*." 425 F.3d at 1120. That identification of whose due process rights are at issue is key. The inquiry in *St. Jude* was not directed at the due process rights of defendants, because those rights are simply not implicated.

So long as defendants are subject to the state consumer protection statute there is no due process injury when an out-of-state consumer chooses to pursue a remedy under the defendant's domestic statute. "Even if the consumer protection and unfair competition statutes of other states differed considerably… *Defendants* are in no position to force Plaintiffs or unnamed class members to sue under the statutes of those states." *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 340 (N.D. Cal. 2010) (emphasis added). As shown by *Estes*, a domestic corporation is *always* subject to suit under the MMPA for its out-of-state conduct. 108 S.W.3d at 797-9. Subjecting a defendant to essentially the same liability under a statute through a private lawsuit rather than an Attorney General action makes no meaningful difference. Defendant is apprised that his or her substantive conduct

may give rise to liability, regardless of the identity of the plaintiff and the form of the lawsuit. It is "not considered a burden that a deceptive and unscrupulous operator may have to answer civil suits in several jurisdictions, provided that any injured party can recover his damages only once." *Brown v. Market Development, Inc.*, 322 N.E.2d 367, 374 (Ohio Com. Pl. 1974). The due process rights that are actually applicable to the defendants are simply not relevant to the constitutional inquiry required under *St. Jude*.

This means that the focus of *St. Jude's* constitutional inquiry is focused on the plaintiffs. A plaintiff cannot claim a due process injury when he or she is allowed to pursue his or her chosen cause of action to the exclusion of another. And in non-class actions, the plaintiff's choice to proceed under one cause of action is clear and unequivocal. The problem arises in a class action, because absent class members cannot be said to have made the same explicit choice. This focus, on the rights of absent class members, appears to be the concern articulated in *St. Jude*—and this concern is well-founded.

If a class representative chose to proceed on one cause of action, even though some class members could access a different cause of action

with more effective remedies, then there is cause for constitutional concerns. Indeed, the possibility that class representatives with divergent interests might impermissibly bind absent members was alluded to in *Shutts*, 472 U.S. at 811-12 (1985). This concern is real; the Missouri Attorney General has objected to class action settlements precisely on this ground, where absent class members would give up claims under the MMPA, in cases where the class representatives elected to proceed on a more difficult theory with far fewer available remedies. *Wilson v. DirectBuy, Inc.,* 2011 WL 2050537, at *12 (D. Conn. 2011) (noting that class representatives' choice of proceeding under civil RICO claim was to the detriment of more generous state consumer protection laws including the MMPA).

There is no such concern here with this class certification request. The district court noted that the other applicable consumer protection laws only presented additional difficulties and restrictions on absent plaintiff class members. Nowhere did the district court identify any hardship that absent class members would face if their action was brought under the MMPA rather than their own state's consumer protection laws.

There is no due process violation to a party if there is no injury to that party's rights. If a defendant's home state "provides a higher level of protection for consumer-plaintiffs through measures that make it easier for consumer-plaintiffs to recover in lawsuits against businesses engaging in fraudulent practices," there is no injury, much less a due process violation, to the absent members. *Elias v. Ungar's Food Products, Inc.* 252 F.R.D. 233, 247 (D.N.J. 2008) (certifying national class under New Jersey's UDAP statute). Allowing such a suit to go forward means that "members of the proposed class residing in other states will generally be afforded no less protection under [that act] than their home state, and, in fact, may receive greater protection." *id.* at 247. The inquiry required by *St. Jude* does not stop at merely finding differences between the applicable causes of action available to the class members. The differences must inure to the detriment of absent class members in order to trigger a constitutional defect.

Allowing the class to access the protections of the MMPA does not violate the Full Faith and Credit of other states nor does it violate the Due Process rights of absent class members.

II. Missouri is interested in the resolution of these claims and giving effect to that interest does not impair that of the other states.

All 50 states have enacted "Little FTC" laws like the MMPA. National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, Sec. 1.1 (8th ed. 2013). These laws draw on a common thread of interests, and as such there are two important interests at issue in their application: 1) the protection of the state's consumers; and 2) ensuring the proper conduct of its domestic merchants. Missouri's interest in this matter is bound up in the latter of the two as the district court noted:

> On the one hand, H&R Block's executive headquarters are in Missouri, it is a Missouri corporation, and all decisions regarding the development and implementation of the compliance fee were made in Missouri. In addition, it follows that Missouri has interest in prohibiting companies that operate in the state from engaging in practices prohibited by the MMPA.

District Court's Order at ADD7.

As shown in *Estes,* Missouri has a compelling interest in policing the conduct of its domestic corporations, even when the harm of that

conduct occurs outside the state. "A state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders." *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921 (Tex. Civ. App. 1976). Though the conduct is directed to outside the state's borders, the effects are felt domestically as "the reputations and businesses of the majority of honest business people within the state are harmed." *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1312 (Ariz. 1983). Recent history underscores the importance of this interest.

In and around 2009, numerous telemarketers set up call centers in the St. Louis area to deceptively sell vehicle service contracts and illegal insurance throughout the national marketplace. Missouri received well over a thousand complaints, the majority of which were from out-of-state consumers, regarding these companies. *A.G. Koster Announces Year's Top 10 Scams*, AGO PUBLICATIONS (January 4, 2010). Although the majority of contacts were directed to other states, Missouri's interest was uniquely harmed: our state earned the unfortunate reputation of being "the Silicon Valley" of vehicle service contract fraud. Maria Altman, *A Push To Curb Auto Service Contract*

Scams, National Public Radio (September 1, 2011). The gravity of this harm led the Attorney General to file numerous lawsuits, even though the majority of restitution would be on behalf of the citizens of other states.

When one of its domestic corporations is alleged to have harmed those outside its borders, Missouri's interest in the resolution of the case is well beyond the threshold set forth in *Shutts***,** 472 U.S. at 818. In *Shutts,* Kansas did not have an overriding interest in policing the domestic corporations of Texas, beyond that of the extent to which those corporations interacted with the citizens of Kansas. *Id.* at 820. The tangential interest of Kansas for those claims rested on the fact that the consumer and the business were both non-residents. Missouri is much more interested here because the defendants are its citizens. Yet, despite acknowledging that Missouri's interest is distinct, the district court still found a constitutional defect due to a perceived conflict between Missouri's law and various other states.

"If the court finds an apparent conflict between the interests of the two states it should reconsider." *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699, 703 - 4 (Mo. 1974). "A more moderate and restrained

interpretation of the policy or interest of one state or the other may avoid conflict.'" *Broglin,* 510 S.W.2d at 704 (citing Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1242 (1963)). "Under Missouri law there is not an actual conflict of law unless the interests of two or more states cannot be reconciled." *Brown v. Home Ins. Co.*, 176 F.3d 1102, 1105 (8th Cir. 1999). The apparent conflict identified by the district court is not an explicit one, such as where defendants "demonstrate that their deceptive conduct is authorized by any other state's laws or that compliance with the substantive laws of Illinois would lead them to violate a law imposed by another state." *Clark v. TAP Pharmaceutical Products, Inc.*, 798 N.E.2d 123, 130 (Ill. App. 2003). Missouri's interest in policing its domestic corporations is not contrary to the overriding interests of the other states: that their citizens are protected against unfair and deceptive conduct. There is no impairment of the other states' interests, and certainly not a violation of the Full Faith and Credit clause, by allowing this suit to go forward as pleaded. *See e.g. Washington Mutual Bank, FA v. Superior Court*, 920 15 P.3d 1071, 1081 (Cal. 2001).

In order to effectively police its corporations, a state may very well provide a ready forum and generous cause of action to out-of-state consumers harmed by this conduct. *Terrill v. Electrolux Home Products, Inc.,* 753 F. Supp. 2d 1272, 1282 (S.D. Ga. 2010). A state that provides generous remedies to an out-of-state party with lesser bargaining power is more likely to ensure that choice-of-law provisions, such as the one used by defendants in this case, are enforced. *1-800-Got Junk? LLC v. Superior Court*, 116 Cal.Rptr.3d 923, 937 (Cal. App. 2010) (enforcing choice of law provision finding no prejudice to franchisee given that the proposed state provided more generous remedies than that of its domestic jurisdiction). This rationale is particularly important in Missouri, where its two major metropolitan centers are bisected by state borders. Indeed, Missouri has generously allowed access to its courts, even when the parties to a consumer transaction are wholly outside the state. *See Sloan-Roberts v. Morse Chevrolet, Inc.,* 44 S.W.3d 402 (Mo. App. 2001) (allowing Kansas consumer to sue Kansas dealer in Missouri state court based on the fact that dealer's alleged scheme was carried out in Missouri). The fact that one state provides an open forum for

citizens of other states to bring a statutory cause of action against its own domestic business does not offend the constitution.

Missouri's interest in policing its domestic corporations is vital; enforcing it does not conflict with the applicable interests of the other states.

III. The district court's ruling threatens Missouri's Ability to cooperate with other state attorneys general.

Beyond the legal importance of *Estes*, there is a great practical reason why the ability of the MMPA to provide relief to out-of-state consumers must be preserved. A key component in public enforcement models is the ability of the several states to cooperate in actions by attorneys general. Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 430 (2003) ("Acting together, the [state attorneys general] have won legal settlements or concessions from tobacco companies, auto manufacturers, toy makers, paint producers, and others, agreements that would have been quite unlikely if sought by individual [state attorneys general] acting alone."). In the realm of consumer protection, one of the most critical ways in

which state attorneys general cooperate is in the sharing of consumer complaints. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 157-60 (Nov. 2013).

In practice, when a state attorney general receives a complaint from one of his or her constitutes, claiming injury from an out-of-state business, the norm is to forward that complaint to the state attorney general of the business's home state. Thus, if a domestic business commits fraud nationally, the attorney general of where the business is located is apprised and can bring action. This is precisely what happened in the previously mentioned service contract cases: other state attorneys general forwarded hundreds of consumer complaints to Missouri for resolution. Indeed, in many ways, the flow of complaints filed throughout the nation to the state of the businesses' domicile is a physical manifestation of the "aggregation of contacts" required under *Shutts* and *Allstate Ins. Co. v. Hague***,** 449 U.S. 302 (1981).

This exchange of information is not purely altruistic; a state is more likely to share information with one of its counterparts, when that agency is able to obtain relief on behalf of out-of-state consumer whose

complaint is forwarded. If the proposition of out-of-state recovery, set forth in *Estes,* is placed in question, this important norm is threatened.

All of these concerns can be avoided by rejecting the district court's finding of a constitutional defect. There is no reason to find a constitutional conflict among the states, when there is no conflict among the interests at issue.

CONCLUSION

The District Court's order denying class certification due to constitutional violations of the Due Process and the Full Faith and Credit Clauses should be reversed.

Respectfully Submitted,

CHRIS KOSTER
Attorney General

/s/ James R. Layton
JAMES R. LAYTON (Mo. Bar 45631)
Solicitor General
james.layton@ago.mo.gov

/s/ Brian T. Bear
BRIAN T. BEAR (Mo. Bar 61957)
Assistant Attorney General
brian.bear@ago.mo.gov

Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-7007
Facsimile: (573) 751-2049

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 3,946 words, which is less than half the length authorized for the brief of Appellant-Plaintiff, the party to whom this amicus curiae supports.

/s/ Brian T. Bear
BRIAN T. BEAR