No. 14-2892

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD PERRAS,

Plaintiff-Appellant,

vs.

H&R BLOCK et al.,

Defendants-Appellees.

On Appeal from an Order Denying Class Certification
United States District Court for the Western District of Missouri
The Honorable Beth Phillips
No. 12-cv-00450-BP

APPELLANT'S PETITION FOR PANEL REHEARING AND/OR RE-HEARING EN BANC

Dated: July 16, 2015

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POINTS OF LAW AND FACT PRESENTED FOR REHEARING

The Missouri Merchandising Practices Act ("MMPA") makes unlawful the use of any deceptive, fraudulent, or unfair practice "in connection with the sale or advertisement of any merchandise in trade or commerce" originating or occurring "in or *from* the state of Missouri." Mo. Rev. Stat. § 407.020.1 (emphasis added); *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 800 (Mo. Ct. App. 2003). Although acknowledging the broad applicability of the MMPA, the panel's opinion construes the word "from" in such a constricted manner that it has no application in the statute at all. H&R Block is located in Missouri and its Compliance Fee (it is undisputed) was created, designed, and *implemented* from Missouri. Although the fee was collected as part of tax-preparation services conducted outside the state, collection of the fee was less than ministerial—it was completely automated based on computer programming performed in Missouri. Because Mr. Perras was injured by deceptive conduct originating from Missouri (creation and implementation of the fee) and he had to pay the fee based on conduct that took place in Missouri (automated tacking of the fee onto his tax bill), the panel misapprehended the law in concluding the MMPA does not apply to Mr. Perras's claims.

STATEMENT REQUIRED BY FRAP 35(b)

Alternatively, if the panel refuses to rehear the appeal, rehearing en banc is appropriate and needed to correct the panel's interpretation, which will have long-lasting impact on civil plaintiffs and the Missouri Attorney General's ability to enforce the

MMPA against Missouri businesses who commit unlawful acts impacting out-of-state residents. This is so because the Attorney General's enforcement powers derive from the same provisions of the statute interpreted by the panel. *See Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 670 (Mo. banc 2007); Mo. Rev. Stat. §§ 407.040, 407.100. 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. Ct. App. 1973). Accordingly, the panel's decision will have vast consequences, warranting rehearing by the Court en banc to rectify the panel's narrow and erroneous interpretation of the MMPA.

ARGUMENT

This Court granted Perras permission to file an interlocutory appeal of the district court's order denying class certification of a nationwide (excluding Missouri) class of consumers. The district court denied certification after concluding it would be unconstitutional to permit the class of non-Missouri citizens to sue a Missouri-citizen under the MMPA. The panel chose not to address the constitutional issue on which the district court based its decision. Instead, without any substantial briefing from the parties on the issue and without purporting to apply any particular rules of statutory construction, the panel decided the scope of the MMPA and concluded that it did not apply to the out-of-state class members' claims in this case. Rather than effectuating a narrow holding, the panel's opinion will have a sweeping effect on the MMPA itself.

Not only does it limit the reach of the statute as to private plaintiffs, it also obstructs the Missouri Attorney General from policing the deceptive conduct of Missouri citizens. As such, the Court en banc should vacate the panel opinion and grant rehearing.

I. The Panel Misconstrued the MMPA.

In characterizing this case as one involving only a "fraudulent transaction," the panel opinion disregarded the plain text of the MMPA, which makes unlawful:

> [t]he act, use or employment by any person of any 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.

Mo. Rev. Stat. § 407.020.1. "The Supreme Court of Missouri has observed that the unfair practices declared unlawful by section 407.020.1 are 'unrestricted, all-encompassing and exceedingly broad. For better or worse, the literal words of the statute cover every practice imaginable and every unfairness to whatever degree.'" *Estes*, 108 S.W.3d at 799 (quoting *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001) and citing 15 CSR 60–8.020(1) (defining an "unfair practice" very broadly)); *see also Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191, 208 (Mo. Ct. App. 2013) (noting that the MMPA and its regulations are "paint[ed] in broad strokes to prevent evasion thereof due to overly meticulous definitions"). By its text, the unlawful act need not occur at the time of sale or transaction, but can occur "before, during

or after." Mo. Rev. Stat. § 407.020.1. A private plaintiff who "suffers an ascertainable loss of money" as a result of one or more of the unlawful acts listed above may bring a suit for damages. Mo. Rev. Stat. § 407.025.1. The Missouri Attorney General may also sue for violations of section 407.020.1. *Id.* at §§ 407.040 & 407.100.

Mr. Perras brought this lawsuit challenging the legality of a "Tax Preparer Compliance Fee" charged by H&R Block as part of tax-preparation services it sold to putative class members. Perras alleges that instituting a Compliance Fee was "deceptive" and "unfair" because it greatly exceeds H&R Block's actual compliance-related costs and, therefore, was unlawful under the MMPA. AA5 (¶21); AA13 (¶15).

The district court specifically did not reach the statutory construction question decided by the panel, calling the application of these facts to the MMPA a "close question." ADD5. A motions panel granted interlocutory appeal, pursuant to Federal Rule of Civil Procedure 23(f), based on a constitutional limitation imposed on the MMPA by the district court interpreting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). That constitutional question was the subject of the Rule 23(f) petition and opposition on which the three-judge panel permitted the appeal. It was the predominant focus of the parties' briefing. Nonetheless, the merits panel relied on an alternate rationale (while leaving the district court's constitutional holding undisturbed) that was the subject of only a sentence and a footnote in H&R Block's brief. Red Br.

at 53 & n.8.[1] Perras responded, and also argued that the "close" statutory question was more appropriately addressed on remand, since it required "the district court to determine in the first instance if the facts of this case fall within the statutory ambit of the MMPA." Grey Br. at 29, *id.* at 27-28. Regardless of the absence of substantial briefing, the panel rested its decision solely on the statutory ground, believing it prudent to avoid the constitutional question.[2] It directly applied the facts to determine, for purposes of class certification, if this case involved an act done in connection with "trade or commerce…in or from the state of Missouri." In doing so, the panel has reached an unsound interpretation of the MMPA that is inconsistent with standard principles of statutory interpretation.

While acknowledging that H&R Block "designed and implemented the compliance fee" in Missouri, slip op. at 7, the panel concluded that "every part of the transactions" at issue occurred in each class member's home state, and therefore, that the MMPA did not apply. *Id.* In particular, the panel found controlling that "each class member contacted and communicated with a local H&R Block representative at a lo-

[1] H&R Block actually made yjr argument that there must be a "sale or advertisement…in or from the state of Missouri," Red Br. at 53, which is foreclosed by *Estes,* 108 S.W.3d at 801 (Mo. Ct. App. 2003) ("As we read the statute, if a deceptive act is used or employed 'in connection with the sale or advertisement of any merchandise in trade or commerce ... *in or from the state of Missouri,*' it is unlawful under section 407.020.1.").

[2] The panel's professed desire to avoid constitutional issues is later contradicted when the panel (erroneously) concludes as part of its holding that Perras cannot challenge "creation[n] of the compliance fee" in Missouri because he would "have no [Article III] standing to bring a claim for relief against H&R [Block] solely for creating the fee," slip op. at 7, which was not even an argument that was briefed by the parties.

cal H&R Block office, contracted for tax-return services, and paid the allegedly deceptive compliance fee" in their home state. *Id.* The panel concluded that the fact that the Compliance Fee was designed and implemented in Missouri was irrelevant because "[t]his lawsuit does not challenge the mere fact of creating the compliance fee" but H&R Block's charging of the fee to consumers. *Id.* The panel stated that Perras would not have Article III standing to bring a claim against H&R Block "solely for creating the fee," an issue not raised or briefed by the parties. *Id.*

The panel's constricted interpretation of the statute failed to apply its broad, plain language in two ways. First, the panel assumes, without any accompanying statutory analysis, that the statute applies only to "transactions." *See* slip op. at 7 (stating the "transactions" for which the class seeks relief occurred in each class member's home state). But, by its plain and unambiguous text, the statute makes unlawful the "act, use or employment" of any deceptive or unfair practice committed "in connection with" the sale of merchandise in trade or commerce originating from the state of Missouri. Mo. Rev. Stat. § 407.020.1. It is not confined to "fraudulent transactions," as the panel found. Such an interpretation is at direct odds with the statute's admonition that an act is unlawful "whether committed before, during or after the sale, advertisement or solicitation," *id.*, and contrary to the Missouri Supreme Court's construction of the statute. For example, the Missouri Supreme Court has held that a plaintiff can even sue a third party to the original transaction for unlawful acts that occurred many months, if not years, *after* the original transaction. *Conway v. CitiMortgage, Inc.,* 438

S.W.3d 410, 413, 415-16 (Mo. banc 2014) (reversing dismissal, holding that "the fact that the wrongful conduct came after the sale was 'of no consequence'").

Here, the unlawful conduct began prior to the tax services purchased by the putative class members, but it is clear under Missouri law that this temporal distinction is irrelevant. *See id.* Perras alleges H&R Block's Compliance Fee was a "deceptive" and "unfair" practice that occurred from Missouri, where the fee was (by computer program) automatically tacked on to every consumers' tax bill, regardless of where they were located. It was undisputed that none of H&R Block's agents in the out-of-state, corporate-owned tax offices had the authority or even the ability to remove the fee. A160, A228-29. And, the panel recognized that the Compliance Fee was designed and implemented in Missouri. *See* slip. op. at 7. Thus, Mr. Perras has alleged a violation of the MMPA even if the face-to-face "transactions" between class members and H&R Block occurred in the class members' home states.

Second, the panel's conclusion that the fact that H&R Block created, designed, and implemented the Compliance Fee in Missouri is irrelevant, fails to give effect to the plain wording of the MMPA, which applies to any act done in connection with a sale in trade or commerce "*from* the state of Missouri." Mo. Rev. Stat. § 407.020.1 (emphasis added). Although the panel does not cite any principles of statutory construction whatsoever, Missouri "courts consider [the statute's] plain and ordinary meaning." *Conway*, 438 S.W.3d at 414 (relying on Webster's Third New Int'l Dictionary (1993)). The word "from" is ordinarily and unambiguously "used to indicate the place

that something comes out of." Merriam-Webster Online Dictionary, FROM, avail. at http://www.merriam-webster.com/dictionary/from (last accessed July 13, 2015).[3]

The panel was wrong to find that "the acts of commerce that Perras grieves did not occur in, or originate from, the State of Missouri," slip op. at 7, given the record in this case. In particular, the Compliance Fee was conceived in Missouri by a steering committee of H&R Block's Missouri-based managers.[4] All decisions related to the amount of the Compliance Fee and the justification therefore were made in Missouri.[5] H&R Block developed at its Missouri headquarters a uniform messaging plan about the Compliance Fee. That centralized messaging strategy included the use of pricing boards, companywide training, a "FAQ" fact sheet distributed via H&R Block's intranet, and information about the fee programmed from Missouri into the computer screens used by each preparer and shown to each consumer.[6] Each of these messaging devices, and how the fee would be described, were all designed in Missouri and

[3] *Accord* Online Oxford Dictionary, FROM, available at: http://www.oxforddictionaries.com (last accessed July 13, 2015).

[4] A167-68 (Marrs Tr. 32:17-33:6); A60-61 (Interrogatory-11) ("All identified individuals are, or were, located at H&R Block's corporate headquarters in Kansas City, Missouri."); A48 (steering committee minutes); A166 (Marrs Tr. 21:13-22:9); A83 (2011 FAQ); A166 (Marrs Tr. 21:13-22:9).

[5] A259 (decision made by "SLG"); A173 (Marrs Tr. 57:23-58:20) (SLG refers to "senior leadership group"), who are located in Missouri, A65-66 (Interrogatory-10); A165 (Marrs Tr. 20:8-21:9) (responsible for "operationalize[ing]" the Initiative and Compliance Fee); A165 (Marrs Tr. 20:21-21:24) (hired Denise Stoll to work on project); A170-71 (Marrs Tr. 48:18-52:19) (Suzzanne Lanaman primarily responsible for "business case"), A132 (Lanaman Tr. 31:17-32:18) (inherited "business case" from Michael Olson); A65-66 (Interrogatory-10) (all worked in Missouri).

[6] A192 (Mazzini Tr. 19:14-20:20).

distributed from there to corporate offices outside the state.[7] Further, H&R Block's Tax Preparer System ("TPS"), which is programmed, maintained, updated, and revised at H&R Block's headquarters in Missouri,[8] is responsible for the accuracy of each tax return prepared by H&R Block nationwide.[9] And from Missouri the TPS software automatically bills every consumer the Compliance Fee.[10] Also, by contract, all H&R Block services needed "to facilitate e-filing and other tax preparation-related technology services" are deemed to take place in the state of Missouri.[11] All of this undisputed record evidence was presented to the panel in Appellant's Brief. *See* Appellant's Brief at 7-22.

This is not a case where there is some intermediary, such as a third-party distributor, between the services designed in Missouri and the consumer. The activities of the

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[7] *See* A203-4 (Mazzini Tr. 94:17-95:16); A192 (Mazzini Tr. 19:14-20:20); A181 (Marrs Tr. 115:24-116:17) (identifying Leigh Schenck as person responsible for pricing board content); A64-65 (Interrogatory-10) (Scheck was located in Missouri); A217 (Stoll Tr. 22:7-23:14) (Kevin Sullivan responsible for training content regarding the Compliance Fee); *see also* A64-65 (Interrogatory-10) (Sullivan worked in Missouri); A172-73, A185-86, A187, A188 (Marrs Tr. 56:21-57:8, 196:20-197:3, 216:5-10, 233:3-9) (FAQs put together by Denise Stoll, Doug Pursley, or Jan Marrs and approved by Marrs); A64-65 (Interrogatory-10) (worked in Missouri); A185-86 (Marrs Tr. 196:20-197:3) (Pursley was a temporary contractor); A129 (Cahoon Tr. 39:3-40:4) (company intranet was maintained in Missouri); A209 (Robinson Tr. 59:1-9) (H&R Block's Tax Preparer System ("TPS") communicates basis for Compliance Fee to uniformly to all customers); A127-28 (Cahoon Tr. 24:8-13, 29:20-23) (TPS is programmed and maintained at H&R Block's Missouri-based headquarters; all updates and revisions to the TPS occur in Missouri).

[8] A127-28 (Cahoon Tr. 24:8-13, 29:20-23).

[9] A51 (Pickering Congressional Testimony); A127 (Cahoon Tr. 21:1-3).

[10] A160 (Maasen Tr. 53:7-54:13); A228-29 (Tinger Tr. 37:10-20, 41:18-22).

[11] ADD13-14; A68-69.

H&R Block's out-of-state employees, in this instance, were controlled by the Missouri company. Indeed, the employees working in the local offices were apparently *unwitting* participants in the Missouri-based compliance-fee scheme because even they were led to believe by the Missouri actors that it was only intended as an "offset" to actual compliance-related costs. A60-61; A211-13, A217, A64-65. Moreover, the tax-preparation services to which the Compliance Fee was connected originated in Missouri because H&R Block's Tax Preparation System ("TPS"), the computer program on which all tax returns are prepared nationwide, is programmed, maintained, updated, and revised at H&R Block's headquarters in Missouri.[12] And from Missouri, the TPS software automatically bills every consumer the Compliance Fee.[13] The panel's contrary assertion—that "the evidence each class member would proffer to support her claim, therefore, would be specific to her experience in her state at her local H&R office," slip. op. at 7, is demonstrably incorrect. Proving the fee grossly exceeded H&R Block's actual compliance-related costs has required Perras to obtain documents and depose witnesses almost exclusively in Missouri—a fact underscored by H&R Block's own admission that "[a]ll identified individuals [responsible for implementing the fee] are, or were, located at H&R Block's corporate headquarters in Kansas City, Missouri." A60-61.

[12] A127-28 (Cahoon Tr. 24:8-13, 29:20-23); A51; A127 (Cahoon Tr. 21:1-3).
[13] A160 (Maasen Tr. 53:7-54:13); A228-29 (Tinger Tr. 37:10-20, 41:18-22).

The panel's holding that "Perras would have no standing to bring a claim for relief against H&R Block *solely for creating* the fee," slip op. at 7 (emphasis added), depends on a misreading of Perras's claim: his claim is not based "solely" on creation of the unlawful fee; of course, he has to suffer an "ascertainable loss of money…as a result of the use…of a method, act, or practice" deemed unlawful by the MMPA, Mo. Rev. Stat. § 407.020.1. Creating and tacking the fee onto his bill was the unlawful practice required under section 407.020.1, and the ascertainable loss was payment of the fee under section 407.025.1. Thus, the unlawful act occurred in Missouri while the loss occurred elsewhere. No part of Article III standing precludes a plaintiff from challenging an activity when that activity causes a loss, even if the two acts occurred in different states. *See, e.g., Franchise Tax Bd. of Ca. v. Hyatt*, 538 U.S. 488, 495 (2003) (holding that a state can have a constitutionally significant interest in a claim even where only "some of the conduct alleged to be tortious occurred" in the state). Article III standing is simply not at issue here: each putative class member has "alleged *personal injury* [payment of the fee] fairly traceable to the defendant's allegedly unlawful conduct [creation and tacking of the fee onto her tax-preparation bill] likely to be redressed by the requested relief [return of the money paid]." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (emphasis added).

To the extent the panel was implying that the MMPA only applies when the conduct (or at least the injury) occurs solely in Missouri, such a holding cannot be squared with either the statute's text or the case law interpreting the statute. First, nowhere

does the statute limit its application to injuries, or even transactions, in Missouri. *See* Mo. Rev. Stat. §§ 407.020.1, 407.025.2. To the contrary it applies to acts done in connection with "trade or commerce…in or *from the state of Missouri*." Mo. Rev. Stat. § 407.020. Nonetheless, without articulating any permissible form of statutory construction,[14] the panel limited the MMPA to transactions or injuries to those that occur in Missouri. That can only be justified as adding a new limitation absent from the statutory text, but "[a] court is not at liberty to 'add words or requirements by implication [to] the statute." *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414

[14] To the contrary, the panel opinion eschews the interpretation urged by the Missouri Attorney General—who the Missouri legislature expressly authorized to promulgate interpretations of the statute. Mo. Rev. Stat. § 407.145; *Ward v. W. Cnty. Motor Co.*, 403 S.W.3d 82, 84 (Mo. banc 2013), *as modified* (May 28, 2013) (relying on regulations promulgated by Missouri Attorney General); *Mesker Bros. Indus. v. Leachman*, 529 S.W.2d 153, 158 (Mo. banc 1975) (stating the Attorney General's opinions, while not binding, are persuasive authority). Instead, the panel opinion uses a policy argument advanced by the U.S. Chamber of Commerce to support its own *sue generis* interpretation. Slip op. at 8 n.6 (""other states *also* have an interest in protecting their local consumers in transactions with foreign corporations"). The motivations of foreign states may be relevant to the intent of a foreign states' legislature, but they are hardly relevant to prove that the Missouri legislature intended "from" to mean "in" or that it wanted to preclude civil plaintiffs and the Missouri Attorney General from suing a Missouri corporation based on extraterritorial transactions when the unlawful acts alleged occurred in Missouri. *See* Brief of Amicus Curiae The Missouri Attorney General In Support of Plaintiff-Appellant's Request for Reversal at 5 (urging that the statutory language "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;'" interpreting *Estes, infra,* as holding that "a domestic corporation is *always* subject to suit under the MMPA for its out-of-state conduct") (emphasis in original); and interpreting the statute to permit out-of-state residents to sue a Missouri resident when the resident "carries out an 'unlawful act' 'from the state of Missouri,'" and specifically concluding that the statute applies to the non-residents' claims in this case).

S.W.3d 455, 467 (Mo. banc 2013). Moreover, reading the word "from" to mean "in," as the panel opinion implies, is not just grammatically inaccurate, but violates the canon of surplusage: "the legislature does not insert superfluous language in a statute." *Beard v. Missouri State Employees' Ret. Sys.*, 379 S.W.3d 167, 169 (Mo. banc 2012).

Second, if the panel opinion is read to limit the MMPA to consumers who enter into transactions in Missouri, it conflicts with the most recent and best pronouncement of Missouri law in *State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 800 (Mo. Ct. App. 2003) (holding that out-of-state consumers injured outside the state could sue Missouri corporation under the MMPA based on acts that occurred in Missouri). Relying on the definitional section of the MMPA, Mo. Rev. Stat. § 407.010(7), the terms "trade or commerce" apply to the "distribution…of any services…wherever situated," *id.*. Thus, when the definition is combined with text, the distribution of tax services and the collection of a compliance fee "wherever situated," *id.,* "from the State of Missouri," *id.* at § 407.020.1, clearly meets the requirements of the statute. Because both the Compliance Fee and associated tax-preparation services originated from Missouri, each time the fee was collected, it was a sale pursuant to the statute and it was commerce that occurred "from" Missouri even if it occurred "in" another state. *See Estes*, 108 S.W.3d at 801. The distinction drawn by the panel—that in *Estes* the "business had numerous ties to Missouri"—is simply not a distinction in this case, where the services and the fee also at least as many ties to Missouri. Slip op. at 6. Instead of "communicat[ing] with customers" by telephone or mail from Missouri, as in

Estes, H&R Block hired and sent employees to do its bidding out of state. The panel opinion does not and cannot explain why that is a distinction with a difference in interpreting whether trade or commerce originated "from" Missouri.

The panel's adoption of an alternate argument to support denial of class certification and construction of the MMPA will not be limited to this case. Already, it has been cited for the broad (and untenable) proposition that the MMPA can never be used to "regulate out-of-state transactions involving out-of-state class members." *O'Shaughnessy v. Cypress Media, L.L.C.*, No. 4:13-CV-0947-DGK, 2015 WL 4197789, at *5 (W.D. Mo. July 13, 2015). It is also inconsistent with at least one recent federal district-court opinion. *See Robbe v. Webster Univ.*, --- F.Supp.3d ----, 2015 WL 1412014, at *3 (E.D. Mo. Mar. 25, 2015) (holding allegations of fraudulent conduct by university professors at defendant's campus in Switzerland stated a claim under the MMPA where the plaintiff alleged that the defendant university "supervises and regulates its foreign campuses from its home campus in Webster Groves, Missouri"). And, while the panel desired to avoid repudiating the erroneous constitutional holding of the district court (whose own decision might still be relied on by future courts), the opinion then turns on a different (and un-argued) constitutional standing proclamation that, at best, will cause confusion in the lower courts. Because this important issue, decided with virtually no briefing, will have lasting consequences that a later panel of this Court will be bound to apply, rehearing is necessary.

II. The Panel's Interpretation Limits Missouri's Own Enforcement Authority.

The panel paid service to the exceedingly broad interpretations that the Missouri Supreme Court has given the MMPA, slip op. at 7, but did not acknowledge that the legislation was "to prevent evasion because of overly meticulous definitions." *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009). The panel opinion does more than adopt an "overly meticulous definition" of the word "from;" it adopts a completely erroneous one. In doing so, the panel's narrow reading of Mo. Rev. Stat. § 407.020.1 raises an issue of exceptional importance. Indeed, it will severely limit the Missouri Attorney General's enforcement authority under the MMPA since section 407.020.1 also defines the scope of a government enforcement action, *see* § 407.040.1, and the statutory definition for consumers eligible for restitution under an Attorney General action under § 407.100 is nearly identical to the statutory standing requirements for private suit under § 407.025. Accordingly, the panel's narrow interpretation of the MMPA will constrain the Attorney General in his ability to fulfill his duty under the statute to police the marketplace in order "to preserve fundamental honesty, fair play and right dealings in public transactions." *See Indep. Dodge, Inc.*, 494 S.W.2d at 368.

CONCLUSION

For the reasons stated, the petition for rehearing or rehearing en banc should be granted.

Respectfully submitted,

Dated: July 16, 2015

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on July 16, 2015, the foregoing 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.

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Attorney for Plaintiff-Appellant