IN THE
SUPREME COURT OF MISSOURI

No. SC 89361

JAMES HUCH and RYAN CARSTENS,
Plaintiffs –Appellants,

vs.

CHARTER COMMUNICATIONS, INC.,
Defendant – Respondent.

BRIEF OF GATEWAY LEGAL SERVICES, INC., THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AS AMICUS CURIAE

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INTEREST OF AMICUS

The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation. NCLC was established in 1969 to carry out research, education and litigation to promote consumer justice. The NCLC has as one of its primary objectives providing assistance to attorneys in advancing the interests of their low-income and elderly clients in the area of consumer law.

The NCLC has provided research and expertise on consumer law for legal services and private attorneys, Congress, state legislatures, and state and local offices charged with the enforcement of consumer protection acts. It also has participated as counsel, co-counsel, and Amicus Curiae in appellate litigation throughout the country and has sponsored and participated in highly acclaimed conferences designed to provide continuing education for legal services and private attorneys. NCLC staff write and publish sixteen legal treatises and annual supplements on consumer credit laws, including *Unfair and Deceptive Acts and Practices* (6th Ed. 2007), *Fair Debt Collection* (5th Ed. 2004) and *Cost of Credit: Regulation, Preemption, and Industry Abuses* (3rd Ed. 2005).

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and oppressive business practices.

Gateway Legal Services, Inc., is a not-for-profit Missouri legal aid program. It was founded in 1995 and began representing clients in 1997. It represents lower-income people in the areas of disability benefits and consumer protection.

BACKGROUND

Plaintiffs-Appellants filed an *Amended Petition for Individual and Class Action Relief* and the Defendant-Respondent filed a *Motion to Dismiss Plaintiffs' Amended Petition*. A hearing on this matter was held on May 16, 2007, and the trial court dismissed all of Plaintiffs' claims with prejudice on May 21, 2007. Subsequently, the judgment was entered in the Circuit Court of St. Louis County, Missouri. Appellate jurisdiction was vested in the Missouri Court of Appeals, Eastern District, pursuant to §477.050 RSMo, and Plaintiffs thereby appealed.

After a decision by the Court of Appeals, Appellants filed a Motion to Transfer to the Missouri Supreme Court. On June 24, 2008, the Missouri Supreme Court accepted transfer of this case. This Court has jurisdiction of this appeal pursuant to Art. V, § 10 of the Missouri Constitution and Supreme Court Rules 83.04 and 83.09.

Pursuant to Supreme Court Rule 84.05, Amici attempted to obtain consent of Respondent Charter Communications, Inc., who took no position whatsoever with regards to the filing of this Amicus Curiae brief. Therefore, Amici now submits with the appropriate motion, our brief for this Court's review.

ARGUMENT

I. The historical trend has been to minimize application of, or eliminate, the voluntary payment doctrine.

The voluntary payment doctrine, with very little variation throughout the United States, states that a person who pays with full knowledge of all facts is unable to recover that money if he paid under a mistake of law, in the absence of fraud, duress, artifice, or coercion.[1] This assertion was first made in 1802 in an English case, Bilbie v. Lumley, in which, "money was paid under mistake, the defendants not having…disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them relating to the time of sailing of the ship insured."[2] The Court noted that the defense had not denied the material nature of the letter in question, but had argued that all disclosures were before the underwriter before the claim was paid, and therefore, money paid could not be recovered. The Court held that ignorance of the law was no excuse, and that money paid in ignorance of the law could not be recovered.[3] While this doctrine took hold in English and American jurisprudence, it was limited in its application. Its underlying rationale was that "partners to a contract are enlightened individuals

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[1] See, e.g., Moody v. Lloyd's of London, 152 P.2d 951, 953 (Ariz. 1944); Ga. Code Ann., § 13-1-13 (2007).

[2] Bilbie v. Lumley, (1802) 2 East, 469, 470 (Eng.).

[3] Id.

exercising discrimination and free will and Courts should not disturb their contractual relations."[4]

Even in the earliest cases, fraud negated the voluntary payment doctrine. For example, in 1832, the Court of Appeals in South Carolina stated that "[i]t is now well settled, that wherever money is paid, which [in justice and fairness], the party is not intitled [sic] to retain, it may be recovered back."[5] In the English case Kelly v. Solari, the Court stated that, "The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, *there being no fraud on the other side*, he cannot recover it back again…"[6]

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[4] New South Wales Law Reform Commission, Report 53 – Community Law Reform Program: Eleventh Report – Restitution of Benefits Conferred Under Mistake of Law, 1987, Section 2.10, available at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R53TOC (emphasis added). See also Keith Spencer, Restitution of Monies Paid Pursuant to Mistake of Law, Vol. 12 Irish Student Law Review, 154-155 (2004) (Ir.), available at http://www.islr.ie/Reviews/2004/pdf/Mistake.pdf.

[5] Lawrence v. Beaubien, 18 S.C.L. (1 Bail.) 623 (S.C. App. 1832).

[6] Kelly v. Solari, (1841) 152 E.R. 24, 26 (Eng.), as reprinted in New South Wales Law Reform Commission, Report 53 – Community Law Reform Program: Eleventh Report – Restitution of Benefits Conferred Under Mistake of Law, 1987, Section 3.3, available at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R53TOC (emphasis added).

Later, many additional exceptions and qualifications emerged regarding the application of voluntary payment doctrine. Courts became adept in promulgating so many exceptions and qualifications that, "[o]ne more often encounters the 'luxuriant undergrowth of exceptions to the general rule' than application of the rule itself."[7] In fact, in Kiriri Cotton Co. Ltd. v. Dewani, the Privy Council applied an exception that when "something more" existed besides mistake of law, "such as something in the defendant's conduct which shows that he was the one primarily responsible for the mistake then the doctrine would not apply."[8]

Federal Courts have their own version of the "something more" exception. They have recognized that "misconduct" will prevent application of the voluntary payment doctrine, holding that, "[w]hen intentional misconduct is alleged on the part of a party seeking to obtain the benefits of the voluntary payment doctrine, the equities sway against its application."[9]

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[7] Report 53, supra note 4, at 1.3.

[8] Kiriri Cotton Co. Ltd. v. Dewani, [1960] A.C. 192, 204 (P.C.) (Appeal taken from E. Afr. Ct. App.).

[9] Avianca, Inc. v. Corriea, 85-3277(RCL), 1992 WL 93128, at *7 (D. D.C. 1992); See In re Nat'l. Steel Corp., et al., 316 B.R. 287 (Bankr. N.D. Ill. 2004); Camafel Bldg. Inspections, Inc. v. Bellsouth http://web2.westlaw.com/find/default.wl?rs=WLW8.06&fn=_top&sv=Split&findtype=l&docname=CIK(LE00138821)&db=CO-

State law regarding the application of the voluntary payment doctrine varies to some degree; however, the general pattern of recognizing broad exceptions is present throughout the states that have retained some version of the doctrine. Further, a significant number of states have rejected the doctrine explicitly or in practice. Connecticut and Kentucky[10] rejected the doctrine totally, and it has largely fallen into disuse in states including Alaska, Nevada, Utah, and Montana.[11] In other states, broad exceptions for all types of wrongdoing exist. For example, Georgia, which has codified its version of the doctrine, provides exceptions for "artifice, deception, or fraudulent

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LPAGE&vr=2.0&rp=%2ffind%2fdefault.wl&mt=WestlawAdver. and Publ'g. Corp., 1:06-CV-1501-JEC, 2008 WL 649778, (N.D. Ga.); Smith v. Orthalliance, Inc., 1:01-CV-2778-BBM, 2004 WL 5512959, (N.D. Ga.).

[10] See, e.g., Northrup v. Graves, 19 Conn. 548 (1849); Underwood v. Brockman, 39 Ky. (4 Dana) 309 (1836).

[11] For example, searches on Westlaw using the term, "voluntary /s payment /s (doctrine rule)" yield no meaningful cases in the jurisdictions of Nevada and Alaska. In Utah, one of the most recent cases involving the voluntary payment doctrine was issued in 1920. Wilson v. Salt Lake County Corporation, 194 P. 125, 125 (Utah 1920). In Montana in 1937, the voluntary payment doctrine fell to disuse because of the state legislature's rejection of it in tax settings. Christofferson v. Chouteau County, 74 P.2d 427, 431 (Mont. 1937).

practices."[12] Other states, like Missouri, embrace the modern day "something more" standard, exempting wrongdoing from the scope of the voluntary payment doctrine with the term "improper conduct." [13] Still other states limit the application of the doctrine by limiting to equity actions, refusing to apply it to contracts.[14]

Many scholars have criticized the doctrine.[15] Some critics have indicated that the complexity of the doctrine's application promotes "disputes and litigation and makes the law less accessible to litigants of modest means."[16] Some have firmly held beliefs that the "rule has been seen to prevent equal justice…and offends the widely held view that it is unfair for a person to receive a windfall consequent on another's mistake."[17] It has also been said that,

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[12] Ga. Code Ann., § 13-1-13 (2007). See Pingree v. Mutual Gas Co., 65 N.W. 6, 7 (Mich. 1895).

[13] See, e.g., Time Warner Entm't. Co., L.P. v. Whiteman, 802 N.E.2d 886, 889 (Ind. 2004); Newton v. Newton, 118 S.E.2d 656, 660 (Va. 1961); Tyler County Court v. Long, 77 S.E. 328, 330 (W.Va. 1913); Wilkins v. Bell's Estate, 261 S.W. 927, 928 (Mo. App. 1924).

[14] Exxon Mobil Corp. v. Gill, 221 S.W.3d 841, 857 (Tex. App. 2007).

[15] E.g., Spencer, supra note 4; Stephen Camp, The Voluntary-Payment Doctrine in Georgia, 16 Ga. L. Rev. 893, 896 n.18 (1982).

[16] Report 53, supra note 4, at 4.7.

[17] Spencer, supra note 4, at 154-155.

> …it does in truth, seem that if one paying must be presumed in all cases to do so with a full knowledge of his liability, it is only fair to presume also that the payee received it with a full knowledge that he had no right to accept, the consequence of which would be that, if he knew a gratuity was not intended, his acceptance would constitute legal fraud.[18]

Amid the criticism and ever-growing exceptions, the House of Lords examined the voluntary payment doctrine's existence in 1998 in Kleinwort v. Lincoln City Council. In that case it was stated that "[a] blanket rule of non-recovery, irrespective of the justice of the case, can not sensibly survive in a rubric of law based on the principle of unjust enrichment…"[19] The House of Lords subsequently decided that the rule precluding recovery under mistake of law (the voluntary payment doctrine), could no longer survive.

II. Unfair and deceptive acts and practices statutes are incompatible with the voluntary payment doctrine.

Unfair and Deceptive Acts and Practices (UDAP) statutory provisions are enforced in all 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands; these statutes were enacted in the 1960s and 1970s.[20] UDAP statutes were modeled after the Federal Trade Commission Act which also bans deceptive acts and

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[18] Report 53, supra note 4, at 4.4.

[19] Kleinwort v. Lincoln City Council, [1999] 2 A.C. 349, 373. (H.L.).

[20] Carolyn L. Carter & Jonathan Sheldon, Nat'l Consumer Law Ctr., Unfair and Deceptive Acts and Practices 1 (6th ed. 2004).

unfair practices.[21] These statutes provide protections to consumers and "provide a flexible and practical consumer remedy for many abuses."[22] This flexibility has been an important consideration of legislatures and courts, and because of this importance, UDAP statutes can "apply to creative, new forms of abusive business schemes in almost all types of consumer transactions."[23]

In Missouri, the Merchandising Practices Act (MPA) was designed to protect consumers from the predatory practices of businesses, and it is broad-sweeping in its language and therefore, its application.[24] The MPA was created to supplement the definition of common-law fraud.[25] It attempts to preserve fundamental honesty, fair play and right dealings in public transactions.[26] The definition of an unfair practice as defined in the statute and regulations has been described by this Court as "all-encompassing and exceedingly broad. For better or worse, the literal words cover every practice imaginable and every unfairness to whatever degree."[27]

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[21] Id.

[22] Id.

[23] Id.

[24] Ports Petroleum Company, Inc. of Ohio v. Nixon, 37 S.W.3d 237 (Mo. 2001).

[25] State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 368 (Mo. Ct. App. 1973).

[26] Id.

[27] Ports Petroleum Company, Inc. of Ohio v. Nixon, 37 S.W.3d 237, 240 (Mo. 2001).

There is a trend worth noting when discussing UDAP statutes and the voluntary payment doctrine. The doctrine's demise in modern times corresponds with the increase of state protection for consumers. As courts have continued to carve away at the application of the voluntary payment doctrine in an effort to curb unjust results, their counterparts in the legislature have drafted far-reaching acts to prohibit and punish statutory fraud. A rule that was fashioned in the nineteenth century at the height of the time of caveat emptor has no application to a statute intended to protect consumers in the twenty-first century.[28]

The incompatibility of a rigorously applied voluntary payment doctrine in a legal environment designed to increase consumer protection is apparent in several recent cases. For example, the Supreme Court of Washington held that the "voluntary payment doctrine is inappropriate as an affirmative defense in the CPA (Consumer Protection Act) context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs."[29] In Tennessee, the Court of Appeals held that "the State has an interest in transactions that involve violations of statutorily-defined public policy, and, generally speaking, in such situations, the voluntary payment rule will not be applicable."[30]

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[28]Carter & Sheldon, supra note 20, at 1 n.3.

[29] Indoor Billboard/Washington, Inc., v. Integra Telecom of Washington, Inc., 170 P.3d 10, 24 (Wash. 2007).

[30] Pratt v. Smart Corp., 968 S.W. 2d 868, 872 (Tenn. Ct. App. 1998).

Indiana's Supreme Court has also declined to allow the voluntary payment doctrine to bar a consumers' claim against a cable company.[31]

The resulting message is clear: more protection for consumers is the aim of legislatures who have promulgated UDAP statutes as well as courts that have whittled away at the voluntary payment doctrine. The voluntary payment doctrine has the opposite effect; it limits not only corporate liability, but also court remedies for businesses who deal unfairly with consumers. If the voluntary payment doctrine were applied to UDAP statutes, specifically the MPA, it would undo the careful work of the legislatures on behalf of the people they represent, taking away remedies where there was clear statutory intent to provide meaningful recovery for illegal acts. As has been stated elsewhere,, "[t]o deny consumers a UDAP remedy because they paid a bill after learning of the deception would ignore the disparity in bargaining power that UDAP statutes were intended to address, since consumers are rightly fearful of the consequences of unilateral nonpayment."[32]

III. If consumers feel as though there is less protection, then they will have less faith in the market.

Courts and legislatures have been the driving force in providing protection for consumers and vulnerable citizenry. These protections have been utilized by consumers

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[31] Whiteman v. Time Warner Entm't Co., 802 N.E. 2d 886, 893 (Ind. 2004).

[32] Carter & Sheldon, supra note 20, at 184.

in order to redress wrongs they have experienced at the hands of unprincipled entities. [33] Both state and federal consumer protection laws provide a web of security for consumers, and an erosion of even one strand of this web is to be assiduously avoided.

According to the Federal Trade Commission Consumer Fraud Survery, 30.2 million Americans were victims of fraud in 2005.[34] Of those 30.2 million, 11.7 million Americans reported either "paying for a product or service that was never received or being billed for a product or service…the consumer had not agreed to purchase."[35] Such statistics are important because the growth and success of an economy is based on how confident the consumer feels about it.[36] In an economy in which fraud is unfortunately

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[33] Elizabeth Borer, Modernizing Medicare: Protecting America's Most Vulnerable Patients From Predatory Health Care Marketing Through Accessible Legal Remedies 92 Minn. L. Rev. 1165, 1193-1195 (2008).

[34] Keith B. Anderson, The Federal Trade Commission, Consumer Fraud in the United States: The Second FTC Survey, 15 (October 2007), available at http://www.ftc.gov/reports/index.shtm#2007.

[35] Id. at S-1.

[36] Consumer confidence is an important indicator of economic health, and has reached a 15 year low. Michael Barbaro & Louis Uchitelle, Americans Cut Back Sharply on Spending, N.Y. Times, January 14, 2008, available at http://www.nytimes.com/2008/01/14/business/14spend.html?_r=2&pagewanted=print&ore...&oref=slogin.

common, it is even more important that there are meaningful laws which are vigorously enforced to protect consumers.[37] The FTC does some of this work[38], and has aggressively pursued those who send unsolicited merchandise and attempt to collect payment for it but they cannot do it alone.[39] The UDAP statutes are designed to provide private enforcement to support the limited resources of the federal and state governments.[40] Security that fraud is unacceptable, and that when it occurs, there is a

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[37] For example, a 1997 study found that "the majority of consumers engaging in online activities and Internet transactions are worried about the confidentiality and security of these systems, including their purchases of goods and services." Because of this concern, the majority of online customers state that "they will not engage in many transactions in electronic commerce unless privacy rules and practices are strengthened." Mark Budnitz, Privacy Protection for Consumer Transactions in Elec. Commerce: Why Self-Regulation is Inadequate, 49 S.C.L. Rev 847, 849 (1998).

[38] 39 U.S.C. § 3009(a) puts power in the Commission to take legal action against those who violate the FTC Act. An unfair or deceptive practice under this section is any use of the mails to send unordered merchandise.

[39] "Section 3009's main purpose is to combat the old and pernicious practice of mailing unsolicited merchandise by enabling the Federal Trade Commission to attack the practice as a per se violation of unfair trade laws and by allowing the consumer to keep the item received." Kipperman v. Acad. Life Ins. Co., 554 F.2d 377, 379 (C.A. Cal. 1977).

[40] Borer, supra note 33.

system of laws to provide redress is essential, for when the consumer is skeptical about the marketplace, the economy suffers.[41]

The desirability of consumers having confidence in courts and competitive markets, and of laws that promote such confidence and competition rather than encroach upon it, has been accepted as sound public policy for centuries. For example, Adam Smith, the great Scottish economist, is considered by many the founder of free market economics and has been described as the economic profession's "original and wisest champion of sound economic institutions."[42] In his renowned book, An Inquiry into the Nature and Causes of the Wealth of Nations, Smith examined the many characteristics

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[41] "Says Lynn Franco, Director of The Conference Board Consumer Research Center: 'This month's Consumer Confidence Index is the fifth lowest reading ever. Consumers' assessment of present-day conditions continues to grow more negative and suggests the economy remains stuck in low gear. Looking ahead, consumers' economic outlook is so bleak that the Expectations Index has reached a new all-time low. Perhaps the silver lining to this otherwise dismal report is that Consumer Confidence may be nearing a bottom.'" Press Release, The Conference Board, The Conference Board Consumer Confidence Index Declines (June 24, 2008), available at http://www.conference-board.org/economics/ConsumerConfidence.cfm.

[42] Jeffrey Sachs, Institutions Matter, but Not for Everything, Finance & Development, June 2003, 38, available at http://www.imf.org/external/pubs/ft/fandd/2003/06/pdf/sachs.pdf.

that make up a successful free market, and how each characteristic affects the consumer. [43] He cautioned:

> To widen the market and to narrow the competition is always the interest of the dealers ... The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted, till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it. [44]

In discussing some businesses' attempts to eliminate competition, Adam Smith recognized that business interests, whether they are advanced through proposed legislation or as in this case, Charter's attempt to expand the voluntary payment doctrine,

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[43] The Library of Econ.and Liberty, The Concise Encyclopedia of Economics, (Biography of Adam Smith), http://www.econlib.org/library/Enc/bios/Smith.html (last visited July 23, 2008).

[44] Adam Smith, Wealth of Nations, Book I Chapter 11.
http://www.adamsmith.org/smith/quotes.htm#jump1
An Inquiry into the Nature and Causes of the Wealth of Nations, Book I Chapter 11. (last visited July 23, 3008).

may not be in the public's best interest. Smith recognized that such proposals or arguments require careful scrutiny. In this case, such scrutiny will show that circumventing protection for consumers in favor of the voluntary payment doctrine will leave them vulnerable – open to deception and oppression. Adam Smith would say that such a choice would not represent sound public policy. Amici respectfully suggest that this Court should agree.

Allowing the voluntary payment doctrine to "trump" the application of the MPA would have far-reaching implications. The voluntary payment doctrine would be transformed into a defense used in all types of transactions, whether it be an unfair, small charge on a credit card, or illegal charges slipped into a lengthy 401k statement. Consumers in Missouri would soon discover that the protection that has boosted their confidence in the market has been largely limited, and in response they will limit their choices and interactions in the market.

CONCLUSION

The voluntary payment doctrine has been in decline for many years. Allowing the use of the voluntary payment doctrine to gut the MPA would be contrary to the current trend in law. Its application is incompatible with the MPA and such a decision would be a step backward. It would unravel the intricate web of protection that the Missouri legislature has created for consumers. Therefore, Amici respectfully submits that this Court should find that the voluntary payment doctrine has no application to the MPA.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 3,211 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief further complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 2003 in 13 point Times New Roman. In compliance with Rule 84.06(g) the diskette provided has been scanned for viruses and is virus free.

I hereby certify that on the 4th day of August, I served the following one typewritten copy and one diskette copy of the foregoing brief via United States Mail, postage prepaid, to:

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