

No. 89361

In The Missouri Supreme Court

James Huch and Ryan Carstens

Plaintiffs-Appellants

vs

Charter Communications, Inc.

Defendant-Respondent

Appeal from the 21st Judicial Circuit Court - St. Louis County, Missouri

Division No. 3 - The Honorable Mark D. Seigel

Appellants' Substitute Brief

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Jurisdictional Statement

Plaintiffs-Appellants filed an *Amended Petition for Individual and Class Action Relief*. Defendant-Respondent Filed a *Motion to Dismiss Plaintiffs' Amended Petition*. Following a hearing on May 16, 2007, the trial court dismissed all of Plaintiffs' claims with prejudice on May 21, 2007. The relevant judgment was entered in the Circuit Court of St. Louis County, Missouri. Territorial appellate jurisdiction was therefore vested in the Missouri Court of Appeals, Eastern District, pursuant to §477.050 RSMo. Plaintiffs-Appellants timely filed their *Notice of Appeal* on June 22, 2007.

This action does not invoke the validity of any treaty or statute of the United States, or of a statute or a provision of the Missouri Constitution, construction of Missouri Revenue laws, title to any state office, and is not a case in which the punishment imposed is death. The judgment that is the subject of this appeal, therefore, fell within the purview of the general appellate jurisdiction of the Court of Appeals pursuant to Art V, §3 of the Missouri Constitution.

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, thereby establishing jurisdiction. 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.

Statement of Facts

Synopsis of Statement of Facts

Plaintiffs-Appellants filed a class action claiming that Charter was illegally charging many of its customers a supplemental fee of approximately \$3/month for a “Channel Guide” that Plaintiffs and Class had not requested. Plaintiffs’ Petition asked the trial court to order Charter to refund the money Charter previously charged its customers for the “Channel Guide.”

Charter filed a Motion to Dismiss, arguing that the Voluntary Payment Doctrine prohibited the court from ordering Charter to refund the money Charter previously charged its customers. The trial court agreed with Charter and dismissed Plaintiffs’ Petition. The Missouri Court of Appeals-Eastern District affirmed the decision of the trial court. This case was then transferred to the Missouri Supreme Court based on Appellants’ Motion to Transfer directed to the Missouri Supreme Court.

In their *Amended Petition for Individual and Class Action Relief* (“Petition”), Plaintiffs/Appellants James Huch and Ryan Carstens are seeking relief against Charter Communications (“Charter”).¹ Plaintiffs have alleged that Charter sent its paper

¹ The *Petition* is titled "*Amended Petition for Individual and Class Action Relief*." (LF 4.)

The *Petition* lists three Plaintiffs, Wendy Santiago, James Huch and Ryan Carstens. Ms. Santiago was later dismissed from the case, leaving Mr. Huch and Mr. Carstens as the

television “Channel Guide” to customers even though its customers did not request this “Channel Guide.” (LF 3.)² Charter charged its customers approximately three dollars per month for this “Channel Guide.” Plaintiffs have alleged that Charter did not inform the Plaintiffs that Charter would be charging them for this “Channel Guide.” (LF 3.)

Plaintiffs have brought this claim pursuant to Missouri’s Merchandising Practices Act, §407.025.2. RSMo (“MPA”). Plaintiffs alleged that Charter's practice of charging customers for merchandise the customers did not request constituted an unfair practice under the MPA. (LF 4.) Plaintiffs have alleged that Charter knew that it was engaging in illegal billing when it billed Plaintiffs and class members for Charter’s “Channel Guide.” (LF 4.)

Plaintiffs alleged that they and proposed class members were damaged by Charter’s illegal conduct. In their Petition, Plaintiffs asked the trial court to certify the following class:

only two plaintiffs. Throughout this Brief, this *Petition* of the Plaintiffs will simply be referred to as the “Petition.”

² Although the Plaintiffs in the trial court proceedings of this case have officially been designated the “Appellants” in this appeal, they have generally been referred to as the “Plaintiffs” in this Brief, to be consistent with the terminology used by the trial court’s order in the Motion to Dismiss, as well as terminology found in the Opinion written by the Court of Appeals.

All Missouri citizens who, as customers of Defendant Charter, have been charged fees by Defendant Charter for receiving the Guide, where such customers did not request the Guide from Defendant Charter or agree to pay Defendant Charter a separate fee, in addition to their monthly fee for cable service, for receipt of the Guide.

(LF 5, 10.) The Petition further alleges that Charter’s practice of sending unrequested merchandise to its customers, then billing them for it, constituted “unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and knowing failure to state material facts.” (LF 9.)

In Count One of the Petition (entitled “Violation of the Missouri Merchandising Practices Act”), Plaintiffs alleged that Charter engaged in these specific illegal activities:

- Failing to give Plaintiffs and the Class the option to receive or not receive the Guide, which is not included in their monthly service package or rate;
- Sending the Guide to Plaintiffs and the Class, who had not affirmatively requested or opted to receive the publication;
- Failing to state or disclose that charges would be made to Plaintiffs’ and the Class’s monthly bill for receiving the Guide; and
- Charging and continuing to charge Plaintiffs and the Class \$2.99/month or \$3.24/month for said Guide.

(LF 9.)

In addition to asking for the certification of a class and seeking various monetary damages allowed under the MPA, Plaintiffs asked the trial court to enter a permanent injunction pertaining to Charter's improper sale of the "Channel Guide":

WHEREFORE, Plaintiffs and the Class request that the Court enter judgment in their favor and against Defendant Charter as follows: . . . (K) That this Court enter a Permanent Injunction prohibiting Defendant Charter from engaging in unfair or deceptive trade practices including the sale of the Guide by unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and the knowing failure to state material facts.

(LF 11.)

In response to Plaintiffs' Petition, Charter filed a Motion to Dismiss. (LF 20.) Charter argued that the "voluntary payment doctrine" ("VPD"), pleaded as an affirmative defense, barred Plaintiffs' claims. (LF 20.) In response to Charter's motion, Plaintiffs filed a memorandum in opposition (LF 53). Charter also filed a reply memorandum. (LF 77.) Plaintiffs responded by filing a sur-reply in opposition. (LF 105.)

The hearing for the motion was eventually scheduled for May 16, 2007. The parties presented oral argument and the trial court took Charter's motion under submission. (LF 116.) The trial court issued its *Order and Judgment* on May 21, 2007. (LF 117-119.) Based on its review of the pleadings, the trial court held:

[P]laintiffs knew exactly what services they requested from Charter. They were, or should have been, aware that their cable bills separately listed a monthly charge for the paper channel guide. They possessed full knowledge of the pertinent facts at the time of payment in that they were being billed for a service which they allegedly never asked for or agreed to. They nevertheless repeatedly paid the Guide charges without objection or protest. There is no allegation that plaintiffs were coerced or threatened by defendant to accept or pay for the guide. Further, any hypothetical fear of losing their cable service as a consequence for refusing to pay would not rise to the level of economic duress that may vitiate the defense of voluntary payment.

The trial court dismissed Plaintiffs' claims with prejudice. (LF 119.)

Plaintiffs appealed the trial court ruling to the Missouri Court of Appeals, Eastern District. On April 15, 2008, Division I of that Court upheld the ruling of the trial court. *Huch v. Charter Communications, Inc.*, 2008 WL 1721868, 1 (Mo. App. E.D.) (Mo.App. E.D. 2008) (Hon. Kathianne Knaup Crane, Presiding Judge, writing the opinion and Hon. Robert G. Dowd, Jr., and Hon. Kenneth M. Romines, J. concurring).³

³The Opinion of the Court of Appeals ("Opinion") has been attached to the Appendix of this brief. Citations to the Opinion of the Court of Appeals will be to the version issued by and paginated by the Court of Appeals (see the Appendix), rather than to the Westlaw version.

The Court of Appeals wrote that the trial court “found” a number of facts, including that Plaintiffs knew exactly what they were paying for and repeatedly paid anyway. (Opinion 3.) The Court of Appeals wrote that “while negative option billing is an unfair practice, it does not rise to the level of fraud or duress as would bar the voluntary payment doctrine.” (Opinion 14). The Court of Appeals equated the term “fraud” in traditional discussions of the VPD with the nine elements of common law fraud, finding that Plaintiffs did not allege such elements. (Opinion 15.) The Court of Appeals also held that the MPA “does not prevent a consumer from waiving his or her statutory rights by paying for the merchandise.” (Opinion 14.) The Court indicated that the VPD can be an affirmative defense to statutory claims but did not address the proper course a court should take if a statute and an equitable affirmative defense are in direct conflict. (Opinion 15.) The Court rejected Plaintiffs’ contentions that an equitable doctrine could not override clear statutory claims. (Opinion 14.)

Points Relied On

Point I

[Waiver/Public Policy]

The trial court erred in dismissing Plaintiffs-Appellants' *Class Action Petition* in reliance on the voluntary payment doctrine ("VPD") because the VPD does not apply to claims brought pursuant to the Merchandising Practices Act ("MPA") in that:

- A. The VPD is a form of waiver, and rights provided by the MPA cannot be waived;**
- B. Application of the VPD to the MPA would be inconsistent with statutory public policy; and**
- C. Application of the VPD to the MPA would improperly allow a doctrine that arose at equity to nullify legislative intent.**

Authority on Which Appellant Principally Relies:

- *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. 2007).
- *National Enameling & Stamping Co. v. City of St. Louis*, 40 S.W.2d 593, 595 (Mo. 1931).
- §407.200 RSMo.

Point II

[Statutory fraud and “improper conduct” as exceptions to the VPD]

The trial court erred in dismissing Plaintiffs-Appellants’ *Class Action Petition* in reliance on the VPD because the VPD does not apply to cases involving fraud or improper conduct, in that:

- A. Plaintiffs-Appellants’ Petition alleges that Respondent-Defendant’s conduct constituted “fraud” under the MPA and the legislative intent of the MPA and judicial interpretation of the MPA make it clear the MPA addresses fraud and other improper conduct;**
- B. Fraud and other forms of improper conduct have always been exceptions to the VPD; and**
- C. Plaintiffs’ position, based on Missouri law, is bolstered by the decisions of courts from other jurisdictions.**

Authority on Which Appellant Principally Relies

Wilkins v. Bell's Estate, 261 S.W. 927 (Mo. App W.D. 1924).

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

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

Point III

[No factual finding that payment was voluntary]

The trial court erred in dismissing Plaintiff-Appellants' *Class Action Petition* in reliance on the VPD because, in ruling on a Motion to Dismiss, a trial court must construe all allegations in the light most favorable to the non-moving party, in that:

- A. The allegations of the Petition did not support the trial court's finding that the Plaintiffs had full knowledge of all the facts, as required by the VPD;**
- B. The trial court failed to acknowledge Plaintiffs' allegations of fraud, deception and improper conduct, each of which constituted an exception to the VPD; and**
- C. The trial court made a "finding" of facts to support the application of the VPD based on facts outside of the pleadings, including "findings" that were inconsistent with Plaintiffs' allegations.**

Authority on Which Appellant Principally Relies:

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. 2007).

Kansas City Power & Light Co. v. Bibb & Assocs., Inc., 197 S.W.3d 147 (Mo. App. W.D. 2006).

Argument of Point I

[Waiver/Public Policy]

The trial court erred in dismissing Plaintiffs-Appellants' *Class Action Petition* in reliance on the voluntary payment doctrine (“VPD”) because the VPD does not apply to claims brought pursuant to the Merchandising Practices Act (“MPA”) in that:

- A. The VPD is a form of waiver, and rights provided by the MPA cannot be waived;**
- B. Application of the VPD to the MPA would be inconsistent with statutory public policy; and**
- C. Application of the VPD to the MPA would improperly allow a doctrine that arose at equity to nullify legislative intent.**

Synopsis of the Argument of Point I

Plaintiffs alleged that Defendant violated the Merchandising Practices Act (“MPA”), acting fraudulently, unfairly and deceptively by mailing unsolicited merchandise to consumers and then billing them for it. These allegations, combined with long-standing principles of Missouri law, require this Court to reverse the judgment of the trial court and to remand this case with instructions that the voluntary payment doctrine (“VPD”) does not apply to Plaintiffs’ MPA claims. This result is appropriate for three reasons.

First, this Court has acknowledged both that the VPD is a form of waiver, and the MPA is not subject to waiver. Second, statutory public policy trumps the VPD, and statutory public policy does not allow the erasure of an entire field of MPA claims by application of the VPD. Finally, because the Missouri Legislature specifically intended to make Respondent's alleged activity illegal and to provide a remedy, applying the VPD conflicts with this legislative intent and, therefore, applying the VPD is inconsistent with the will of the people.

The trial court was bound to take as true that Defendant's behavior was "unfair" and "deceptive," that Defendant's behavior constituted "fraud," and that Charter's practice constituted "unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and knowing failure to state material facts." In ruling on the Defendant's motion to dismiss, the trial court was under a legal duty to assume that the Defendant knew of the illegality of its activity when it mailed the bills and that Defendant profited from its illegal behavior. (LF 4.)

Nonetheless, the trial court ruled against Appellants and that ruling was upheld by the Court of Appeals. If the Opinion of the Missouri Court of Appeals were to become Missouri law, it would dramatically alter the scope of the VPD, making it Missouri law that:

- By paying a *per se* illegal bill, customers would waive their legal right to recovery provided by the MPA;

- Missouri’s statutory policy under the MPA, of offering broad protection for consumers, would be wiped away by the VPD despite the fact that the VPD has always been subject to statutory public policy exceptions;
- Companies could be allowed to profit from illegal billing, but consumers would be charged with full knowledge of every detail of all of their bills—even unordered merchandise—and consumers could be required to pay more than what they owed;
- The specific will of the people, expressed through statutes and regulations, could be disregarded by the application of an “equitable” doctrine;
- The VPD, never before applied to improper conduct in Missouri, would apply even to allegations of unfair and deceptive behavior defined by Missouri statute;
- Consumers bringing actions based on statutory fraud established by Chapter 407 would have less protection than those pursuing common law fraud claims; and
- Courts would be allowed to read allegations of a petition in the light least favorable to the non-moving party on a motion to dismiss and to find facts to support a defendant’s affirmative defense even if such facts were not pleaded.

The standard of review when considering a trial court's grant of a motion to dismiss is *de novo*. *McCarthy v. Peterson*, 121 S.W.3d 240, 243 (Mo. App. E.D. 2003).

A. The Voluntary Payment Doctrine is a form of Waiver to which the Merchandising Practices Act is not Susceptible

Since the VPD only applies when parties knew all the facts and chose to pay a sum to which there was no legal claim, it is a form of waiver. However, it is only applicable if the underlying cause of action is susceptible to waiver. This Court and others have made clear that the MPA is not susceptible to waiver. The argument boils down to this:

IF the VPD is a form of waiver; AND

IF the MPA is not susceptible to waiver;

THEN the decision below must be reversed.

This Court has recently acknowledged this reasoning. In *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339-340 (Mo. 2007), Defendant Midwest charged consumers a document preparation fee. The fee was disclosed on a HUD-1 form and paid by the consumers without protest. Plaintiffs asserted that the document preparation fees were illegal in that they constituted charges for the unauthorized practice of law. Defendant countered that the charges were disclosed and voluntarily paid, and that the plaintiff's mistake was one of law, barring recovery. This Court refused to apply the VPD, holding that:

[T]he voluntary payment doctrine is not applicable in all situations.

Namely, the activities prohibited by section §484.020 are not subject to waiver, consent or lack of objection by the victim. *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. App. W.D. 2001). The voluntary payment doctrine is a

principle based on waiver and consent. Consequently, Midwest cannot benefit from this defense. To hold otherwise-that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized business of law and be barred from recovery due to having made a voluntary payment-would be illogical and inequitable.

Id. at 339-340.

When confronted with similar issues in *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. 2008), this Court again refused to apply the VPD. In addition to refusing to apply the VPD to the unauthorized practice of law, this Court's *Carpenter* decision arguably extended the *Eisel* decision by refusing to apply the VPD even to a common law claim of money had and received.

In *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992), this Court made it clear that the MPA is not susceptible to waivers. *High Life* adopted the reasoning of *Electrical and Magneto Service Co., Inc. v. AMBAC International Corp.*, 941 F.2d 660 (8th Cir.1991)(overruled on other grounds by *Baxter Intern., Inc. v. Morris* 976 F.2d 1189, 1197 (8th Cir. 1992)). The *Electrical and Magneto* Court held that:

Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.

941 F.2d at 663. *High Life* concerned this Court's refusal to apply a forum selection clause because it would allow out of state law to govern the sale of beer. This Court applied a number of factors, relying upon the 8th Circuit's characterization of the MPA. What is important to the instant case is that this Court whole-heartedly adopted the holding of the 8th Circuit that the protections of the MPA are not subject to waiver.

The idea that the MPA can be waived has been deemed offensive by other Missouri appellate courts as well. For example, in *Whitney v. Alltel*, 173 S.W.3d 300 (Mo. App. W.D. 2005), a defendant required consumers to waive their rights to class actions and some forms of damages pursuant to an arbitration clause. The Court of Appeals held that the arbitration clause was unconscionable because it effectively eliminated people's rights under the MPA and other similar statutes. The court held that this violated Missouri public policy.

[Defendant's arbitration clause] would effectively strip consumers of the protections afforded to them under the Merchandising Practices Act and unfairly allow companies like [Defendant] to insulate themselves from the consumer protection laws of this State.

Whitney, 173 S.W.3d at 314. This result would be unconscionable and in direct conflict with the Missouri Legislature's declared public policy as evidenced by the MPA and similar statutes. *Whitney's* recognition that a defendant cannot immunize itself from the MPA is entirely consistent with *High Life*. It is also logically consistent with Missouri's general approach to how and when a defendant may exculpate itself from wrongdoing.

A look at the law regarding exculpatory clauses is instructive because, at its heart, application of the VPD in this case would serve to exculpate respondent through an implied waiver. In Missouri, “[c]ontracts exonerating a party from acts of future negligence are to be strictly construed against the party claiming the benefit of the contract, and clear and explicit language in the contract is required to absolve a person from such liability.” *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. 1996) (internal citations and quotations omitted). “To release a party from its own future negligence, exculpatory language must be clear, unambiguous, unmistakable, and conspicuous.” *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 845 (Mo. 1997) (internal quotations omitted). The general rule is clear in Missouri: “[O]ne may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.” *Alack*, 923 S.W.2d at 337.

In light of Missouri law regarding waivers and exculpatory clauses, could any defendant exculpate itself from allegations of unfair and deceptive behavior? In this case, in which it is alleged that Defendant knowingly and intentionally violated the law, even a clearly worded, conspicuous and explicit exculpatory clause would be unenforceable. Similarly, such a clause could never be implied. Yet by proffering the VPD as a total defense, Defendant has asserted (and the trial court and Court of Appeals have agreed) that the mere payment of an illegal bill could serve as an intentional waiver of important consumer rights under the MPA.

If defendants could really exculpate themselves from the MPA by inserting a clever phrase in a contract, it would be a bleak world for all consumers. Just as problematic

arbitration clauses have quickly become a standard part of almost every consumer contract, so too would onerous exculpatory clauses be inserted in contracts throughout Missouri with a few simple keystrokes. Thankfully, this is not the law in Missouri.

In sum, although there are a number of legal and logical reasons why the VPD should not apply to MPA claims such as those brought by Plaintiffs, the most straightforward one is this: the VPD is a waiver, and the MPA cannot be waived.

This case is like *Eisel* and *Carpenter* in many ways. Defendants in *Eisel* and *Carpenter* charged fees to which they were not entitled. The fees were disclosed, the customers paid, and the defendants were unjustly enriched. This Court refused to apply the VPD, even to an equitable claim for money had and received, because 1) the claims were not subject to waiver; and 2) applying the doctrine would be illogical and inequitable.

Here, Charter charged a fee for which it had no legal claim. The fee for the “Channel Guide” was disclosed on customer paperwork and the customers paid. Charter was unjustly enriched. This Court should refuse to apply the VPD because 1) these claims are not subject to waiver; and 2) applying the doctrine would be illogical and inequitable.

Put another way (to paraphrase *Eisel*):

[Charter] cannot benefit from this defense. To hold otherwise-that a customer, not a [cable company], would be burdened with the responsibility to [recognize the illegality of sending unsolicited merchandise and adding it to a bill] and be barred from recovery due to having made a voluntary payment-would be illogical and inequitable.

B. Statutory and General Public Policy are Broad Exceptions to the VPD

The VPD does not trump statutory public policy. In numerous Missouri cases Courts have refused to apply the VPD because it would violate public policy. It is important to recognize that in addition to this Court's recognition that the VPD is a form of waiver, some courts have articulated a separate exception to the VPD based solely on public policy.

For example, in *Lamar Tp. v. City of Lamar*, 169 S.W. 12 (Mo. 1914) a township sought to recover certain road and bridge funds overpaid to another city. The city receiving payment argued that even if it received too much money, the payments were made voluntarily and the mistake was one of law, preventing recovery. *Id.* at 13-14. This Court forcefully rejected the contention. Referring to another court's holding, this Court held, "so on the grounds of public policy, the court was right in holding that the maxim 'Volenti non fit injuria' [to a willing person no injury is done] has no application to the illegal payment of public funds to a public officer." *Id.* at 15. Based on this public policy consideration, this Court asserted that if money is paid to a public official by mistake, it can be recovered. This Court then took a parting swipe at the defendant's claim that the VPD should bar recovery, stating:

Such a rule as is contended for by the appellant might and could become a mighty instrument of evil, and might (since there is no gauge by which to measure the kind and nature of the mistake of law which will serve to

excuse) be used to defend against all manner of thefts and larceny and the illegal frittering away of the public money.

Id. at 16. In *Lamar*, this Court decided that the VPD was such a bad rule that it should never be applied to governments. Nor was this Court happy with the idea of applying the VPD to individuals:

The best that may be said of the rule, even as applied to individuals, is that it is a handy rule to apply in those rare cases where the application of it prevents gross injustice.

169 S.W. at 15. *Lamar* has been cited with approval in a more recent case holding that the VPD could not prevent a county commissioner from recovering excess commissions allegedly paid as a result of a mistake of law. *Engleman v. City of Dearborn*, 544 S.W.2d 265 (Mo. App. 1976).

Similarly, in *City of St. Louis v. Whitley*, 283 S.W.2d 490, 492 (Mo. 1955), an employee of the City of St. Louis paid money to a dog catcher and several “stray dog spotters” for several years. The City later learned that the dog catcher and his employees had been offering only negligible services. *Id.* at 491-492. The City sought to recover the money. *Id.* The defendants contended that money paid could not be recovered. This Court refused to apply the VPD, noting that defendants were unjustly enriched and that there were allegations of “fraud.”⁴ This Court refused to apply the VPD, holding that

⁴ It is worth noting here that these were not allegations of “common law fraud” but rather of general wrongdoing. Wrongdoing, or improper conduct, as more fully discussed in

plaintiff had at least alleged that defendants acted improperly. This Court also concluded that allowing for retention of the money would violate the well-established principle that “public funds are trust funds” *Id.* at 493. *See also, F. W. Niedermeyer v. The Curators of the University of Missouri, Columbia*, 61 Mo. App. 654 (Mo. App. W.D. 1895) (holding that the VPD does not apply in cases of “moral duress,” or where the payee fails to show “good faith and fair dealing”); *see also Wilkins v. Bell's Estate*, 261 S.W. 927 (Mo. App W.D. 1924) (holding that the VPD does not apply whenever there is “improper conduct” on the part of the payee).

Missouri’s use of a public policy exception is consistent with the limited application of the VPD in other states. In the Tennessee case of *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. App. 1997), the court was faced with whether the VPD was a defense to overcharging for medical records in violation of a Tennessee statute. The defendant asserted that the charges for medical records were clearly disclosed, and that even if a party believed they were too high or illegal, they waived their right to raise the issue by voluntarily paying the bill. The court rejected the argument, reasoning that:

Section II, has always been an exception to the VPD. Whether it is articulated as “fraud” or simply recognized as a public policy exception, the result is the same. *Whitley* presents a unique hybrid in which it is called fraud, and then the Court goes on to acknowledge that allowing unjust enrichment would be inequitable.

[T]he 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.

968 S.W.2d at 872.

Even in states that have more aggressively applied the VPD, such as Alabama, appellate courts have acknowledged that statutory public policy exceptions might exist. For example, when an Alabama trial court failed to consider the application of the VPD to a potential class claim, the Alabama Supreme Court remanded, suggesting that the trial court should decide whether, considering “the various statutes discussed herein, the conduct of the U-Haul defendants violates public policy as established by the Legislature so that a public-policy exception to the voluntary-payment doctrine applies in this case.” *U-Haul Co. of Alabama, Inc. v. Johnson*, 893 So.2d 307, 312 -13 (Ala. 2004).

In *Criterion, Ins., Co. v. Fulgham*, 247 S.E.2d 404 (Va. 1978), the Virginia Supreme Court recognized that it must ultimately consider whether application of the VPD is consistent with public policy. Even in the absence of statutory public policy, the Virginia Supreme Court refused to apply the VPD on general policy concerns. The *Criterion* Court found that payment made by an insurer to an insured was made voluntarily and that it was technically a “mistake of law” usually covered by the doctrine. The Court also acknowledged that its prior precedent would require application of the VPD. Nevertheless, the Court exercised its power to promote justice over technicality. The

court refused to “blindly apply the . . . doctrine in [the] case when it means reaching a wholly inequitable result.” *Id.* at 300.⁵

Even in Illinois (the state that accounts for close to half of all reported VPD cases and whose precedents have been heavily relied upon by Defendant), appellate courts are now hesitant to apply the VPD in cases where the VPD would tread upon statutorily-based public policy. For example, in a case involving the Hospital Records Act, an Illinois appellate court wrote:

The purpose of section 8-2001, as construed, leads us to agree with Pratt that, like Tennessee, this state has an interest in transactions that violate “statutorily-defined public policy.” . . . In her complaint, Ramirez alleges that Smart's charges were unfair and deceptive under the Consumer Fraud Act. The intent and purpose of that Act lend additional support to our refusal to apply the voluntary payment doctrine to this case.

⁵ The power to refuse to apply an equitable doctrine to reach an equitable result has been recognized in Missouri as well. Equity is justice administered with fairness, as contrasted with strictly formulated rules of common law. *In re Estate of Mapes*, 817 S.W.2d 545, 548 (Mo. App. W.D. 1991). The principles of equity are “elastic so as to preserve their flexibility to meet the requirements of a given case.” *Cannon v. Bingman*, 383 S.W.2d 169, 174 (Mo. App. 1964).

Ramirez v. Smart Corp., 863 N.E.2d 800, 810 (Ill. App. 3 Dist. 2007) (second portion of this quote is from footnote 2). *See also, Brown v. SBC Communications, Inc.*, No. 05-777, slip op. (S.D. Ill. March 1, 2007).⁶

A similar result was reached by a New York court in 2007. In *MacDonell v. PHH Mortg. Corp.*, 846 N.Y.S.2d 223 (N.Y. A.D. 2 Dept. 2007), the plaintiffs filed a class action to recover fees that violated New York’s Real Property Law §274-a(2) and General Business Law, §349(a). The New York Supreme Court, Appellate Division, held that although the voluntary payment doctrine could apply to common law causes of action, it “will not bar such statutory causes of action.” *Id.* at 224.

The cases cited above support Plaintiffs’ contention that applying the VPD to nullify statutory intent is inconsistent with existing law.

1. The Underlying Rationales Sometimes Offered for the Application of the VPD Lack Merit in this Matter

Defendant might argue that there are public policy reasons that support the VPD. The two most plausible sources of this alleged public policy, however, are inapposite. The two most common justifications for the VPD are, 1) that the VPD promotes “certainty” by allowing those who receive payment to be sure they can retain it; and 2) that the VPD resolves disputes efficiently and effectively. In this case, neither rationale has any legitimate support. Charter is neither entitled to have certainty it can retain

⁶ *Brown* can also be found at 2007 WL 684133.

illegal money nor is Charter entitled to “resolve” disputes by slamming shut the court house doors for Missouri citizens.

a) No Party Has a Right to Be Certain It Can Retain Illegal Gains

One principle that has sometimes been said to support the application of the VPD is “business certainty.” This rationale was expressed by the English case of *Brisbane v. Dacres*, 5 Taunt 143, 128 Eng. Reprint 641, cited by *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812-813 (Mo. App. 1969):

[I]t would be most mischievous and unjust if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the Statute of Limitations, to rip up the matter and recover back the money. He who received it is not in the same condition; he has spent it in the confidence it was his, and perhaps has no means of repayment.

The argument is that entities are entitled to certainty that the money they receive will not later need to be returned. This idea drove many early VPD cases in which taxes voluntarily paid were not later returned. *See also, Brookside Memorials, Inc. v. Barre City*, 702 A.2d 47, 49 (Vt. 1997).

Before discussing the wisdom of such a rationale in this case, it is worth noting at the outset that certainty to retain funds already paid, to the extent that it ever existed, has been resoundingly rejected by modern laws. Individuals often receive IRS and state tax refunds from prior years thanks to accountants who catch additional deductions and who then file amended tax returns. The government is not relieved of its duty to pay such

refunds because it “relied upon” the funds. Businesses do not have a guarantee of certainty either.

Claims for a breach of warranty or for a refund for a defective product are routinely allowed. Similarly, claims for injury based on defective product can require a company to pay not only what it received as payment for the product, but also additional damages. Companies are not entitled to be certain to retain the money they have been paid. They are entitled only to the funds which the law entitles them to retain. The same is true here. Providing Charter (or any company) certainty that it can retain funds from illegal activity would be a perverse incentive that would encourage wrongdoing. Such “certainty,” far from providing a reason to support the VPD, cuts strongly against its application.

A slightly different way to consider this issue is to ponder the proverbial “other side of the coin.” Although Charter and companies like it strongly support the VPD, they would not be advocates of a complimentary and hypothetical “Voluntary Acceptance Doctrine.” If the Plaintiffs in this case were to send less than full payment for a bill, and Charter cashed the checks, only later recognizing the customer payments were too low, would Charter be prohibited from attempting to recover the full amount due? Under Missouri law, the answer is a resounding “no.” In fact, even if the consumer wrote, “In payment of the full amount owed on this bill - cashing this check shows acceptance of full payment of the bill,” there would not be accord and satisfaction. There can be no accord and satisfaction if there is settlement at less than the debt both parties agreed was due and owing. *Ritter Brickwork Co., Inc. v. Absher*, 735 S.W.2d 786, 787 (Mo. App. E.D. 1987).

Businesses have the luxury of cashing a check, only to later inform consumers that they owe more than the business collected, but Charter asserts in this case that it can, with this Court’s blessing, hold consumers to a different standard where customers “voluntarily” pay illegal bills and are then barred from recovering their overpayments. Such an approach would be nonsensical and imbalanced. The Court of Appeals decision would create a world where illegal acts promote certainty, but consumers have no right to be certain that companies must follow the law. It would promote “certainty” that businesses could recover every cent they are owed—and then some—while undermining the reasonable expectancy of consumers that companies must obey the law.

Indeed, consumers should pay their full bills, as long as those bills are not illegal. If they do not pay their bills, Charter should be able to collect the amounts owed to it. However, the reverse must be equally true. Charter should be allowed to collect only its full legitimate bill. If it collects more, a consumer should be able to recover the difference. Only when there is a legitimate dispute and both parties choose to resolve it through a conscious settlement or novation, should the courts recognize that the parties’ obligations have been altered.

This common-sense view is not a whimsical creation of the Plaintiffs. *See* § 6 (2) of the *Restatement (Third) of Restitution and Unjust Enrichment (T.D. No. 1, 2001)*:

Payment of money resulting from a mistake by the payor as to the existence or extent of the payor’s obligation to an intended recipient gives the payor a claim in restitution against the recipient to the extent the payment was not due.

The comments of this section are even more telling:

As in other cases of benefit conferred by mistake, the fact that the claimant may have acted negligently in making a mistaken payment is normally irrelevant to the analysis of the claim. . . [T]he recipient of a mistaken payment who is aware at the time of the payor's mistake is almost certain to be liable in restitution, because the recipient's awareness of the mistake will foreclose the most significant of the affirmative defenses.⁷

Id. at Cmt. a.

Courts seek to encourage justice, not deception. The limited purpose of the VPD has been certainty, but only in cases where wrongdoing is absent, where there is a good faith dispute, and where all the facts are on the table. Until the decision by the Court of Appeals in this case, the VPD always paralleled the doctrines of accord and satisfaction.

⁷ Compare this modern version of the Restatement with § 45 of the Restatement (First) of Restitution (1937):

Satisfaction Of Non-Existent Obligation. When Restitution Not Granted

Except as otherwise stated in §§ 46-55, a person who, induced thereto solely by a mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution.

This balance should remain and Charter's assertion that it is entitled to certainty for its alleged illegal behavior should be soundly rebuffed.

b) The Application of the VPD Does Not Resolve Disputes in this Matter

The VPD has sometimes been justified as encouraging one with a financial dispute to first address it with the other party in an attempt to resolve that dispute. For example, in a classic case from Indiana, the court wrote that “[the person seeking restitution] had full knowledge of [the facts]; but alleges he was mistaken as to his rights, in a matter in which he had constituted himself a judge in his own cause, and decided against himself. We are of the opinion that the weight of authority is that he can not be now heard to reverse his own judgment.” *Bond v. Coats*, 16 Ind. 202, 203 (Ind. 1861).

In this matter, as discussed more fully in Point III, there is no allegation customers actually knew that they were being charged extra amounts for the Channel Guides they did not order. To the contrary, the Petition, read in the light most favorable to Plaintiffs, asserts that Charter without permission added charges that were relatively small to a bill. In this case and in any other case brought under the MPA, there is no dispute between the parties based on knowledge of all facts that occurs in the absence of arm-twisting or improper conduct. This is not a situation in which two parties dealt as equals, one consciously deciding to pay, and later regretting his or her decision. This case, and any case with allegations of unfairness, deception, suppression, omissions or other breaches of the MPA, does not present a good faith dispute and negotiated resolution. As such, the “efficient resolution of disputes” rationale is inapplicable.

Charter might argue though, that the VPD is needed as a check for those who would bring frivolous class claims for fees they willingly paid. This argument shatters under scrutiny. If a jury or judge concludes that consumers solicited merchandise and then paid for it, there is no unfair practice or deception. If, on the other hand, there is evidence the merchandise was sent and billed without the agreement of the customer, there is deception and unfairness, and recovery is appropriate. In either case, the VPD is superfluous. Instructing the finder of fact on the MPA alone would be sufficient to fully resolve such a case. Wrongful acts will result in liability and fair behavior will not.

Perhaps the underlying concern is that some claims will be trumped up, or manufactured, but despite much ado, economic theory dictates that bringing a claim for solicited merchandise on the hopes of proving that the merchandise was actually unsolicited is not prudent for either consumers or their attorneys. Similarly, for 150 years the VPD has never been applied to claims for “bill cramming” or the mailing of unsolicited merchandise, yet Missouri has fared well. The sky is not falling; there is no need to distort the VPD in an effort to stem a tide that is not washing in.

C. The Voluntary Payment Doctrine Cannot Be Applied to Invalidate the Specific Intent of the Missouri Legislature

The Missouri Legislature and the Missouri Attorney General contemplated the types of acts alleged to have been carried out by Defendant Charter and deemed them to be illegal. The VPD is in direct conflict with the Missouri statutes and regulations that forbid this conduct precisely because the VPD would excuse that same behavior. More

specifically, Missouri Revised Statute §407.200 vests a consumer with a right to refuse unsolicited merchandise. 15 CSR 60-8.060.1, a regulation promulgated by the Attorney General, applies this principle by designating efforts to bill or collect money for unsolicited merchandise unfair practices. Specifically, §407.200 (“Unsolicited Merchandise: How Disposed Of”) provides:

Where unsolicited merchandise is delivered to a person for whom it is intended, such person has a right to refuse to accept delivery of this merchandise or he may deem it to be a gift and use it or dispose of it in any manner without any obligation to the sender.⁸

15 CSR 60-8.060.1 provides:

It is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to collect payment from consumers, for any merchandise which the consumer has not ordered or solicited.

The fundamental purpose of the MPA is the “protection of consumers.” *State ex rel. Nixon v. Continental Ventures Inc.*, 84 S.W.3d 114, 117 (Mo. App. W.D. 2002). Courts consistently read the MPA broadly in order to effectuate its purpose. Certainly, if an activity is a dead-bang violation of MPA standards, such as those articulated in §407.200,

⁸ It is worth noting that this section parallels 39 U.S.C. §3009, which allows consumers to treat unsolicited merchandise as a gift and requires any sender of unsolicited merchandise to affirmatively disclose the consumer’s right to retain the merchandise free of charge.

it should not stand. Similarly, in furtherance of the purpose of enacting the MPA to effectively protect consumers, the Missouri Legislature gave the Missouri Attorney General the power to promulgate regulations which define specific acts that constitute violations of the MPA. *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 601 (Mo. banc 1993) (holding that in 1986 the legislature granted “the attorney general authority to promulgate rules setting out the exact scope of Missouri's law and the meaning of the words employed in the Merchandising Practices Act”). The regulations issued by the Attorney General have the full force of law. *PharmFlex, Inc. v. Division of Employment Sec.*, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997). Violation of these regulations is *per se* illegal. Any doctrine that says otherwise cannot stand.

The Missouri statute and Missouri regulation discussed above demonstrate that the Missouri Legislature and the Attorney General sought to prohibit the very same illegal conduct that the Opinion of the Court of Appeals has deemed permissible, thanks to its broad new application of the VPD. A company [here Charter] was sending a product that a consumer never requested [a cable guide] and the consumer [Plaintiffs], having received something that attempts to collect for the merchandise [here their monthly bill], paid. The contrast is stark. Codified law makes Charter's behavior illegal while the VPD make it permissible.

From the onset, the potential that this dispute would be resolved in favor of the “equitable doctrine” rather than in favor of legislative intent has been a concern to Plaintiffs. At the trial court level, Plaintiffs argued:

It is clear that the legislature never contemplated rewarding companies for dreaming up ways to cheat customers. Nevertheless, Charter brazenly asks this Court to, in effect, reform the law. Charter's interpretation of the above regulation would neuter the MMPA, rendering consumers vulnerable to infinite variations of clever business billing schemes.

(LF 62.)

To evaluate the argument that a statute cannot be trumped by an equitable defense that is in direct conflict, consider this analogy: at common law, recovery in tort actions was not allowed for pure economic loss. *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901, 905 (Mo. 1986). This exception has been taught to generations of law students. However, the MPA allows for recovery for "ascertainable loss" and this has allowed many consumers to bring claims for economic loss resulting from a fraudulent business transaction. What would a trial court say if a defendant argued that an MPA claim was barred by the common law "no pure economic loss" rule? The existence of the MPA would certainly end this inquiry in favor of enforcing the statute.

In this case, the MPA, expressed through both a statute and a regulation, recognizes a valid claim for either collecting or attempting to collect payment for unsolicited merchandise. Even if the VPD could apply to this case (Plaintiff contends it does not), the VPD would still be in direct conflict with an on-point statute and regulation. The existence of §407.200 and 15 CSR 60-8.060.1 ends this inquiry. Applying the VPD to the MPA would require the judiciary to override the will of the people. This is

impermissible under legal precedent as well as Article II, §1 of the Missouri Constitution. *See e.g. Wentz v. Price Candy Co.*, 175 S.W.2d 852, 857 (Mo. 1943) (holding that “the fundamental rule of statutory construction is that courts shall ascertain and give effect to the intention of the legislature. All other rules are subordinate to this one. Otherwise, the legislative intent could be defeated through erroneous decisions.”) (internal citation omitted).

The history of Missouri case law has demonstrated that Missouri courts are far more likely to apply or create exceptions to the VPD than to apply the Doctrine itself. Courts in Missouri and around the country have worked diligently to apply the VPD only when doing so would promote justice and courts have recognized their inherit power, and that of the legislature, to limit the VPD to a narrow set of cases. This Court has recognized that the VPD is a waiver and that waiver is never inferred. The VPD is not, and has never been, a tool to override statutory public policy. Rather it is a historically limited doctrine designed to be applied rarely, only to resolve legitimate, good faith claims. The underlying rationales that are sometimes raised in support of the VPD counsel against its application here.

For all of these reasons, the decision of the trial court should be reversed.

Argument of Point II

[Statutory fraud and “improper conduct” as exceptions to the VPD]

The trial court erred in dismissing Plaintiffs-Appellants’ *Class Action Petition* in reliance on the VPD because the VPD does not apply to cases involving fraud or improper conduct, in that:

- A. Plaintiffs-Appellants’ Petition alleges that Respondent-Defendant’s conduct constituted “fraud” under the MPA, and the legislative intent of the MPA and judicial interpretation of the MPA make it clear the MPA addresses fraud and other improper conduct;**
- B. Fraud and other forms of improper conduct have always been exceptions to the VPD; and**
- C. Plaintiffs’ position, based on Missouri law, is bolstered by the decisions of courts from other jurisdictions.**

The standard of review when considering a trial court’s grant of a motion to dismiss is *de novo*. *McCarthy v. Peterson*, 121 S.W.3d 240, 243 (Mo. App. E.D. 2003).

In Missouri and, in fact, in every state that retains the VPD in any form, it is common to find cases where the appellate courts refuse to apply the VPD to improper conduct, artifice, coercion, fraud and other types of wrongdoing. The Court of Appeal’s narrow reading of fraud as only including “common law fraud” misunderstood the history of the VPD, and in doing so, attempted a dramatic and unwarranted expansion of it. (Opinion 15.)

Section A considers the history of the VPD in Missouri, establishing that the decisions of the trial court and Court of Appeals in this case are inconsistent with the historical application of the VPD. Section B discusses the purpose of the MPA, showing that it has always been designed to protect consumers from “fraud,” broadly defined. Section C carefully analyzes out-of-state decisions which specifically deal with the application of the VPD to Unfair and Deceptive Acts and Practices statutes (“UDAP”) statutes.

A. The Historical Roots of the VPD Do Not Support Its Application in this Matter

From its inception, the VPD has never been intended to function as a “get-out-of-jail-free card” for bad actors. Its application has always required “good faith and fair dealing.” *F.W. Niedermeyer v. The Curators of the University of Missouri*, 61 Mo.App. 654, 5 (Mo. App. W.D. 1895). A brief look at the history of the VPD generally, and a more detailed look at its application in Missouri, is telling.

The VPD is a doctrine that was inherited from England early in America’s history. In English law traceable to at least the 1600s, there was no distinction between a mistake

of law and a mistake of fact. A person who paid money under a mistake of law or fact was generally able to seek recovery in an action called *indebitatus assumpsit*.⁹ It was not until 1802, in *Bilbie v. Lumley* (1802) 2 East 469 (102 ER 448), that Lord Ellenborough indicated that a mistake of law would not allow for the recovery of money paid with full knowledge of all facts. Scholars have since suggested that his maxim, now often paraphrased as “ignorance of the law is no excuse,” was imported from the criminal context. Lord Ellenborough reasoned that if a party could claim ignorance of the law after reaching a decision to pay an amount owed, simply because he later learned of a better legal defense, this could lead to a flood of litigation. He wrote: “Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.” *Id.* at 472 (ER at 449-450).

Even though the principle laid out in *Bilbie* was controversial among some justices, it was eventually adopted in the New World. For better or for worse, the distinction between a mistake of fact (for which restitution could be sought) and a mistake of law (for which restitution could not be sought) began to appear in the United States. From the beginning, a few courts such as Connecticut whole-heartedly rejected the distinction, reasoning that anytime one party obtained money that it was not owed, that money should be disgorged. *Northrup v. Graves*, 19 Conn. 548 (1849). The *Northrup* court held that:

⁹ Law Reform Commission, *Restitution Of Benefits Conferred Under Mistake Of Law* Chapter 2 (1987), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R53TOC>.

[We] mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law; and this we insist, may be done, both upon the principle of *Christian* morals and the common law.

Id. at 5 [emphasis in the original].¹⁰

In Missouri, the VPD emerged during the Civil War. In *Clafin v. McDonough*, 33 Mo. 412 (Mo. 1863), the plaintiffs had paid a city tax collector the full amount demanded under threat that they would be indicted if they did not pay. It was later determined that the plaintiffs did not owe the tax. This Court articulated the VPD as follows:

¹⁰ The *Northrup* court was generally concerned with substance over form. When discussing maxims such as “every man is charged with knowledge of the law,” the Court wrote: “These [maxims], and all other general doctrines and aphorisms, when properly applied to facts and in furtherance of justice, should be carefully regarded; but the danger is, that they are often pressed into the service of injustice, by a misapplication of their true meaning. It is better to yield to the force of truth and conscience, than to any reverence for maxims.” *Id.* at 5.

[A] person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest.

The *Clafin* Court specifically noted that there was no allegation of fraud and that the plaintiffs had full knowledge of all the facts before making the payment. *Id.* at 3.

From *Clafin* forward, a look at early Missouri cases demonstrates that the VPD has never been applied to allow intentional wrongdoers to profit from their illegal action. In fact, early recitations of the VPD make clear that the “fraud” exception was shorthand, intended to cover a wide range of wrongdoing, often designated as “improper conduct.” For example, in *National Enameling & Stamping Co. v. City of St. Louis*, 40 S.W.2d 593, 595 (Mo. 1931), this Court made clear that fraud and “improper conduct” were exceptions to the rule:

Except where it is otherwise provided by statute it is held by the great preponderance of adjudged cases that, where one under a mistake of law, or in ignorance of law, but with full knowledge of all the facts, and in the absence of fraud or improper conduct upon the part of the payee, voluntarily and without compulsion pays money on a demand not legally enforceable against him, he can not recover it back.

This statement of the VPD doctrine in *National Enameling* is consistent with other Missouri cases. *See e.g. Wilkins v. Bell's Estate*, 261 S.W. 927 (Mo. App. W.D. 1924); *Security Savings Bank v. Kellems*, 274 S.W. 112, 116 (Mo. App. S.D. 1925) (The VPD

does not apply where something akin to “fraud” is alleged, even though the allegation would not be sufficient to sustain a cause of action for common-law fraud.). In addition, this is consistent with national trends and Hornbook law. The classic statement of the VPD is found in § 45 of the Restatement (First) of Restitution (1937). It requires an “honest claim.”

Satisfaction of Non-Existent Obligation. When Restitution Not Granted

Except as otherwise stated in §§ 46-55, a person who, induced thereto solely by a mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution.

As suggested by the exemptions for “fraud and improper conduct,” Missouri cases, over the span of almost 150 years, do not reveal any inclination to allow the VPD to enrich wrongdoers. Instead, as discussed *supra*, this Court has suggested that unless the VPD is watched carefully, it could become a “mighty instrument of evil.” *Lamar*, 169 S.W. at 16.¹¹

¹¹ Even when the VPD was applied, amongst Supreme Court Justices there was dissension and fear that the doctrine was contrary to justice. In *Ferguson v. Butler County*, 247 S.W. 795, 797 (Mo. banc 1923), the VPD was applied, and Justice C.J. Woodson wrote a dissent. He dissented in part because “it was written, thousands of years ago, that he who exacts more than the law allows is a tyrant, and it is now too late

In many VPD cases, both parties agreed to both the facts and the law, and later a party learned that it had a legal defense to a claim. Many of these VPD decisions arise in the context of the payment of taxes and government fines. For example, in *Ferguson v. Butler County*, 247 S.W. 795 (Mo. banc 1923), the plaintiff who had been prosecuted for criminal assault cut a deal with the prosecutor to pay a \$2,500 fine (with additional amounts due later) in lieu of prison time. After entering this deal and paying the \$2,500 fine, the plaintiff realized that the law limited the fine to only \$1,000. He filed a suit for repayment of the excess amount of the fine (\$1,500). The defendant county raised the VPD. The court held that plaintiff's payment was due to a mistake of law and that all facts were known at the time, dismissing the plaintiff's claim.

In a second type of VPD case, there was a genuine dispute as to the amount owed, both parties knew all the facts, and a party decided to resolve the dispute by paying the contested amount. Later, perhaps deciding that the decision to pay was not wise or after learning of a different legal defense, the party would seek to reopen the settled matter through the court system. The VPD acted to bar the action. This was essentially the case in *Claflin*.

In either of these cases, the VPD was limited to situations in which both parties acted in good faith, and the payment was truly voluntary. A thorough review of Missouri law does not reveal meaningful support for the idea that the VPD can be applied to prevent

for me to indorse an act that was placed under the ban of the moral, if not the civil, law, during the remote antiquity.”

recovery in a case in which the party seeking repayment alleged improper conduct or wrongdoing.

Missouri appellate courts have often been reluctant to apply the VPD. With regard to the past 70 years, Plaintiffs have only found three reported Missouri appellate cases that apply the VPD. Two of those cases involve insurance companies seeking repayment of money they knowingly paid.¹² In that same 70-year period, seven Missouri appellate courts have found reasons to refuse to apply the VPD to bar a claim.

A look further back reveals much of the same. Much of the Missouri history of the VPD can be illustrated by a long string of appellate courts working hard *not* to apply the VPD. Missouri's long and tumultuous relationship with the VPD is telling, indeed. Much of Missouri's anti-VPD legal history is presented in summary fashion in the

¹² The only Missouri appellate cases decided since the 1923 case of *Ferguson v. Butler*, 247 S.W.795 (Mo. banc 1923) that apply the VPD to bar a claim appear to be *Benton v. Cook & Younts Insurance*, 249 S.W.3d 878 (Mo. App. W.D. 2008) (barring an insurance company that had full knowledge from recouping a payment); *American Motorists Insurance Company v. Shrock*, 447 S.W.2d 809 (Mo. App. 1969) (where it was held that the VPD barred an insurance company from recouping burial expenses it had paid to its insured under a mistake of law), and *Jurgensmeyer v. Boone Hospital Center*, 727 S.W.2d 441 (Mo. App. W.D. 1987) (where an individual plaintiff attempted to recover fees he paid to a doctor who he was accusing of malpractice).

Appendix (a list of nineteen Missouri appellate cases that refused to apply the VPD).¹³

This list of Missouri cases culminates with the recent cases of *Eisel v. Midwest Bank Center*, 230 S.W.3d 335 (Mo.banc 2007) and *Carpenter v. Countrywide Home Loans*,

¹³ Those nineteen cases include the following: *Courtney v. Boswell*, 65 Mo. 196 (Mo. 1877); *Westlake & Button v. The City of St. Louis*, 77 Mo. 47 (Mo. 1882); *F. W. Niedermeyer v. The Curators of the University of Missouri*, 61 Mo.App 654 (Mo. App. 1895); *Rhodes v. Dickerson*, 69 S.W. 47 (Mo. App. W.D. 1902); *American Brewing Co. v. City of St. Louis*, 187 S.W.129 (Mo. 1905); *American Manufacturing Co. v. City of St. Louis*, 192 S.W. 399 (Mo. 1917); *Divine v. Meramec Portland Cement and Material Company*, 353 S.W. 444 (Mo. App. W.D. 1923); *Wilkins v. Bell's Estate*, 261 S.W. 927 (Mo. App W.D. 1924); *Mississippi Valley Trust Company v. Begley*, 252 S.W. 76 (Mo. banc 1923); *Security Savings Bank v. Kellems*, 274 S.W. 112 (Mo. App. S.D. 1925); *White v. McCoy Land Co.*, 87 S.W.2d 672 (Mo. App. E.D. 1935); *Freund Motor Co v. Alma Realty*, 142 S.W.2d 793 (Mo. App. E.D. 1940); *Brink v. Kansas City*, 198 S.W. 710 (Mo. 1947); *City of St. Louis v. Whitley*, 238 S.W.2d 490 (Mo. 1955); *Manufacturers Casualty Insurance Company v. Kansas City*, 330 S.W.2d 263 (Mo. App. 1959); *Commercial Union Insurance Company v. Farmers Mutual Fire Insurance Co.*, 457 S.W.2d 224 (Mo. App. 1970); *Ticor Title Insurance Company v. Mundelius*, 887 S.W.2d 726 (Mo. App. E.D. 1994); *Eisel v. Midwest Bank Centre*, 230 S.W.3d 335 (Mo. banc 2007); *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008).

Inc., 250 S.W.3d 697 (Mo.banc 2008). Both are telling decisions about the truly limited nature of the VPD in Missouri.

B. The Broad Purpose of the MPA Counsels that It Falls Within the Fraud and Improper Conduct Exception of the VPD.

The history of the VPD makes it clear that the “fraud and improper conduct” exception is a broad one. The remaining question is only whether or not the MPA falls within that exception. Because the MPA was designed specifically to supplement common law fraud, and because an MPA cause of action requires allegations of unfair, deceptive, misleading, oppressive or otherwise improper behavior, the MPA is well within the “fraud” exception to the VPD.

The MPA serves to supplement the common-law definition of fraud. *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899 (Mo. App. E.D. 2003). Its purpose is to “preserve fundamental honesty, fair play and right dealings in public transactions.” *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973).

Pursuant to §407.020.1:

The 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 ... is declared to be an unlawful practice.

This provision is intentionally broad to prevent “evasion by overly meticulous definitions.” *Clement*, 103 S.W.3d at 900.¹⁴

The MPA emerged in an era when many states were adopting additional protection for their citizens. It became law in Missouri in 1967 and, since that time, has been an effective tool to remedy wrongs ranging from automobile fraud to deceptive pricing. The definition of merchandise is broad so that the law offers protection to purchasers of services, intangibles and real estate as well. §407.010(4).

As discussed above, this Court has acknowledged that “Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices.” *High Life Sales Company v. Brown-Forman Corp*, 823 S.W.2d 493, 498 Mo. 1992)(, citing with approval to *Electrical and Magneto Service Co., Inc. v. AMBAC International Corp*, 941 F.2d 660 (8th Cir. 1991). It is not to be waived. *Id.*

The elements of the MPA invite allegations of any of a variety of improper conduct plus an allegation that such conduct caused an ascertainable loss. It is axiomatic that each time an MPA claim is made, there is, by definition, an allegation of fraud or similar wrongdoing. In fact, in the consumer attorney community, UDAP statutes are commonly referred to as “statutory fraud.”

¹⁴ These principles were first set out in *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973). At that time 36 states had UDAP statutes. Now all 50 have them.

The assumption of the Court of Appeals that “fraud” means “common law fraud” (see Opinion, 14) was inconsistent with the above-cited VPD cases, including *National Enameling & Stamping Co. v. City of St. Louis, supra*. The pleading requirements of the MPA and its intent urge its continued inclusion as an exception to the VPD. To hold otherwise is to reach an illogical result in which consumers have more protection under common law fraud than under a statute designed to offer additional protection. The VPD would be powerless against allegations of common law fraud, but it could vitiate entire sections of claims, such as “cramming,”¹⁵ billing for unsolicited merchandise, and “negative option billing,” all of which are actionable under the MPA.

C. Case Law Throughout the United States Demonstrates that the VPD Should Not Apply to UDAP Statutes

Appellants have broken their analysis of out-of-state decisions into two categories. Section 1 discusses the VPD in states other than Missouri, and then specifically analyzes the cases that discuss and reject the application of the VPD to UDAP statutes. Section 2 takes a close look at a number of the cases upon which Respondent and the Court of Appeals relied, revealing that they are readily distinguishable from this case.

¹⁵ “Cramming” occurs when charges show up on one’s phone bill for services that were never ordered.

1. Many States prohibit or limit the VPD and the better reasoned decisions that have considered applying the VPD to UDAP statutes reject this application.

As discussed in Section A of this Point on Appeal, the VPD has never been a tool for allowing wrongdoers to escape liability. Rather, it has consistently been limited to situations in which there is no improper conduct. All other states that still recognize the VPD consider fraud and duress to be exceptions, and some states that have codified the doctrine in modern times have been careful to make sure the exceptions are broad enough to cover any wrongdoing. For example, in Georgia, where the VPD is codified, the language of the statute captures a wide range of improper conduct.

Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered . . .

Ga. Code Ann., § 13-1-1.

Other states echo this language in their common law. *See e.g. Pingree v. Mutual Gas Co.*, 65 N.W. 6, 7 (Mich. 1895) (holding that “artifice, fraud or deception . . .” are exceptions). Still other states are in step with Missouri’s earliest cases, stating that “fraud and improper conduct” are exceptions to the VPD. *See e.g. Woodmen of the World v. American Soc. of Composers*, 19 N.W.2d 540 (Neb. 1945)¹⁶; *Evans v. Gale*, 17 N.H. 573

¹⁶ This case and several others listed in the string cite are consistent with a trend in much of the United States. Although *Woodman* is a 1945 case, it is one of the last reported

(N.H. 1845); *Nelson v. Swenson*, 124 A. 468, 468-469 (R.I. 1924); *Hawkinson v. Conniff*, 334 P.2d 540, 543 (Wash. 1959); *Craig v. Lininger*, 61 Pa.Super. 339 (Pa. Super. 1915).¹⁷ Still other states constrain the doctrine, without using the term “improper conduct,” by requiring that a defendant have a “colorable claim” to the money, which would clearly exclude a claim that is illegal on its face. *See e.g. Home Insurance Co. v. Hartford Fire Insurance Co.*, 379 F.Supp.2d 1282 (M.D. Ala. 2005).

In many other states, the VPD has been literally or virtually abandoned. For example, in California, a review of recent case law shows that the VPD is not actively applied by courts. The same is true in many other states, including Nevada and Alaska. Even considering the states in which the VPD was at times rigorously enforced, there has been a steady retreat. Consider, for example, this statement from the Texas Supreme Court:

[A]lthough the voluntary-payment rule may have been widely used by parties and some Texas courts at one time, its scope has diminished as the rule's equitable policy concerns have been addressed through statutory or other legal remedies. Indeed, this Court has affirmatively applied the rule

cases in Nebraska. The VPD seems to have been most active in the 1800s and the first half of the last century, with the reporting of VPD decisions diminishing significantly in the second half of that century. Most cases dealt with contract or restitution actions.

¹⁷ This case is also noteworthy because it recognized an exception for any party with an “undue advantage” over another.

only once in the last forty years, and that holding has itself been modified since. *BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 771 (Tex. 2005).

Appellants' review of case law reveals that exceedingly few courts have ever applied the VPD to a claim by consumers that a business acted unfairly and in violation of statutory law. Given this silence regarding the scope of application of the VPD, and the confusion resulting from the VPD's sometimes convoluted history, this Court now has the opportunity to write a salient opinion on a matter not only important to millions of Missouri citizens, but to consumers nationwide. There is opportunity for an opinion that will once and for all clarify the distinction between traditional VPD situations and those based on a UDAP statute prohibiting deception, unfairness or wrongdoing. Such an opinion would reverse the Court of Appeals decision in this case and, in doing so, preserve the historical uses of VPD while prohibiting the expansion of the VPD to types of cases for which it was never intended.

Throughout the United States, the question of whether or not the VPD applies to UDAP statutes has been considered only rarely. This is likely true because 1) UDAPs are relatively new creations and, since their inception, the myriad of exceptions to the VPD have caused it to fall out of favor;¹⁸ and 2) because the VPD is intuitively inconsistent with the broadening of consumer protection.

¹⁸ This is evidenced by the scant reporting of such cases in Missouri in the last 40 years.

For example, in *Steward v. Falcon Cable Holding Group, LP*, 4:98CV0349 TCM (E.D. Mo. November 10, 1998), a trial court granted class certification, rejecting application of the VPD on a motion ruling, noting “Missouri courts have found the [voluntary payment doctrine] to be harsh and have abandoned its application” when equitable considerations warrant. This judicial hesitancy to apply the VPD at the trial court level has largely limited its application and the resulting number of appellate decisions. It would be a brave defendant indeed who would risk an appeal to argue that although they are alleged to have violated the law, they should be able to retain the illegal gains because equity requires it.

This Court would not be alone in refusing to apply the VPD to UDAP claims. In one of the few cases to consider the issue, the Washington Supreme Court promptly disposed of the VPD in the UDAP context. It held that “We agree . . . that the voluntary payment doctrine is inappropriate as an affirmative defense in the [Washington UDAP] context, as a matter of law, because we construe the [Washington UDAP] liberally in favor of plaintiffs.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10, 23 (Wash. 2007). The Court thereby rejected claims that consumers had voluntarily paid an allegedly illegal surcharge levied by a telecommunications company.

Similarly, in New York, in *MacDonell v. PHH Mortgage Corp.*, the plaintiffs filed a class action alleging that the defendant charged an improper fee for producing payoff statements and that this constituted consumer fraud. The Court upheld prior rulings that “the voluntary payment doctrine will not bar such statutory causes of action.” *MacDonell v. PHH Mortg. Corp.*, 45 A.D.3d 537, 539 (N.Y.A.D. 2 Dept. 2007).

An Indiana court reached the same conclusion and articulated additional reasons. In *Time Warner Entertainment Co. v. Whiteman*, 802 N.E.2d 886 (Ind. 2004), subscribers to a cable television company challenged “late fees” that exceeded the cable company’s cost of collection. The Court declined to apply the VPD, holding that:

In a business setting, it is at least paradoxical to suppose that the overpayment of an asserted (or any payment of a non-existent) liability could ever be “voluntary,” and it is important to bear in mind that the proper operation of the voluntary-payment rule must be realistic rather than artificial. The rule does not, for example, impute knowledge of relevant circumstances of which the payor is not in fact aware, describing as “voluntary” a payment that was actually the consequence of negligence or inadvertence . . . A more appropriate statement of the voluntary-payment rule . . . is that money voluntarily paid in the face of a recognized uncertainty as to the existence or extent of the payor’s obligation to the recipient may not be recovered, on the ground of “mistake,” merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation.

Id. at 891-892. With regard to consumer transactions, the *Time Warner* Court considered, but then rejected, the two main policy rationales of the Voluntary Payment Doctrine: 1) it allows entities that receive payment for service to rely upon these funds and to use them unfettered in future activities, and 2) the doctrine operates as a means to settle disputes without litigation by requiring the party contesting the payment to notify

the payee of its concerns (and after the notification, a payee who has acted wrongfully can take steps to rectify the situation). *Id* at 893.

Regarding point one, the Court held that the VPD would allow businesses to take advantage of their own wrongdoing. Further, the Court asserted that the VPD was really developed to give governments (not businesses) unfettered use of collected funds and that a business “should be expected to suffer the consequences of its wrongdoing.” *Id*.

Regarding the second rationale, the Court held that the VPD should be applied as a dispute resolution device only where money has truly been “voluntarily paid in the face of a recognized uncertainty as to the existence or extent of the payor’s obligation to the recipient.” *Id*.

2. Cases in which the VPD applied to a UDAP are distinguishable and, in many cases, drew dissents or have been retreated from by subsequent decisions

In the Court of Appeals, Defendant relied primarily upon a handful of cases to support its assertion that VPD can apply to UDAP statutes. The vast majority of the authority was from Illinois. In addition, the Opinion of the Court of Appeals in this case relied upon cases such as *Putnam v. Time Warner Cable*, 649 N.W.2d 626 (Wis. 2002). *Putnam* is one of the only cases to directly consider a peripheral UDAP allegation and still apply the VPD.

In *Putnam*, plaintiffs alleged that Time Warner was charging an illegal penalty for late fees (\$5.00) because the fee greatly exceeded the actual cost of recovering late fees. *Id*. at 630. The Wisconsin court noted that the action was, at its core, a contract action,

and that any references to fraud were general, and made with no particularity. The Court concluded that in Wisconsin, unlike Missouri, there was no historical exception for wrongdoing in general and that liquidated damages had never been an exception.

The *Putnam* case, like all the cable cases cited by Defendant (and those additional cases cited by the Court of Appeals), is different than this case in a number of significant ways. In *Putnam*, the Plaintiff's theory that the late fees were illegal penalties was not statutory in nature. Second, at its core, the case did not allege intentional wrongdoing. Instead, the Wisconsin Supreme Court viewed the case as a contract action, and held that the VPD does apply to contracts. The Court held that the allegations were not sufficiently similar to fraud to fall within the exception. It wrote:

These differences under the law in the treatment of allegations of fraud, duress, and mistake of fact versus unlawful liquidated damages advise against them being treated as equals. Allegations of fraud, duress, and mistake each work to negate the true voluntariness of payments. The wrongdoing of unlawful liquidated damages may be technical in nature. *Id.* at 465.

Based on the *Putnam* Court's belief that allegations of unlawful liquidated damages did not rise to the level of assertions of fraud, the Court applied the VPD.

This case is different than *Putnam* because Plaintiffs have made clear allegations of fraud, unfairness and material omissions. Plaintiffs have brought their claims solely under a consumer fraud statute. The Plaintiffs' claims are not contractual in nature, and the Court of Appeals has found that Plaintiffs' allegations are sufficient to plead an unfair

practice.¹⁹ This case does not involve a “technical” claim. To the extent that Plaintiffs’ allegations are taken as true, Charter knowingly violated Missouri law. Missouri has always recognized that “improper conduct,” (another way of expressing “unfair practices”) is an exception to the VPD. *See Wilkins v. Bell's Estate*, 261 S.W. 927, 928 (Mo. App W.D. 1924) (holding that the VPD does not apply whenever there is fraud or "improper conduct" on the part of the payee). *See also National Enameling*, 40 S.W.2d at 595 (Mo. 1931).

Defendant and the Court of Appeals also cited to a series of Illinois cases in which the VPD was applied to consumer fraud actions, but Illinois has begun to retreat from this position. In *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 810 (Ill.App. Ct. 2007), the court indicated that the intent and purpose of a Medical Record Act lent “additional support to our refusal to apply the voluntary payment doctrine to this case.” In the federal case of *Brown v. SBC Communications, Inc.*, No. 05-777, slip op. (S.D. Ill. March 1, 2007), the Court, applying Illinois law, denied the motion to dismiss of the defendant telephone company, indicating that fraud represents a well-recognized exception to the VPD. The *Brown* Court expressed skepticism that the VPD applied to any claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (Illinois’ UDAP).²⁰ Interesting for this case, the Court further wrote that the voluntary payment doctrine,

¹⁹ Opinion, p. 14.

²⁰ This case can also be found at 2007 WL 684133.

does not bar claims to recover payments made under a mistake of fact, and thus would not bar the claims of Brown and the proposed class if they made the payments at issue under a mistake of fact as to whether they had in fact ordered the services for which they allegedly were billed.

In this case, the Court of Appeals concluded that violations of the MPA were not “fraud.” The court reasoned that “common law fraud” had nine elements, and not all were pleaded in this case. (Opinion 15.) This assumption that the term “fraud” (as it appears in common statements regarding the VPD) was synonymous with “common law fraud” is erroneous. It fails to recognize the “fraud and improper conduct” exception that is present in Missouri and throughout the country, it fails to acknowledge the spirit and purpose of the MPA, and it ignores Plaintiffs’ allegations that Charter acted with knowledge that its actions were illegal.

In order to be true to the limited historical use of the VPD, this Court should continue to refuse to apply the VPD to actions that involve wrongdoing of any kind, including all violations of the MPA. Statutory fraud is fraud.

Argument of Point III

[No factual finding that payment was voluntary]

The trial court erred in dismissing Plaintiffs'-Appellants' *Class Action Petition* in reliance on the VPD because, in ruling on a Motion to Dismiss, a trial court must construe all allegations in the light most favorable to the non-moving party, in that:

- A. The allegations of the Petition did not support the trial court's finding that the Plaintiffs had full knowledge of all the facts, as required by the VPD;**
- B. The trial court failed to acknowledge Plaintiffs' allegations of fraud, deception and improper conduct, each of which constituted an exception to the VPD; and**
- C. The trial court made a "finding" of facts to support the application of the VPD based on facts outside of the pleadings, including "findings" that were inconsistent with Plaintiffs' allegations.**

The standard of review when considering a trial court's grant of a motion to dismiss is *de novo*. *McCarthy v. Peterson*, 121 S.W.3d 240, 243 (Mo. App. E.D. 2003).

In reviewing the trial court's dismissal of Plaintiffs' Petition for failure to state a claim upon which relief can be granted, the sole issue to be decided is whether, after allowing the pleading its broadest intendment, treating all facts alleged as true and construing all allegations favorably to plaintiffs, the averments invoke principles of substantive law entitling plaintiffs to relief. *Lowrey v. Horvath*, 689 S.W.2d 625, 626 (Mo. banc 1985).

A. The Trial Court Failed to Construe the Allegations in a Light Most Favorable to Appellants

Although the law requires that Plaintiffs' allegations should be given their broadest and most favorable reading, the trial court's "findings" (subsequently adopted by the Court of Appeals) fail to give Plaintiffs such a broad reading. Instead, facts were construed against Plaintiff and "findings" were made in the absence of evidence. The following specific factual conclusions made by the trial court violate the legal standard for a motion to dismiss. Starting on page two of its decision (LF 118), the trial court "found," among other things, the following:

- "[P]laintiffs knew exactly what services they requested;
- They were, or should have been, aware that their cable bills separately listed a monthly charge for the Guide;
- They possessed full knowledge at the time of payment that they were being billed for services which they allegedly never asked for or agreed to; and
- They repeatedly paid the amount billed for the Guide without objection or protest.

Contrary to the conclusions of the trial court, Plaintiffs actually alleged the following :

- No Plaintiff requested the Guide from Defendant Charter. (Plaintiff's Petition, ¶9, LF 3)
- Defendant did not inform Plaintiffs that it would be charging for the Guide. (¶10, LF3).

- The Guide is not included as part of Plaintiff’s monthly cable television channels or services. (¶11, LF3).
- The Guide has been appearing as a separate line item on the monthly bill of Plaintiffs. (¶12, LF4).
- Defendant charged and continues to charge the Plaintiffs \$2.99/month or \$3.24/month for said guide. (¶13, LF 4).
- Defendant Charter’s Practice of negative option billing for the Guide constitutes deception, an unfair practice/ and or concealment, suppression, or omission of a material fact in connection with the sale of its cable television channels and services. (¶15, 16, LF 4).
- Defendant Charter knew at the time it billed Plaintiffs for the Guide that it was engaging in negative option billing. (¶17, LF 4).
- During the course of these transactions, Defendant Charter engaged in unfair or deceptive trade practices . . . including:
 - Failing to give Plaintiffs and the Class the option to receive or not receive the Guide, which is not included in their monthly service package or rate;
 - Sending the Guide to Plaintiffs and the Class, who had not affirmatively requested or opted to receive the publication;
 - Failing to state or disclose that charges would be made to Plaintiffs’ and the Class’s monthly bill for receiving the Guide. (¶37, LF 9)

Plaintiffs' allegations should have been read in the light most favorable to Plaintiffs. The allegations of the Petition should have been given "their broadest intendment, treating all facts alleged as true, and construing the allegations favorably to the pleader, to determine whether they invoke principles of substantive law." *Bellos v. Winkles*, 14 S.W.3d 653, 655 (Mo. App. E.D. 2000). They were not.²¹

Had the trial court construed these allegations in the Plaintiffs' favor, they would clearly survive a motion to dismiss, even if a Court were to determine that the VPD could apply to MPA claims like these. Plaintiffs assert that the following reading of the

²¹ Several of the conclusions found in the Trial Court's Order conflict with the evidence that Plaintiffs would present in this case. For example, contrary to the trial court's Order (LF 117), Charter's "Channel Guide" contained no price and Charter's Channel Guide was not described as a "Channel Guide" on the bill itself (it was only described as a "paper guide" amongst the multiple pages of text in the bills). Although Plaintiffs attached copies of a Channel Guide cover and copies of several bills to a legal memorandum filed with the trial court and these exhibits are thus part of the legal file, Plaintiffs do not rely upon those exhibits in this appeal due to stage of the litigation (a Motion to Dismiss) and a potential dispute over the propriety of such exhibits. Plaintiffs nonetheless feel compelled to mention these exhibits in this footnote because at a practical level, it would put Plaintiffs at a disadvantage to *not* mention them, in that Plaintiffs' allegations were construed the trial court in a way that was contrary to the exhibits viewed by the trial court.

allegations is a reading that is truly consistent with Plaintiffs' allegations, the construction Plaintiffs' allegations should have been given at this stage of the litigation:

Plaintiffs agreed to receive cable services from Charter. Charter promised to provide those services for a fixed price. Charter began sending a "Channel Guide" to the consumers. Nothing on the guide or with the guide indicated that it cost anything at all. The Guide was unsolicited by the Plaintiffs. Charter never disclosed that Plaintiffs could keep the Guide as a gift. Instead, Charter began adding a small charge to Plaintiffs' bills. The charge was in no way highlighted, and the bills never indicated that Charter had added a new charge for the unsolicited merchandise. . When Plaintiffs noticed the charge, they brought this claim. Charter's practice of sending something that looked free, and should have been free by law, and then sending Plaintiffs a bill representing that Charter could charge for merchandise was deceptive. Charter broke the law on purpose.

Findings that Plaintiffs knew of the charges or that Charter did not "trick" Plaintiffs are not consistent with the broad reading of the allegations that the trial court was required to conduct. *Lowrey*, 689 S.W.2d at 626. Unfortunately for Plaintiffs, the narrow reading of the allegations granted by the trial court was the basis for the trial court's holding that the factual requirements of the VPD were met.

For example, Plaintiffs alleged that Charter failed to disclose that it would charge for the Guide when it was mailed, yet Charter nonetheless included a charge on the monthly

bill. Sending something that implies financial obligation where no obligation exists could be found to be deceptive, but the trial court found otherwise. Similarly, Plaintiffs alleged that Charter unilaterally added the charge to the bill. There is no allegation that Plaintiffs knew of the charge, understood it, or continued to pay knowing either of these things.

Plaintiffs are entitled to a legal right to prove that Charters' charges for its Channel Guide were deceptive, as alleged. Plaintiffs are entitled to prove that Charter omitted critical information, as alleged. Both of which would vitiate the VPD. Plaintiffs are entitled to prove that Charter's added-on charges were inconspicuous and unrecognized, a fact that is entirely consistent with the allegations. All of these opportunities were denied by a premature dismissal of this case, which violated the standards for a motion to dismiss.

B. The Court Found Facts that were not Plead to Support the Affirmative Defense of the VPD, yet such Facts Must Be Proven by Defendant.

This section is closely related to the section above, but deserves brief, but separate attention. In addition to failing to construe Plaintiffs' arguments in a way that was most favorable to them, the trial court found, and the Court of Appeals acknowledged and affirmed "findings" that were in direct conflict to the allegations, and were facts that Defendant bore the burden of proving. This violates the law. "The party asserting an affirmative defense bears the burden of proof." *Kansas City Power & Light Co. v. Bibb & Assocs., Inc.*, 197 S.W.3d 147, 156 (Mo. App. W.D. 2006). "When an affirmative

defense is asserted, such as a statute of limitation, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred.”

International Plastics Development, Inc. v. Monsanto Co., 433 S.W.2d 291, 294 (Mo. banc 1968).

In this case, Defendant had the burden of proving, assuming arguendo that the VPD could apply, that Plaintiffs knowingly paid the added-on charges for months without objection. Defendant had the burden of proving that its behavior did not amount to trickery. This Court can scour the Petition, but it will not find a single allegation to support the conclusion that Plaintiffs knew and did not care, or that Charters actions were transparent and fair. Nonetheless, the Court made a factual finding that these things were true despite the total lack of evidence.

It is Appellants’ long-established legal right to have questions of fact resolved by a jury, not by a trial judge at a motion to dismiss. Trial courts must “allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff.” *Martin v. Crowley, Wade and Milstead, Inc.*, 702 S.W.2d 57, 57 (Mo. banc 1985). Appellants strenuously suggest that application of the VPD is inappropriate in this matter; however, even if this Court were to determine that the VPD could apply to an MPA claim such as this one, arriving at such a conclusion would require factual findings as to whether or not fraud, deception, improper conduct, or lack of full knowledge of all facts would bar its application. Each of these is a question of fact to be decided no earlier than a summary judgment, if not at trial by a jury.

Conclusion

Plaintiffs have alleged that Defendant acted fraudulently, unfairly and deceptively by mailing unsolicited merchandise to consumers and then billing them for it. These MPA allegations, combined with long-standing principles of Missouri law, require this Court to reverse the judgment of the trial court and to remand this case with instructions that the voluntary payment doctrine does not apply to Plaintiffs' MPA claims. Plaintiffs' allegations clearly establish that Defendant's conduct involved fraud and improper conduct, a long-standing exception to the VPD.

Further, the VPD cannot be employed to nullify statutory public policy, including Missouri public policy established by the MPA. The Missouri public policy established by the VPD is so clear and so critically important to Missouri consumers that it cannot be waived by consumers and certainly cannot be waived by the inadvertent payment of an illegal bill.

Even if Points I and II were denied, the decision below should be reversed for the reasons set forth in Point III. The standard for deciding motions to dismiss require the development of an evidentiary record, with issues regarding the VPD to be decided at an appropriate time based on admissible evidence.

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Certificates of Service, Brief Form and Virus Scanning

1. Two copies of the foregoing were hand-delivered this 4th day of August, 2008 to attorneys for the Respondent:

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2. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 31,000 words. This brief contains 18,602 words, as determined by the word count feature of MS Word (not including the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix).

3. Pursuant to Rule 84.06(g), Appellant hereby certifies that the CD-ROM accompanying the paper version of this brief has been scanned for viruses and that it is virus-free.

4. One original and 9 copies have been hand-delivered to the Missouri Supreme Court on August 4, 2008, along with a CD-ROM containing the brief in MSWord.

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Appendix

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§407.020. Unlawful practices, penalty--exceptions--civil damages

1. The 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 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. The use by any person, 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 of the fact that the

attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

**§407.025. Civil action to recover damages--class actions authorized, when—
procedure**

1. 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 in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper.

2. Persons entitled to bring an action pursuant to subsection 1 of this section may, if the unlawful method, act or practice has caused similar injury to numerous other persons, institute an action as representative or representatives of a class against one or more defendants as representatives of a class, and the petition shall allege such facts as will show that these persons or the named defendants specifically named and served with process have been fairly chosen and adequately and fairly represent the whole class, to

recover damages as provided for in subsection 1 of this section. The plaintiff shall be required to prove such allegations, unless all of the members of the class have entered their appearance, and it shall not be sufficient to prove such facts by the admission or admissions of the defendants who have entered their appearance. In any action brought pursuant to this section, the court may in its discretion order, in addition to damages, injunction or other equitable relief and reasonable attorney's fees . . .

§407.200 RSMo. Unsolicited Merchandise: How Disposed Of

Where unsolicited merchandise is delivered to a person for whom it is intended, such person has a right to refuse to accept delivery of this merchandise or he may deem it to be a gift and use it or dispose of it in any manner without any obligation to the sender.

Missouri Regulation 15 CSR 60-8.060.1

It is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to collect payment from consumers, for any merchandise which the consumer has not ordered or solicited.

The Summarized History of the Missouri Courts Hesitant to Apply the Voluntary Payment Doctrine in Missouri

Courtney v. Boswell, 65 Mo. 196, 1877 WL 9137 (Mo. 1877) (The Missouri Supreme Court declared that an action for breach of warranty is an exception to applying the VPD).

Westlake & Button v. The City of St. Louis, 77 Mo. 47, 1882 WL 10062 (Mo. 1882), 46 Am.Rep. 4 (1882) (Where the threat for payment comes from one "closed and power to enforce payment" (e.g., the city of St. Louis), the voluntary payment doctrine didn't apply. Here, the city was about to shut off a business owner's water supply to force the business to pay and an illegal fee).

F. W. Niedermayer v. The Curators of the University of Missouri, Columbia, 61 Mo.App 654, 1895 WL 1669 (Mo.App. 1895) (The VPD does not apply in cases of "moral duress." Where one fails to show "good faith and fair dealing" the VPD does not apply).

Rhodes v. Dickerson, 69 S.W. 47 (Mo.App. W.D. 1902) ("Misrepresentation" is yet another exception to the application of the VPD).

American Brewing Co. v. City of St. Louis, 187 S.W.129 (Mo.1905) (The VPD did not apply where the city threatened to shut off to pay oars water supplied to procure an excessive fee. The court ruled that exceptions to the application of the VPD include "duress," "compulsion," and "business exigency." The Court indicated that the lack of equal bargaining power was also significant in its decision not to apply the VPD).

American Manufacturing Co. v. City of St. Louis, 192 S.W. 399 (Mo. 1917) (The Court indicated that the VPD did not apply, relying upon an expanded view of what constitutes duress for a business-plaintiff).

Divine v. Meramec Portland Cement and Material Company, 353 S.W. 444 (Mo.App. W.D. 1923) (The VPD does not apply to bar a plaintiff's suit against a third party for a voluntary payment made to a second party caused by that third party).

Wilkins v. Bell's Estate, 261 S.W. 927 (Mo.App W.D. 1924) (The VPD does not apply whenever there is fraud or "improper conduct" on the part of the payee).

Mississippi Valley trust Company v. Begley, 252 S.W. 76 (Mo.banc 1923) (The VPD does not apply in cases of "legal duress," which can be less than the threat of personal injury or criminal prosecution/imprisonment. In this case, the legal duress was caused by the payee's threat to expose a family member to disgrace).

Security Savings Bank v. Kellems, 274 S.W. 112, 116 (Mo.App. S.D. 1925) (The VPD does not apply where something akin to "fraud" is alleged, even though the allegation would not be sufficient to sustain a cause of action for common-law fraud.)

White v. McCoy Land Co., 87 S.W.2d 672 (Mo.App. E.D. 1935) (The VPD did not apply to payments made on behalf of Plaintiff by third party trust company).

Freund Motor Co v. Alma Realty, 142 S.W.2d 793 (Mo.App. E.D. 1940) (VPD did not apply to rent paid by auto dealership to realty company, "duress" being liberally construed to exist due to the existence of forfeiture provisions in the lease).

Brink v. Kansas City, 198 S.W. 710 (Mo. 1947) ("Business duress"-the power to disrupt or destroy the business of the taxpayer for failure to pay a license tax- is enough to make payment not voluntary).

City of St. Louis v. Whitley, 238 S.W.2d 490 (Mo. 1955) (the VPD does not apply to suits seeking recovery of unauthorized payments made by public officials.)

Manufacturers Casualty Insurance Company v. Kansas City, 330 S.W.2d 263 (Mo.App 1959) (the VPD does not apply to "technical" or "implied" duress. The Court announced that it was taking a more "liberal view" regarding whether certain types of taxes given that immediate payment is necessary to avoid harsh penalties for nonpayment).

Commercial Union Insurance Company v. Farmers Mutual Fire Insurance Co., 457 S.W.2d 224 (Mo.App 1970) (the voluntary payment doctrine did not apply to an insurer who do not have knowledge that the insured at a second insurance company, both of them with sporadic coverage. The Court did not consider whether the insurer had access to knowledge whereby it might have learned about the existence of the other insurer).

Ticor Title Insurance Company v. Mundelius, 887 S.W.2d 726 (Mo.App E.D. 1994) (the VPD does not apply to an escrow agent where the payment was made in the performance of its duty as escrow agent, where it was seeking restitution from a home purchaser).

Eisel v. Midwest Bank Centre, 230 S.W.3d 335 (Mo.banc 2007) (where the activities prohibited by statute are not subject to waiver, consent or lack of objection, the voluntary payment doctrine does not apply. This would be "illogical and inequitable.").

Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697 (Mo. banc 2008) (follows *Eisel* in holding that the VPD does not apply where the activities prohibited by a statute are not subject to waiver, consent or lack of objection by the victim.)

Trial Court Order and Judgment date May 21, 2007

Opinion of the Court of Appeals