

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 Reply Brief

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Reply - Point I

The Voluntary Payment Doctrine is a form of waiver that is inconsistent with the essential purpose of the Merchandising Practices Act. The VPD is also inconsistent with Missouri statutory public policy.

Overview

This case presents a chance to consider one of law's most interesting intersections; the junction between legal argument, with the complexities that have evolved over the decades, and traditional and common-sense notions of justice that the law is designed to promote. The simplicity of this case can be obscured by Plaintiffs' and Defendant's complex legal analysis, but that would be unfortunate, for in the end, there is a simple question before this Court.

If it is taken as true that a business has willfully violated a specific Missouri statute written to protect consumers from unfair practices, is it the law of Missouri that the business can nonetheless retain the illegally obtained money if the customer's do not discover the *per se* unfair practice before paying?

Boiled down even further, "Is it the law that a company can willfully break the law so long as it is not immediately caught?" These questions are the gut-level justice questions that drive this case, but they necessarily implicate delicate legal questions involving

things like the exceptions for fraud and improper conduct, the definition of “full knowledge of all facts,” and whether the MPA is subject to waiver¹

Charter, perhaps sensing it is not strong on the equities, has focused its response largely on the technicalities, attempting to collapse the fraud exception, suggesting the MPA is subject to waiver, and arguing that the ability to know is the same as full knowledge. Charter has wisely attempted to encourage an analysis mired in detail, allowing the forest to be obscured by the trees. In Charter’s analysis, an allegation of willful violation is smeared until it morphs into an innocent mistake for which no company should be punished. Clear, consistently recognized exceptions for fraud and improper conduct are quietly collapsed and swept away, and the MPA, unsusceptible to even conspicuous waiver, becomes waivable by payment of an illegal charge. These positions are skillfully advanced, but they carry dangerous implications for an unprecedented expansion of the VPD.

In this reply, Plaintiffs attempt to briefly and soundly answer Charter’s legal assertions while maintaining the “big picture” analysis required in this matter.

¹ These questions have been comprehensively addressed in Appellant’s initial brief and are not rehashed here. Section I of this brief instead addresses specific arguments made by Charter that require further consideration. These points are given separate headings. Because many issues could be addressed in any section, the vast majority are discussed in Section I, leaving only lean discussion in Sections II and III.

Discussion

Below, Plaintiffs briefly address the various issues raised or responsive Charter's Response Brief. Each issue is addressed in a separate section.

1. Charter's Position Would Require this Court to Reward Illegality and to Effectively Repeal Existing Law

To agree with Charter that the VPD trumps consumer protection laws would be to invite the judicial repeal of §407.020, §407.200 and Missouri Regulation 15 CSR 60-8.060.1, and by that action this Court would support, and in fact create, an economic model that, by the implementation of a broad reaching VPD, rewards illegality by making it profitable to disregard established law. The Missouri Legislature has acted to prohibit such a result. Anticipating the possibility that companies would send unsolicited merchandise and attempt to collect money, the Missouri legislature vested consumers with the right to keep unsolicited merchandise as a gift. 15 CSR 60-8.060.1, a regulation promulgated by the Missouri Attorney General, enforces this statutory right by prohibiting merchants from even asking for payment for unordered merchandise:

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.

(Emphasis added.)

Charter's arguments are similarly unfounded when juxtaposed with the recognized purpose and reach of the MPA. As set forth in Appellant's initial brief, the MPA extends to all forms of cheating. Notably, it also extends beyond civil enforcement actions. Where a defendant "willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony." §407.020.3 RSMo. In short, if the VPD were expanded to cases like this one, Charter could be a felon without being required to return the fruits of its felonious behavior. This is not, and has never been, the law of Missouri.

Instead, as Appellants made clear in their initial brief, and reassert herein, both the equitable concerns in this case and the expansive body of VPD cases require a reversal of the trial court because the VPD does not apply to the MPA, to willful conduct, to fraud and improper conduct, or to situations in which there is a factual question regarding whether parties had "full knowledge of all facts."

2. The Missouri Attorney General Supports Plaintiffs' Position

Reading Charter's conclusions regarding the Attorney General's Brief, one might assume that the Attorney General filed his Amicus Brief in support of Charter. (See Resp Br 15.) At various points, Charter asserts the Attorney General suggested that Plaintiff alleged that there was full knowledge of the illegal charge. This is untrue. (A. G. Br. 11.) According to the Attorney General, there is no allegation that Plaintiffs were aware that they were being charged illegally for the channel guide. (A.G. Br. 7). Despite Charter's

attempted reliance on portions of the Attorney General’s brief, the Attorney General agrees with Appellants that the VPD is inconsistent with the history and logic of the MPA and should not be applied to any claim that states a cause of action for statutory consumer fraud. The Attorney General filed an amicus brief specifically to ask this Court to reverse the trial court. Note, for example, the title to Section II of the Attorney General’s Brief: **“The Voluntary Payment Doctrine is inapplicable to a claim brought under the MPA.”** (A.G. Br. 8). Contrary to Charter’s assertions (*See* Resp. Br. 43, 57), the Attorney General does not agree with Charter on any of the major issues of this case.

Instead, the Attorney General clearly explains that consumers are not limited to basing their statutory fraud claims to the “four corners of the contract.” (AG Br. 9.) The Attorney General has taken the time to explain various ways in which courts have distinguished Chapter 407 from common law, making it especially insusceptible to the VPD. (A.G. Br.10.).

3. Exhibits

On pages 60 and 61 of its Brief, Charter suggests that Appellants do not want this Court to review several exhibits: copies of the Channel Guide and of some sample bills Charter sent to its customers. (Resp. Br. 61, including fn 12.) Far from true, Plaintiffs attached these exhibits to the surreply memoranda in the trial court. Plaintiffs then referred to these exhibits in the trial court and the Court of Appeals in order to illustrate the nature of their claims. (L.F. 110-115.) During this appeal, however, Appellants have

been cautious about referring to these Exhibits, based their experience in the Court of Appeals. (Opin. 5-6). Appellants enthusiastically invite this Court to review these exhibits, as these exhibits illustrate this cause of action.² Appellants invite this Court to review these exhibits, considering them in the context of the average consumer who encountered them. Unless a consumer was carefully inspecting bills to determine if a company was breaking the law, it is hard to imagine they would notice the various items in their bill. This Court can observe for itself that such charges were small enough to allow the average consumer to see a total on their bill was that in line with what they were owed. For this reason, consumers found no reason to scour their bills for illegal charges.³

As Charter suggests (Resp. Br. 12), these sample bills give an idea of the amount of the added-on monthly fee for the Channel Guides. The Exhibit representing the front cover of a Channel Guide illustrates that the Channel Guide cover contained no price and was billed under a different name (“paper guide”) than the name found on the publication itself (“Channel Guide”).

² Appellants had previously alluded to these exhibits. (Appellants’ Br. 59.)

³ Charter infers that consumers have such a duty, and that they should also assume that if they pay an illegal charge without discovering it, they will never be able to attempt to recover it. This is circular. If the VPD does not apply, no consumer is foreclosed from recovering money they were illegally charged just because the company did a good job of keeping the charge low enough and obscure enough to avoid immediate detection.

Charter argues that Appellants alleged that the bill was written "so that anyone reading the bill would know what was being charged for and how much was being charged for it." Appellants never made such allegations, and would not, as this Court can see by reference to the exhibits. (Resp. Br. 42.) "Would know" is vastly different than "could know." It was this difference between "would know" and "could know" that gave rise to the need for Missouri statutes that prohibit merchants from charging customers for things they did not order.

4. The Appellate Cases upon Which Charter Relies

Charter has presented this Court's with a long list of cases allegedly supporting its proposition that the VPD applies to payment of improper itemized charges. (Resp. Br. 20-23.) A careful examination of these cases, however, reveals that the vast majority of Charter's cases (13 out of 19) did not involve any claims brought pursuant to any consumer fraud statute. These 13 irrelevant cases cited by Charter include the following:

1. *Spagnola v. The Chubb Corp.*, 2007 WL 927198 (S.D.N.Y. 2007).
2. *Cook v. Home Depot U.S.A.*, 207WL 710220 (S.D. Ohio 2007).
3. *Butcher v. Ameritech Corp.*, 727 N.W.2d 546 (Wis. Ct. App. 2006).
4. *Morales v. Copy Right, Inc.*, 28 A.3d 440 (N.Y. 2006).
5. *Smith v. Chase Manhattan Mortg. Corp.*, 206 WL 353975 (W.D. Ark. 2006).
6. *Putnam v. Time Warner Cable*, 649 N.W.2d 626 (Wisc. 2002).
7. *Dillon v. U-A Columbia Cablevision*, 790 N.E.2d 1155 (N.Y. 2003).
8. *Hassen v. MediaOne of Greater Fla., Inc.*, 751 So.2d 1289 (Fl. Ct. App. 2000).

9. *Telescripps Cable Co. v. Welsh*, 542 S.E.2d 640 (Ga. Ct. App. 2000).
10. *Hill v. Telecom*, 200 WL 264325 (N.D. Miss. 2000).
11. *McWethy v. Telecommc'ns*, 988 P.2d 356 (Okla. Civ. App. 1999).
12. *Horne v. Time Warner Operations, Inc.*, 119 F.Supp.2d 624 (S.D. Miss. 1999).
13. *Sanchez v. Time Warner, Inc.*, 1998 WL 834345 (M.D. Fla. 1998).

Charter has recycled many of these same case cites throughout its Brief. Charter cited five additional cases (found at p. 20 of its Brief), where the Plaintiff brought both common law claims and statutory consumer fraud claims. Charter failed to advise this Court that in none of these five cases did an appellate court apply the VPD to a statutory fraud count. It is also worth pointing out that each of these five cases arises in only one state, Illinois.

1. *Williams-Ellis v. Mario Tricoci Hair Salons & Day Spas*, 2007 WL 3232490 (N.D. Ill. 2007)(The VPD was only applied to the claim for breach of contract, not consumer fraud).
2. *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155 (Ill. 2005)(VPD was applied to the restitution claim only).
3. *Jenkins v. Concorde Acceptance Corp.*, 802 N.E.2d 1270 (Ill. 2003)(VPD not applied to a consumer fraud claim; the Court held that plaintiff failed to state a claim for consumer fraud).

4. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663 (7th Cir. 2001)(the court held that plaintiff never stated a cause of action under the consumer fraud count for reasons entirely unrelated to the VPD).
5. *Dreyfus v. Ameritech Mobile Comm., Inc.*, 700 N.E.2d 162 (Ill. 1998) (the trial court had dismissed the consumer fraud count; the appellate court applied the VPD only to a count for breach of contract).

By lumping these cases together, Respondent fails to recognize the fundamental difference between common law claims and statutory consumer fraud claim, namely, that while courts have applied the VPD to contract actions, they have, indeed, been reluctant to apply the doctrine of voluntary payment to statutory consumer claims.

While Respondent correctly asserts that payment of itemized charges based on breach of contract invites application of the doctrine of voluntary payment, Respondent's own cases demonstrate that the VPD is rarely applied to claims brought pursuant to consumer fraud statutes. Certainly, if this Court were to apply the VPD to this MPA claim, it would be the first time this was done by any Missouri appellate court.

Only one case contained in Charter's long list of cases (again, beginning at Resp Br. 20) was brought solely pursuant to a statutory consumer fraud statute: *Newman v. RCN Telecom. Servs., Inc.*, 238 F.R.D. 57 (S.D.N.Y. 2006). In this New York case, however, the Court held that the plaintiff had full knowledge of the problem (slow internet connection speed), given that he himself tested the Internet speed and he determined that it was slower than promised, yet he kept paying the bills sent by the ISP.

This New York case is a far cry from a case where the merchant is slipping small charges for unrequested merchandise into customers' recurring bills.

At page 19 of its Brief, Charter cites a few additional cases that, according to Charter, "provide a straightforward application of the affirmative defense in Missouri." A careful reading of these cases, however, readily shows that they don't live up to Charter's description. For instance, *Benton House, LLC v. Cook & Younts Ins. Inc.*, 249 SW.3d 878 (Mo.App. W.D. 2008), is yet another breach of contract action, not a case involving the MPA. In *Benton*, the Court held that the VPD applied because an insurer made an unwarranted payment in the absence of any mistake of fact.

Perhaps the most curious case cited by Charter, though, is the unreported federal case of *Kep-Co, Inc. v. Regency Savings Bank*, 2007 WL 607745 (E.D. 2007). In *Kep-Co*, Regency Bank initiated foreclosure proceedings against an apartment building owned by Kep-Co. Regency argued that the plaintiff's "breach of contract" claim was barred by the VPD. The Court (Hon. Catherine D. Perry) refused to apply the VPD, however, because the "contract count here is so vague and confusing." The Court indicated that though the VPD applies to contract actions, the plaintiff might be "seeking some kind of relief, on some kind of theory that is not barred by that doctrine." *Id.* at 2-3. The only "straightforward" thing about *Kep-Co*, then (again, a case brought to this Court's attention by Charter), is that the VPD doesn't necessarily apply to causes of action that are not based in contract. That is exactly what Plaintiffs are arguing in this case.

Defendants heavily rely upon two additional non-reported circuit court cases, the Illinois trial court case of *Hurley v. Charter*, No. 06-L-655 (St. Clair County Circuit

Court, Ill., February 28, 2007) (Resp Br. 20) and the Missouri trial court decision of *Eppert v Tele-Communications, Inc.* No. 972-09146 (Mo., 22d Judicial Circuit, April 19, 2002) (Resp. Br. 31). Although both of these cases applied the VPD, neither of these courts considered many of the specific concerns and arguments raised by Plaintiffs in this appeal. Regarding *Hurley*, it must also be remembered that the trend in Illinois appellate cases is to restrict the application of the VPD in cases based on consumer statutory fraud. (See Appellant's Br. 54.)

5. Reluctance of Courts to Apply VPD

Appellants have shown this Court that numerous appellate courts, Missouri and otherwise, are reluctant to apply the VPD whenever doing so would be unfair (see Appellant's Br. 42-55.) Respondent has not rebutted this important point in its Response, but rather, suggests only that some of the specific excuses the courts have articulated in their efforts to not apply the VPD fall within recognized exceptions. Appellants' point remains strong then, that numerous Missouri appellate courts have worked hard to not apply the VPD whenever the result would be unjust, creating new exceptions when necessary and carefully and broadly applying existing ones.

Appellants have relied on numerous cases to demonstrate that the VPD should not apply to cases involving statutory consumer fraud. Respondent complains that the analysis in one of the most recent of such cases, *Indoor Billboard/Washington, Inc. v. Integra Telecom*, 170 P.3d 10 (2007), is "cursory." Such an analysis *should* be cursory, because when applied to statutory consumer fraud, the VPD is nonsensical. The potential

injustice is almost palpable, and it caused the Washington Supreme Court to quickly and thoroughly shut the door forever for Defendants who would rely on “equity” to break the law. It was the shotgun “justice” of the VPD that likely inspired the Missouri Supreme Court to write these harsh words:

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 . . . 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.

Lamar Tp. v. City of Lamar, 169 S.W. 12, 16 (Mo. 1914). Perhaps Charter does not like that Missouri Courts have shown reluctance to apply the VPD, but *Lamar* undoubtedly establishes that this is the case, and the track record of Missouri Appellate decisions ever since substantiates the trend. (See Appellant’s Appendix, beginning A4.)

Charter’s response to Appellant’s waiver argument is half-hearted. It is a distinction without a difference. (Resp. Br. 27-29). Contrary to Respondent’s argument, the particular *method* of the waiver is irrelevant to this argument. What’s important is that A) the VPD constitutes a waiver and B) consumer rights under the MPA cannot not be waived. Therefore, the VPD cannot apply to the MPA, because the VPD is based on waiver and MPA consumer rights cannot be waived. Certainly it cannot be said that consumers have waived the right to contest a small line item by overlooking it. (App Br.

14ff.) Two cases decided by this Court constitute the basis for this strong syllogistic argument. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339-340 (Mo. 2007); *High Life Sales Co. v. Brown-Forman Corp*, 823 S.W.2d 493, 498 (Mo. 1992).

6. Affirmative Defenses and their Applicability to Statutory Violations

Respondent does some extraordinary legal maneuvering when it claims that Missouri Rule of Civil Procedure 55.08 expressly recognizes waiver as an affirmative defense "without qualification." (Resp Br. 36). The words of Rule 55.08 never suggest that the VPD applies to cases based on the MPA. Whereas Rule 55.08 invites the pleading of affirmative defenses, it is clearly inviting only those affirmative defenses that *apply*. Otherwise, a surreal legal landscape would prevail. Defendant's position would allow "comparative fault" to be raised in a breach of contract case, since "comparative fault" is listed by Rule 55.08?

Contrary to Respondent's argument, Appellants never claimed that the MPA abolishes all affirmative defenses (Contrary to Resp Br. 16, 23). Appellants simply suggest that when an affirmative defense directly conflicts with a statute, the statute prevails. This is hardly groundbreaking. With regard to MPA cases, those common law affirmative defenses that are entirely inconsistent with the essential purpose of the MPA cannot stand. Those that are not, can continue to be enforced.

For instance, accord and satisfaction is perfectly consistent with the MPA because it provides the defendant with a right to demonstrate that the plaintiff has already been compensated for the wrong. Consider, also, the trespass case cited by Charter, *Crews v.*

Tusher, 651 S.W.2d 677 (Mo.App., S.D. 1983), in which a statutory trespass cause of action was trumped by the trial court's finding of fact that the plaintiff consented to the trespass. (Resp. Br. 24.) Appellants agree that consent is entirely appropriate in a trespass case, even though the original claim was based on statute and the defense was based on common law. This defense is compatible with this claim because this claim and this defense do not inherently conflict with one another. Only those affirmative defenses that are inconsistent with the fundamental purpose of a remedial statute are trumped by such a statute. The fundamental purpose of the MPA is “[t]o 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). Additionally, the legislature affirmatively stated that sending unsolicited merchandise and receiving a payment (which presumed both a bill and “voluntary” payment) is illegal; the VPD says it is not. The direct conflict can only be resolved in favor of the statute and against the VPD.

7. Even Unilateral Mistake Would Allow for Recovery

It is worth a brief note to discuss Charter’s implied assertion that the Plaintiffs made a mistake by not noticing the charge. Even if this were the case, it is clear that Charter knew of the charge, and therefore Plaintiff’s “mistake.” Additionally, Plaintiffs’ allegations suggest that Charter played a role in encouraging the mistake (by levying the charge without customer permission in the first place). Even if the customers thus made a “mistake” by not realizing that an illegal charge had been added, legal precedent

supports Plaintiffs' position that they should be granted relief. A unilateral mistake may be used to rescind a contract where: 1) enforcement would be unconscionable, or 2) where the other party had reason to know of the mistake. *Asbury v. Crawford Elec. Coop., Inc.*, 51 S.W.3d 152, 157 (Mo. App. 2001).

8. Charter is Blaming the Victims

Throughout its Brief, Respondent blames the victims of Charter's scam, indicating that these victims were at fault for not catching the illegal charges or because the consumers might be opportunistically manipulating their claims. (Resp. Br 39.) Even if this were proven to be true (which is clearly a question of fact not to be decided at this point in the litigation), the VPD is entirely superfluous. If a jury concluded that the company made an innocent mistake, or in the alternative that the customers actually requested the VPD and brought a frivolous claim, the jury could conclude that there was no unfair practice, or that Defendant did not cause the damages at all. Either way, a jury would, based upon the fully developed facts, determine if a business acted deceptively or unfairly. In no case would the VPD be necessary to make sure that only liable companies are made to pay.

On page 12 of its Amicus Brief, the Attorney General echoes this position. He makes it clear that consumers would be prohibited from taking advantage of the lack of the VPD in MPA cases because there are sufficient safeguards already in place. If it turned out that a group of consumers really fully knew that they were paying for

merchandise they didn't originally order but were presently enjoying and voluntarily receiving, the MPA violation would not, in that case, be the cause of their damages.

Charter repeatedly claims that this lawsuit was not necessary because the two Plaintiffs could have made a simple phone call to Charter. With all due respect to Charter's attorneys, such a "solution" is disingenuous. Stopping a widespread illegal practice with regard to only two people out of a class of "numerous" consumers (LF 6) does not "solve" the problem; it conceals it. A business who could cheat 100,000 customers, only to refund the illegal gains to 50 of them, would, in the absence of altruism and considering only the financial returns, do well to continue its illegal billing. Although one may assert that customers would switch to alternatives, this presumes knowledge of the illegality (rather than a failure to discover it) and it also presumes viable alternatives. Charter, a quasi-monopolistic entity is hardly susceptible to true market forces.

The Amicus Brief filed by Gateway Legal Services, The National Consumer Law Center and The National Association of Consumer Advocates makes a strong showing that the focus of MPA suits should not be potential harm to businesses that charge money for merchandise that was not requested. Rather, the focus of the MPA is consumers. The above referenced brief's detailed history of the VPD, its chronicling of its steady decline into disuse, and the recount of the very real problems presented by Charter's alleged practices remind this Court that Charter's actions impact real people in real ways.

In addition to consumers, there is another group that is harmed by Charter's actions. This group is underrepresented in this matter. It is comprised of the thousands of

businesses that carefully comply with the law, instead of gaining economic advantage by bending the rules. Upholding the MPA and refusing to apply the VPD in this case, ensures that businesses that abide by Missouri laws do not get saddled with an unfair competitive disadvantage. Upholding the MPA thus upholds the integrity of the marketplace. (Gateway, NCLC and NACA Amicus Br. 21.)

Reply - Point II

Plaintiffs alleged that Charter's conduct constituted fraud under the MPA.

Applying the VPD in this case is thus not allowed because fraud and other forms of improper conduct are exceptions to the VPD.

Charter admits that Plaintiffs successfully alleged that Charter engaged in fraudulent conduct. (Resp Br. 45.) Charter has also admitted that Plaintiffs have pleaded a viable claim. (Resp Br. 23, 40.) The Attorney General agrees that the Plaintiffs have stated a cause of action for statutory consumer fraud pursuant to Chapter 407. The Attorney General further indicates that whenever a viable claim is stated under Chapter 407, the VPD does not apply (Amicus Brief of the Atty. Gen., pp. 10, 11).

Appellants have set forth a long legal history of the VPD, demonstrating that Missouri Courts are reluctant to apply the VPD in cases involving improper conduct, including fraud, especially where applying the VPD would result in an injustice. This case is such a case. In its Brief, Respondent has not provided any reason to think otherwise.

Charter has argued there was no actionable fraud alleged in the Petition, as though illegally billing customers for merchandise they did not request is not fraudulent or otherwise improper conduct under the MPA. (Resp. Br. 46.). Respondent further argues that the customer payments were "voluntary" because the customers made their payments

without compulsion or duress (Resp. Br. 47). This is wholly inapposite to whether or not knowing violation of the law constitutes fraud or improper conduct.

Appellants have thoroughly documented the reluctance of the courts to apply the VPD whenever it would result in an injustice. Respondent then spent considerable energy arguing that this case does not involve the right *kind* of improper conduct.

Missouri cases do not turn on the distinction offered by Respondent.

Nor could any Missouri cases precisely answer the question, since this is the first MPA case considering whether the VPD ever applies in an MPA case. No Missouri case, other than the lower courts in this case (i.e., the trial court and the Court of Appeals) has ever held that the VPD applies in an MPA case. Based on the numerous public policy issues raised in Point I, applying VPD would undercut the MPA, thereby thwarting the will of the Missouri Legislature.

Reply - Point III

Plaintiffs’ allegations did not support the trial court’s finding that they had full knowledge of all the facts, as required by the VPD. Further, the trial court made improper “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.

Charter argues that the allegations themselves resolve this case. That is a bold argument, given that the trial court has a duty to construe the pleadings in favor of the Plaintiffs. *Lowrey v. Horvath*, 689 S.W.2d 625 (Mo.banc 1985).

Rather than re-argue the entirety of this point (which is set out carefully in Appellant’s initial brief), Plaintiffs assert to this Court that the trial court engaged in some spirited yet unwarranted fact-finding in reaching its conclusions. (See App. Br. 57-58.) In this section, Plaintiffs respond only to Charter’s newest contentions regarding the allegations in this case.

First, it is not at issue that Plaintiffs stated a cause of action under the MPA, and that as such, for purposes of this argument, it must be assumed that Charter knowingly violated the law. For instance, see pages 23 and 40 of Appellant’s Response Brief, where Charter indicates that it “has not challenged the petition as failing to state a claim under the MPA for allegedly using negative option billing.” The Attorney General concurs, writing that the Plaintiffs have stated a cause of action in their Petition (A.G. Br. pp. 10, 11.)

If Charter's Response to Point III were briefly summarized, it would be that Charter's arguments in favor of affirming the trial court endorse, and in fact require, daring leaps from the allegations actually made to the inferences required to support Charter's motion to dismiss. For example, Charter asserts that Plaintiffs knowingly paid for the channel guide (Resp. Br. 16, 53, 57), but it never points to such an allegation. Some assertions regarding the knowledge of the Plaintiffs require direct quotes. For example, consider this assertion from Respondent's Brief: "As plaintiffs' amended petition makes clear, both Huch and Carstens knew from the time they received their first bill in 2005, that they were being charged for a channel guide that they claim they did not order." (Resp Br 53, 57). Plaintiffs urge this Court to comb through the allegations to see whether it can point to any allegations that substantiate such a claim. Contrary to what Respondent is arguing, Plaintiffs brought this suit precisely because they did not know (until shortly before bringing this suit) that they were being charged additional money for the Channel Guide.

Related to the above argument about knowledge, Charter argues that the Plaintiffs *must have seen the illegal charges*, raising this unsupported argument over and over throughout its Brief (See e.g. Resp. Br. 37, 39, 53.) These inferences, drawn by Charter and the trial court to support Charter's affirmative defenses, defy the required treatment of allegations at the motion to dismiss phase.

When the appropriate standard is applied, taking allegations in a light most favorable to the Plaintiffs, it simply does not follow that if a business tucks an illegal charge into of a recurring bill as a line item, and if customers pay it, that all such

customers fully knew the amount and purpose of the charge and gladly paid for a useless and unrequested guide. Charter argues that it told its customers how much they were paying and for what purpose, (Resp. Br. 29) yet Charter cannot assert that Plaintiffs requested the guide that was mailed, that this trinket was labeled with a price, that it provided anything significantly different from the free information available on each cable subscriber's television, or that it was identified on the bill by the same name that appears on the guide. Charter is similarly mum in pointing to any allegation that Charter informed its own customers that far from being required to pay for the guide, it could be treated as a gift.

Examples of times in which the allegations are read in favor of Charter rather than Plaintiffs are not in short supply. Note also page 58 of Respondent's brief, where respondents conflate the existence of an inconspicuous line item with actual knowledge. The crux of this dispute appears on that page where Charter argues that because the "Guide has been appearing as a separate line item on the monthly bills of Plaintiffs," Plaintiffs (and class members) had actual and full knowledge of these illegal charge.

From the discussion above it is evident that issues such as whether customers had full knowledge, or for that matter whether Charter committed fraud, are questions of fact to be resolved by a jury. At this stage, considering what was before the trial court, the proper broad reading of Plaintiffs' claim is that average and reasonable customers were deceived by Charter's *per se* unfair practice, resulting in ascertainable loss. If Charter wishes to prove otherwise, it must do so through discovery, raising issues at trial or at the summary judgment stage.

Facts require development, and the discovery in this case could readily support Plaintiffs' position. Because discovery was never allowed, Plaintiffs can only suggest the sort of evidence that could be presented at trial. For example, Plaintiffs may call as a witness a psychologist who would opine regarding the percentage of customers who would actually notice a relatively small and thus inconspicuous add-on to a relatively large cable bill. Plaintiffs may obtain evidence through discovery that Charter knew from studies that customers do not detect small add-ons in their bills, or that Charter executives affirmatively decided to omit a price from the cable guide specifically to avoid alerting consumers. Discovery may reveal that Charter gave its customer service agents the right to remove charges without further authorization if customers complained in order to avoid lawsuits for as long as possible, or that Charter has never advertised for the purchase of the cable guide, making the proposition that customers requested it preposterous. Admittedly, all of this is uncertain at this time because it requires discovery, and the development of facts, but this is precisely why a motion to dismiss should not have been granted. The process of discovery was short-circuited by a ruling that construed Plaintiffs' own petition against them, assumed facts to support Defendant's affirmative defense, circumvented the role of a jury, and deprived Plaintiffs of the broad and favorable reading of the allegations to which they were entitled.

For these reasons, the decision is unsupported and the trial court's decision must be reversed.

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.

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 inadvertently waived by consumers, certainly not by the inadvertent payment of an illegal bill, the exact situation anticipated by the Missouri Legislature when it prohibited the practice of sending and requesting payment for unsolicited merchandise.

Further, 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 requires 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 10th day of October, 2008 to attorneys for the Respondent:

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2. This Reply Brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 25% of 31,000 words (7,750 words). This brief contains 6,590 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 October 10, 2008, along with a CD-ROM containing the brief in MSWord.

John Campbell, #59318

Reply - Appendix

Appendix Table of Contents:

§407.020 RSMo	A1
Missouri Regulation 15 CSR 60-8.060.1	A2
§407.200 RSMo	A2

§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.

§407.200 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.