

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC 89361**

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**JAMES HUCH and RYAN CARSTENS,**

**Appellants,**

**v.**

**CHARTER COMMUNICATIONS, INC.,**

**Respondent.**

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**BRIEF OF ATTORNEY GENERAL OF MISSOURI  
AS AMICUS CURIAE**

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**JEREMIAH W. (JAY) NIXON  
Attorney General**

**JAMES R. LAYTON  
Missouri Bar No. 45631  
james.layton@ago.mo.gov  
State Solicitor**

**PETER LYSKOWSKI  
Missouri Bar No. 52856  
peter.lyskowski@ago.mo.gov  
Assistant Attorney General**

**Supreme Court Building  
207 West High Street  
P.O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321**

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## **INTEREST OF AMICUS**

The Attorney General appears under Rule 84.05(f)(1) and (4) to urge correction of the erroneous application of the Merchandising Practices Act (“MPA”) in evaluating plaintiffs’ claims.<sup>1</sup> The Attorney General, as the State’s primary enforcer of the MPA, has an interest in ensuring that the tools and remedies available through the MPA, as interpreted by the appellate courts, are properly applied.

## **BACKGROUND**

Plaintiffs alleged that, in violation of the MPA, Defendant sent, and then billed for, unsolicited cable channel guides in connection with Defendant’s providing of cable service. Defendant asserted that because Plaintiffs received and paid for the guides, the voluntary payment doctrine prevented any recovery. The Eastern District held that the trial court acted properly in dismissing Plaintiffs’ claims on this basis.

The Eastern District’s opinion fails to apply the MPA in the manner intended by the legislature and interpreted by the courts reviewing it. Its opinion is further inconsistent with the regulations promulgated pursuant to the MPA. Specifically, the Court’s holding: (1) ignored holdings of this and other courts that require liberal construction of the MPA in favor of consumer protection and (2) erroneously applied the voluntary payment doctrine to an MPA action.

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<sup>1</sup>Chapter 407 RSMo 2000. All statutory references are to RSMo 2000.

## ARGUMENT

### **I. The Eastern District ignored court decisions that prescribe liberal construction of MPA claims in favor of consumer protection.**

Missouri courts reviewing the MPA have consistently held that the MPA is intended to protect consumers and should thus be given liberal construction. The Eastern District ignored thirty years of Missouri case law in evaluating Plaintiffs' claims, and it failed to explain or even acknowledge its departure from unequivocal precedent.

The Court of Appeals – including the Eastern District – has recognized that the purpose of the MPA is remedial, *i.e.*, the protection of consumers. *State ex rel. Nixon v. Polley*, 2 S.W.3d 887, 892 (Mo.App. W.D. 1999). More specifically, the MPA “supplement[s] the definitions of common law fraud in an attempt 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. W.D. 1973). And in furtherance of these aims, both the Eastern and Western Districts have agreed that the MPA is to be liberally construed. *Missouri v. Marketing Unlimited of America, Inc.*, 613 S.W.2d 440, 445 (Mo.App. E.D. 1981); *State ex rel. Nixon v. Continental Ventures, Inc.*, 84 S.W.3d 114, 117 (Mo.App. W.D. 2002).

This Court too, has endorsed the remedial purpose of the MPA:

In short, 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.

*Electrical and Magneto Service Co, Inc. v. AMBAC International Corp.*, 941 F.2d 660, 663 (8<sup>th</sup> Cir. 1991), quoted with approval, *High Life Sales Company v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. banc 1992). And just last year, this Court reiterated that “[r]elevant precedent consistently reinforces the plain language and spirit of the statute [the MPA] to further the ultimate objective of consumer protection.” *Gibbons v. Nuckolls*, 216 S.W.3d 667, 670 (Mo. banc 2007).

The Eastern District here failed to construe the MPA liberally in favor of consumer protection despite its historical recognition of this principle. That court had previously recognized that section 407.020 is written so as to “give broad scope to the meaning of the statute and to prevent evasion because of overly meticulous definitions.” *Webster v. Areaco*, 756 S.W.2d 633, 635 (Mo.App. E.D. 1988) (“Areaco”). Here, the court ignored its own interpretation by delving deeply into the merits of Defendant’s affirmative common law defenses and Plaintiff’s responses to those defenses instead of determining simply whether the petition set forth a claim that “fair dealing has been violated.” *Id.* (citing *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362

(Mo.App. W.D. 1973). The result reached by the court cannot be reconciled with the legislative intent of the MPA.

The court's failure to properly construe the MPA is particularly troublesome given the procedural posture of the case: a review of the trial court's granting of a motion to dismiss.<sup>2</sup> That is, the court had before it no evidence – it only had the parties' pleadings. The court acknowledged that “a motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition.” Opinion at page 3 (citing *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. banc 2007)). And it acknowledged that its review of the granting of a motion to dismiss requires acceptance of “all properly pleaded facts as true” and construction of all allegations “favorably to the pleader,” giving the pleadings “their broadest intendment.” Opinion at page 3 (citing *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003) *et al.*). But then the court turned almost immediately to – and focused almost solely on – the merits of the Defendant's affirmative defenses.

As a preliminary matter, the court failed to identify where in their amended petition the Plaintiffs admitted any “knowledge” that they were paying the channel guide charge. The inference to which the Plaintiffs were entitled, at a minimum, is that they

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<sup>2</sup> The court noted that its review of dismissal for failure to state a claim is *de novo*. Opinion at page 3 (citing *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 768 (Mo. banc 2007)).

were not aware of the charge or its purpose at the time they paid the Defendant's bills. An affirmative defense may only be the basis for dismissal if the pleadings actually contain the facts necessary to support that defense. *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo banc 1995) ("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."). Even if the voluntary payment doctrine were an appropriate defense to liability under the MPA, the averments in the petition were ambiguous. Neither the court of appeals nor the district court was in a position to weigh Defendant's affirmative defense or Plaintiffs' response to that defense without consideration of further evidence.

**II. The Voluntary Payment Doctrine is inapplicable to a claim brought under the MPA**

The Court's divergence from thirty years of case law analyzing MPA claims is best evidenced in its specific holding that:

Plaintiffs have not demonstrated that the public policy behind the MMPA would preclude the voluntary payment doctrine from being used as a defense to prevent a consumer who has waived his or her rights by voluntary payment from repudiating his or her prior payments and recovering them back in a private damage action under the MMPA.

Opinion at page 6. The public policy behind the MPA, as construed by numerous decisions by this Court and the Court of Appeals, do not support this approach to analyzing the Plaintiffs' claims.

Missouri courts have repeatedly rebuffed efforts by defendants to raise common law principles to avoid liability under the MPA. In *Areaco*, for example, the court rejected efforts to claim, under the common law doctrine of merger, that a consumer's contract and subsequent disclosures cured earlier statements made during a sales presentation. 756 S.W.2d at 636. Likewise, it held, a consumer is not limited to the "four corners" of a contract under the common law parol evidence rule, but may present evidence of the entirety of communications with the merchant: "If such misrepresentation or deceptions are made, the statute has been violated whether or not the final sales papers contain no misrepresentation or even correct the prior misrepresentation." *Id.* In *Gibbons*, last year, this Court read the MPA to reject the assertion that consumers could only claim relief from the merchant that sold the merchandise to them, and not a merchant up the stream of commerce that had engaged in the underlying activity that injured the consumer, thereby clarifying that the common law principle of privity was inapplicable to an MPA action. 216 S.W.3d 667, 670. Thus, Missouri courts have distinguished the cause of action under the MPA from common law actions and their corresponding defenses.

The legislature's passage of section 407.200 authorizing consumers to keep without obligation any unsolicited merchandise further illustrates the MPA's purpose to move beyond the common law for the protection of consumers.

Additionally, pursuant to section 407.145 and chapter 536, the attorney general has promulgated regulations to further carry out the intent of the MPA, and these rules have the force and effect of law. *Missouri National Education Association v. Missouri State Board of Mediation*, 695, S.W.2d 894, 897 (Mo. 1985). The attorney general's interpretive rules have been accepted and used by this Court and the Court of Appeals. *See, e.g., Hess v. Chase Manhattan Bank, USA, NA*, 220 S.W.3d 758 (Mo banc 2007); *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828 (Mo. App. E.D. 2000); *State ex rel. Nixon v. Polley*, 2 S.W.3d 887 (Mo. App. W.D. 1999).

In particular those interpretive rules appropriately define the terms used in section 407.020.1 more broadly than they were understood under common law. For example, this Court in *Hess* observed that the practice of omitting material fact, proscribed by section 407.020.1, defined "material" more broadly than the common law and that the statute, as interpreted by the regulations, "imposes a broader duty on sellers than the common law imposes for fraud liability." *Hess*, 220 S.W.3d at 774.

Among those rules is the clarification that under the MPA it is an unfair practice to "bill, charge, or attempt to collect payment" for merchandise that has not been ordered. 15 CSR 60-8.060. But that merely articulates the obvious: that the practice of billing consumers for merchandise they have not ordered is an unlawful practice. This

conclusion is inescapable from the MPA, its interpretive rules, and from the legislative intent relied upon in case law. To suggest that a consumer who has paid a bill that unfairly included charges for unordered merchandise cannot recover those funds ignores this precedent and thwarts the purpose of the MPA. The legislature did not intend for the voluntary payment doctrine to protect merchants that add charges to consumers' bills for merchandise they did not agree to purchase.<sup>3</sup> Such a common law principle should play no part in determining whether a billing practice is a deceptive or unfair practice under the MPA.

To be clear, this is *not* to say that a consumer who, fully knowing the existence and purpose of a charge and paying the same without protest, will necessarily be entitled to recover those payments in a private MPA action. However, it is not the voluntary payment doctrine that may prevent such recovery. Rather, section 407.025 requires a private litigant to demonstrate an “ascertainable loss ... as a result of the ...unlawful

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<sup>3</sup> The factual scenario presented in this Court's recent decision, *Finnegan v. Old Republic Title Co.*, is consistent with this reasoning: there a title company allegedly overcharged consumers for notary services in violation of statutory rates; this court re-instated the plaintiff's MPA claims to recover monies they had already paid before learning of the statutory limit and the fact they had been overcharged. 246 S.W.3d 928 (Mo. banc 2008) (reversing the decisions of the Court of Appeals, Eastern District).

practice” to bring such a claim. See, e.g., *Hess*, 220 S.W.3d at 773 (noting that a private plaintiff must prove (1) a purchase, (2) for personal, family or household purposes, (3) the suffering of an ascertainable loss, (4) as a result of unlawful conduct). Accordingly, a private plaintiff must show both ascertainable loss and that such loss was caused by unlawful conduct.<sup>4</sup> For the MPA’s private cause of action, loss caused by the unlawful conduct is required. In the pending case, the plaintiffs have alleged such loss; evidence will be required to prove how much loss may have been caused by unlawful conduct by the defendant.

Similarly, when a consumer knowingly and voluntarily accepts and pays for merchandise – in the absence of other fraudulent or deceptive conduct affecting the transaction – a defendant does not face the prospect of having to pay damages to a private litigant or making restitution under section 407.100.4 in an action brought by the Attorney General. In this respect, the equitable principle underlying the common law’s

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<sup>4</sup> The consumer must prove an “ascertainable loss” of either money or property. *Freeman Health System v. Waas*, 124 S.W.3d 504 (Mo.App. S.D. 2004) (patient who had not yet paid bill could not prove “ascertainable loss”); *Jackson v. Charlie’s Chevrolet, Inc.*, 664 S.W.2d 675, 676 (Mo.App. E.D. 1984). Additionally, the failure to prove a causal link between a consumer’s injury and conduct declared unlawful by section 407.020 is fatal. *Owen v. General Motors Corp.*, 2008 WL 2756547 at \*7 (8<sup>th</sup> Cir. (Mo.)); *Willard v. Bic Corporation*, 788 F.Supp. 1059, 1070 (W.D. MO 1991).

voluntary payment doctrine is not entirely absent – the requirement of causation for restitution under the MPA injects an appropriate limitation on consumer recovery for unlawful conduct.

The Attorney General’s enforcement action under section 407.100 of the MPA is not dependent upon whether any damages at all have accrued. *E.g., Areaco, supra*, 756 S.W.2d at 635-636.<sup>5</sup> But a merchant that has adopted the practice of charging for unordered merchandise does not escape all sanctions if consumers “catch on” to that practice, continue receiving and paying for the merchandise, and thus cannot prove “ascertainable loss” by virtue of it. The MPA does not excuse unlawful conduct on the basis that it resulted in no damage or only *de minimis* harm.

The Attorney General may still pursue an action for injunctive relief, civil penalties and other relief under Section 407.100. *Id.* Indeed, once a violation of the MPA is established, the harm to the public is presumed, and an injunction against the conduct may issue. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837-838 (Mo.App. E.D. 2000); *State ex rel. Webster v. Milbourn*, 759 S.W.2d 862, 864 (Mo.App.

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<sup>5</sup> *See, also, Jackson v. Charlie’s Chevrolet, Inc.*, 664 S.W.2d 675, 676, 677 (Mo.App. E.D. 1984) (“The principal thrust of Chapter 407 is directed toward authorizing the Attorney General to enjoin those who sell or attempt to sell merchandise from using unlawful practices. A private cause of action is given only to one who purchases and suffers damage.”)

E.D. 1988). Nothing in the plain language of the MPA or the court decisions interpreting it supports the application of the voluntary payment doctrine to excuse what the MPA defines as an unlawful practice.

## CONCLUSION

For the reasons stated above, the Attorney General urges this Court to reject the Eastern District's reasoning and conclusion in *Huch and Carstens v. Charter* and remand the case to the circuit court for proper application of the MPA to Plaintiffs' claims.

Respectfully Submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

JAMES R. LAYTON  
Missouri Bar No. 45631  
james.layton@ago.mo.gov  
State Solicitor

PETER LYSKOWSKI  
Missouri Bar No. 52856  
peter.lyskowski@ago.mo.gov  
Assistant Attorney General

P.O. Box 899  
Jefferson City, MO 65102  
(573) 751-3321(Telephone)  
(573) 751-0774 (Facsimile)

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This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 2,900 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief further complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point Times New Roman. In compliance with Rule 84.06(g) the diskette provided has been scanned for viruses and is virus free.

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2008, I served the following one typewritten copy and one diskette copy of the foregoing brief via United States Mail, postage prepaid, to:

**SIMON PASSANANTE, P.C.**

Eric Vieth  
Amy Collignon Gunn  
John E. Campbell  
701 Market St., Suite 1450  
St. Louis, MO 63101-1886  
Telephone: 314-241-2929  
Facsimile: 314-241-2029

**ATTORNEYS FOR APPELLANTS**

**THOMPSON COBURN, LLP**

James W. Erwin  
Roman P. Wuller  
Robert J. Wagner  
One U.S. Bank Plaza  
St. Louis, MO 63101-1693  
Telephone: 314-552-6000  
Facsimile: 314-552-7000

**ATTORNEYS FOR RESPONDENTS**

\_\_\_\_\_  
Peter Lyskowski