Huch v. Charter Communications Inc.: Consumer Prey, Corporate Predators and a Call for the Death of the Voluntary Payment Doctrine Defense

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“[These laws come] from an order of men, whose interest is never exactly the same of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.”

–Adam Smith, *Wealth of Nations*¹

“The nature of any human being, certainly anyone on Wall Street, is the better deal you give the customer, the worse deal it is for you.”

–Bernie Madoff²

### I. Introduction

If a cashier gives you too much change at the store, you give it back. That is what most of our parents taught us; they taught us it was the right things to do. But our parents had never heard of the voluntary payment doctrine. The voluntary payment doctrine is an ancient ‘equitable defense’³ that leaves most attorneys scratching their head, and until recently, posed an imminent threat of gutting many consumer protection laws by allowing companies to retain money from unsuspecting consumers who paid due to the companies’ mistakes or, in some cases, outright fraud.

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³ *Bilbie v. Lumley*, (1802) 2 East 469 (102 ER 448).
The voluntary payment doctrine ("VPD") states that, absent fraud or duress, one who makes a voluntary payment with full knowledge of all material facts is not entitled to recover the payment. This sounds benign enough; however, in recent times, some companies have attempted to distort the VPD into a rule that allows companies to reap tremendous windfalls by collecting illegal payments and then arguing that those who paid should be barred from recovering their money. This, "it isn’t cheating unless you get caught” rule turned our parents’ heuristic about doing the right thing on its head. In the VPD world that companies sought to create, if the clerk gave you too much money back, you kept it. And when the store came knocking for the refund, you told them that since they had given too much change with full knowledge of all the facts and in the absence of fraud or duress, you were allowed to keep the money you did not deserve. Companies seized upon the VPD and argued that it applied even if the company took affirmative steps to induce payments by a consumer who was not obligated to make such payments. This doctrine was applied even if the company engaged in consumer fraud. As a result, the VPD posed a very real threat to the effectiveness of consumer fraud acts.

Although the justification for the VPD was equity and the rule had roots reaching back to law from almost 400 years ago, it threatened to become a tool of inequity. This rise of the VPD, corresponding with an era marked by corporate fraud, posed serious concerns for the orderly functioning of the marketplace. Although the VPD had become largely extinct in the mid-twentieth century, courts began to examine the VPD anew in

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4 See, e.g., Claflin v. McDonough, 33 Mo. 412 (Mo. 1863).
7 Bilbie, 2 East 469 (102 ER 448).
the 1990s and early 2000s, and based on those decisions, the VPD showed some signs of rising from the proverbial ashes. The trend began when a string of decisions relating to cable companies recognized the VPD as a defense to excessive late fees. Multiple State Supreme Courts held that the doctrine could serve as a bar to recovery in at least some cases. Simultaneously, a host of other courts reiterated that the VPD was a viable defense, perhaps even to consumer class actions.

The wave of decisions in favor of businesses, based on the VPD, reached full swell in *Huch v. Charter Communications* [10] ("Huch I"), in which the Eastern District Court of Appeal for Missouri held that the VPD allowed Charter, a cable company, to keep charges that it collected for merchandise people never requested. The procedural posture of the case was especially interesting: the trial court granted a motion to dismiss. This meant that, even though the trial court took the plaintiff’s allegations that Charter illegally billed for unsolicited merchandise in violation of specific Missouri laws prohibiting such behavior as true, the VPD still served as a complete bar to recovery. The affirmation by the appellate court was immediately cited by defendants as a reason to throw any number of claims out of court. [11] The decision meant that even in the face of fraud and illegal profit, consumers could lose the right to recover if they did not detect the fraud and refuse to pay immediately. For a bleak moment, it appeared the VPD would rise as a justification for corporate theft and negligence precisely when consumer remedies were most needed to help rebuilding waning consumer confidence, and in doing so, would become a powerful defense to many consumer fraud claims regarding tacking.

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[8] Supra, note 5.
[9] Id.
on of charges, cramming, illegal renewal and a host of other forms of consumer fraud. If the story ended with *Huch I*, this would be a bleak article for those who advocate for vigorous consumer protection.

In *Huch v. Charter Communications*¹² (“*Huch II*”), however, the Missouri Supreme Court addressed and fully discussed the collision between the VPD and modern consumer fraud statutes, reverseing the lower court. The Court held that the VPD does not apply to Missouri’s Unfair and Deceptive Acts and Practices (“UDAP”) statute, known as the Missouri Merchandising Practices Act.¹³ This Missouri Supreme Court decision is seminal and is already being cited by subsequent courts around the country.¹⁴ The future of the VPD is not fully written, however. This article argues for the adoption of *Huch II* reasoning throughout the country, allowing for the continued eradication of the VPD from modern consumer jurisprudence.

In Section II, this article addresses the history of the VPD, including its roots in England. Section III discusses the likely trajectory of the VPD both in the United States and internationally, and Section IV addresses the public policy concerns that require that the VPD be fully eliminated from consumer jurisprudence, thereby fully adopting the legal thinking of some past progressive courts, who wrote:

> “Such a rule . . . could become a mighty instrument of evil, and might . . . be used to defend against all manner of thefts and larceny and the illegal frittering away of the public money.”¹⁵

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¹² 290 S.W.3d 721 (Mo. 2009).
¹³ R.S.Mo. §§ 407.010 et seq.
¹⁵ *Lamar Tp. v. Lamar*, 169 S.W. 12, 16 (Mo. 1914) (citing *Sheldon v. S. Sch. Dist. in W. Soc. of Suffield*, 24 Conn. 88 (Conn. 1855); *Baltimore v. Lefferman*, 4 Gill 425 (Md. 1846); *Preston v. Boston*, 12 Pick. 7, 13 (Mass. 1831); *Norton v. Marden*, 15 Me. 45 (1838); *Clarke v. Dutcher*, 9 Cow. 674 (N.Y. Sup. Ct. 1824)).
II. The History of the Voluntary Payment Doctrine

A. England

The VPD is a doctrine that was inherited from England early in America’s history. It is closely related to the mistake of law doctrine, and in many states today the VPD is only available as a defense where the mistake which induced payment was one of law and not of fact. A mistake of law occurs when a party is “ignoran[t] of a rule or principle of law” or reaches an “erroneous conclusion as to the operation of the law upon a known set of facts.”

In English law traceable to 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*. It was not until 1802, in *Bilbie v. Lumley*, that Lord Ellenborough indicated that a mistake of law which induced payment would not allow for the recovery of money paid with full knowledge of all facts. This maxim was imported from the England’s criminal law, where a defendant’s ignorance of the illegality of his conduct was no defense. Lord Ellenborough reasoned that a party should not be able to recover an amount paid simply because his ignorance of the law induced the payment. His concern was that parties who

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17 *Claflin*, 33 Mo. 412.
20 *Bilbie*, 2 East 469 (102 ER 414).
21 The rule is often stated as follows: *ignorantia legis non excusat*, or “ignorance of the law is no excuse.” See, e.g., *Beck v. Thompson*, 4 H. & J. 531, WL 944 (Md. 1819) (citing *Bilbie*, 2 East 469; *Stevens v. Lynch*, 12 East 38 (1810)).
have made payments will seek the courts’ assistance in recovering those payments once they learn that there was no legal obligation to pay. In Lord Ellenborough’s words, “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.”

*Bilbie* proved to be a turning point. The English cases which followed *Bilbie* continued to allow recovery of payments made under mistake of fact, and where payment was induced by fraud or duress, but precluded recovery if the mistake was one of law. For example, in *Kelly v. Solari* (1841) the court held that where the plaintiff, a director of a life insurance company, made payment on the policy under a mistake of fact—agents of the insurance company had forgotten that the defendant’s policy had lapsed because a premium had gone unpaid—the plaintiff was entitled to recover. The court took a firm stance, stating that “it is in every case unconscientious to retain money paid under a mistake of fact.”

**B. The United States**

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. In Missouri, for example, the VPD emerged during the Civil War in the case of...
Claflin v. McDonough in 1863. In Claflin, the plaintiffs 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. The Missouri Supreme Court articulated the VPD as follows:

[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.

Based on this articulation, the Court held that the plaintiffs were barred from recovering the overpayment.

Although decisions like Claflin were not uncommon, even during this early period, the VPD was met with opposition in some states. For example, Kentucky and Connecticut rejected the rule from the outset. Connecticut reasoned that any time one party obtained money that it was not owed, that money should be disgorged. The Supreme Court of Connecticut held in Northrup v. Graves:

[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.

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27 Claflin, 33 Mo. at 412.
28 Id.
29 Id.
30 Id.
31 Underwood v. Brockman, 39 Ky. (4 Dana) 309 (1836); Northrup v. Graves, 19 Conn. 548 (1849).
32 Northrup, 19 Conn. at 548.
33 Id. at 5 [emphasis in the original]. The Northrup court was generally concerned that the distinction between a mistake of law and a mistake of fact promoted form over substance. 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.
Connecticut’s outright rejection was the exception, not the rule. Many states and courts adopted the VPD, allowing recovering only when there was a mistake of fact, fraud, or duress.\textsuperscript{34} There is evidence, however, that courts routinely wrestled with the day-to-day inequities the VPD could create. In fact, courts became so adept in promulgating many exceptions and qualifications that some observers noted that “[o]ne more often encounters the ‘luxuriant undergrowth of exceptions to the general rule’ than application of the rule itself.”\textsuperscript{35}

1. Mistake of Fact

The line between a mistake of law and mistake of fact is a blurry one and the distinction is often painfully difficult to elucidate.\textsuperscript{36} As discussed above, a mistake on the part of the payor as to a fact material to the payment will preclude the voluntary-payment defense,\textsuperscript{37} since such payment is not truly made voluntarily.\textsuperscript{38} A mistake of fact occurs where a party possesses “unconscious ignorance or forgetfulness of” a material fact.\textsuperscript{39}

For example, in \textit{Aetna Life Ins. Co. v. Nix}, the defendant-policy holder misrepresented to the plaintiff-insurance company that her husband’s injury occurred while he was working, when in fact he had fallen off a horse on personal time.\textsuperscript{40} Had the husband’s injury arisen out of employment, his medical expenses would have been

\begin{itemize}
  \item \textit{Lewis v. Cooper}, 3 Tenn. (Cooke) 467 (1814);
  \textit{City of Baltimore v. Lefferman}, 4 Gill 425, 1846 WL 2849 (Md. 1846);
  \textit{Jones v. Watkins}, 1 Stew. 81, 1827 WL 443 (Ala. 1827);
  \item \textit{Claflin}, 33 Mo. 412.
  \item \textit{Wheeler v. Bd. of Comm’rs}, 91 N.W. 890 (Minn. 1902).
  \item \textit{Kowalke v. Milwaukee Elec. Ry. & Light Co.}, 79 N.W.2d 762 (Wis. 1899).
\end{itemize}
covered under defendant and plaintiff’s health insurance contract. The insurance company paid out on the policy and then brought suit to recover the payments, claiming it was mistaken as to whether the defendant’s husband was injured within the scope of employment, and thus whether payment was owed under the contract. Consistent with the VPD, the court held that because the insurance company’s payments were induced by its mistaken belief about the circumstances of the husband’s injury, the insurance company was entitled to recover. Similar to the Nix case, taxes paid under a mistake of fact have often been held recoverable by the taxpayer.

2. Fraud

A look at early American cases demonstrates that the VPD was not intended to allow intentional wrongdoers to profit from their illegal action. The fraud exception was almost immediately recognized as being a broad protection which would apply even where no common law fraud had occurred. Indeed, 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, the Missouri Supreme 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

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41 Id.
42 Id. at 1252-1253.
43 Id. at 1253.
44 Wheeler, 91 N.W. at 890.
45 Supra note 25.
46 Id.
47 National Enameling & Stamping Co. v. St. Louis, 40 S.W.2d 593, 595 (Mo. 1931)
money on a demand not legally enforceable against him, he can not recover it back.\textsuperscript{48}

Many states followed the “fraud or improper” conduct formulation.\textsuperscript{49} Thus, the traditional formulation of the VPD limited its application to situations in which there is no improper conduct on the part of the payee.\textsuperscript{50} Therefore, a payor-plaintiff was not necessarily required to have a colorable claim for common law fraud against the payee-defendant in order to come within the protection of this exception.\textsuperscript{51} This rule, as discussed herein, was called into question in \textit{Huch I}, in which the Court held that claims of consumer fraud were not sufficient to defeat the VPD defense.\textsuperscript{52}

3. Duress

A payor who is under compulsion or duress at the time of payment may recover such payment from the payee if he was the source of the duress.\textsuperscript{53} Duress traditionally consists of a threat by a party to do something which he has no legal right to do.\textsuperscript{54} Courts have held that duress undermines the voluntary nature of the payment.\textsuperscript{55} The decisions in many of these early cases focused on the unequal bargaining power between the two

\begin{footnotesize}
\textsuperscript{48} National Enameling at 595.  
\textsuperscript{50} See, e.g., \textit{Pingree v. Mutual Gas Co.}, 65 N.W. 6, 7 (Mich. 1895) (holding that “artifice, fraud or deception” are exceptions).  
\textsuperscript{51} State \textit{ex rel. Webster v. Areaco Inv. Co.}, 756 S.W.2d 633, 635 (“It is not necessary in order to establish “unlawful practice” [under Missouri’s Merchandising Practices Act] to prove the elements of common law fraud.”). 
\textsuperscript{52} Huch \textit{v. Charter Communications, Inc.}, 2007 WL 5086331at * 1 (Mo. Cir. May 21, 2007).  
\end{footnotesize}
parties and the fact that retaining monies paid under duress to violate basic public policy. By and large, the degree of coercion necessary to prevent the application of the voluntary payment defense decreased over time. In other words, there is more protection afforded to alleged victims of duress today than in the past. Indeed, many courts did not take long to expand the duress exception beyond threats of physical harm to include moral duress, legal duress, which can be less than the threat of criminal prosecution, and business/economic duress. For example, in *Albany v. Abbott*, the New Hampshire Supreme Court held that because “the law properly regards the lender on usury the oppressor, and the borrower as the oppressed, and therefore will not treat the payment of usurious interest as a voluntary payment,” the borrower in usury is entitled to recover the illegal interest.

## C. Modern Trends

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56 See Rees, 164 Ill.App. at *4 (explaining that moral duress may involve one party taking advantage of “extreme necessities or weakness of another”).
57 Id.
58 Id.
59 See Restatement (Second) of Contracts § 176 cmt. a (1981) (explaining that “Courts first recognized as improper threats of physical violence and later included wrongful seizure or detention of goods”).
61 See Forrest v. New York, 13 Abb.Pr. 350 (N.Y.Sup. 1861); Cox v. Welcher, 36 N.W. 69 (Mich. 1888); Maysville v. Melton, 42 S.W. 754, 755 (Ky. App. 1897); Mississippi Valley Trust Co. v. Begley, 252 S.W. 76 (Mo. banc 1923);
62 An early Michigan case, for example, held that taxpayer who paid an illegal tax after a lien was placed on his land was under legal duress, and therefore entitled to recover the amount of tax paid. See Newberry v. Detroit, 150 N.W. 838, 839-840 (Mich. 1915).
64 *Albany*, 1981 WL 4691 at *2.
Despite the general trend towards more exceptions and less frequent application of the VPD during most of the twentieth century, the VPD remained a sometimes valid and viable defense, even if its parameters were somewhat unclear.

By the early 1990’s the VPD had not yet been tested against the increasingly ubiquitous consumer fraud statutes and consumer class actions. In its first outings it fared well, however, showing renewed usage and vitality when cable companies that were being sued for unfair and deceptive practices began pleading the VPD as an affirmative defense.\(^{65}\) In several cases, courts recognized the defense, and in some of the first examples in jurisprudence, entire classes of claims were swept away as a result.\(^ {66}\) Although each case had slightly different sets of facts, a common theme emerged. The cable companies asserted that the VPD barred recovery because even if the fees were illegal, the customers did not identify the fee and challenge it prior to paying. The companies argued that the ability to discover the fee, and payment in the face of at least that potential knowledge, equaled a voluntary payment with full knowledge of the facts.\(^ {67}\) Just like that, the VPD resurfaced as a renewed tool of choice for defendants who have allegedly cheated customers.\(^ {68}\) The caveat emptor tone of the court decisions signified a potential erosion of consumer rights.

In addition to the cable companies above, several other corporate defendants utilized the VPD as a defense to consumer class action claims. They too prevailed. For example, in 2006 when Ameritech, a telecommunications company, was collecting sales

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\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id.
tax that was deemed illegal and contrary to statutes, the Supreme Court of Wisconsin held that it was the customers’ fault for not inquiring about the illegal tax, and that as a result, the VPD functioned to eliminate the customer’s right to seek recovery.69 The cell phone industry followed, prevailing in a 2007 United States District Court of the Western District of Washington decision striking down a class action on extra-contractual and undisclosed surcharges in cell phone bills.70 The string of consumer defeats continued with similar holdings in New York71 and Texas.72 As a result, in the years just before Huch I, the VPD had become a staple corporate defense, a ready-made antique doctrine to that could excuse even fraudulent billing. Huch I, as discussed supra, was an extension of these decisions, holding that consumers had no recourse against even the per se illegal charges if the consumer did not discover them in the first instance, refuse to pay, and file a claim.

III. Huch v. Charter Communications, Inc. (Mo. 2009)

A. The Rise of the UDAPs

Statutory protection for consumers, in the form of Unfair and Deceptive Acts and Practices ("UDAP") provisions, started with the Federal Trade Commission Act in 1914.73 This Federal Trade Commission Act banned deceptive acts and practices and became the template for many of the state-based consumer protection statutes spanning

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69 Butcher v. Ameritech Corp., 727 N.W.2d 546 (Wis. 2006).
70 Riensche v. Cingular Wireless LLC, 2007 WL 3407137 (W.D. Wash.).
71 Spagnola v. The Chubb Corp., 2007 WL 927198 at *3 (S.D.N.Y.).
several decades including the 1960s and 1970s. The significance of the rise of these state-based UDAPs is two-fold: the original FTC act did not allow for state or private enforcements and these statutes curb the doctrine of caveat emptor establishing a level of fairness in the marketplace. By enacting these statutes, legislators sought to offer consumers broad protection from a wide range of dishonest and abusive business practices. The UDAPs tend to be guarded by courts and are drafted with broad applicability to the extent that “almost any abusive business practice aimed at consumers is arguably a UDAP violation”. Nowadays every state in the union now has some sort of legislation designed to address unfair and deceptive acts and practices.

Missouri’s UDAP is called the Missouri Merchandising Practices Act (“MMPA”). It was designed to protect consumers and to preserve fundamental honesty, fair play, and right dealings in public transactions. Enacted in 1967 as a shield to predatory business practices and to supplement to the preexisting common-law fraud

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75 National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (7th Ed. 2008).
76 Id. at 2; See id. at 115 (stating that “deception, unfairness, and unconscionability are broad and evolving standards that arguably apply to almost every consumer abuse. Consequently, consumer attorneys should always consider the applicability of a UDAP claim when a consumer complains of merchant, creditor, landlord, or other marketplace misconduct”). For example, the New York prohibits “deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service…” N.Y. GEN. BUS. LAW § 349. See also Indoor Billboard Washington, Inc. v. Integra Telecom of Washington, Inc., 170 P.3d 10, 18 (construing Washington UDAP statute as prohibiting acts and practices that have the mere “capacity” to deceive, and rejecting any intent requirement); State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635 (Mo. App. 1988) (“It is the defendant’s conduct, not his intent, which determines whether a violation has occurred.”).
77 Supra , note 75 at 1033-1054.
cause of action, the MMPA is broad in purpose, language, and application. As the Amicus brief asserted in *Huch II*, the definition of an unfair practice as defined in the statute and regulations has been described by the Missouri Supreme Court as “all-encompassing and exceedingly broad. For better or worse, the literal words cover every practice imaginable and all unfairness to whatever degree.”

**B. U.S. Trends on the Eve of *Huch I***

Some statutes explicitly eliminate the voluntary payment doctrine as a defense to claims brought under them. In other words, the payor is provided relief even if the payment was made voluntarily and with full knowledge of all the facts. Even in the absence of explicit statutory preclusion of the VPD, however, courts have often found the defense to be incompatible with the broad protection intended to be provided by consumer protection statutes and have refused to allow it as a defense. One example is the Supreme Court of Washington stating the “voluntary payment doctrine is inappropriate as an affirmative defense in the CPA (Consumer Protection Act) context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.” Additionally, both Tennessee’s appellate courts and the Indiana Supreme Court have similar holdings declaring that the VPD will not bar consumer claims against businesses.

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80 Id.
82 See, e.g., TEX. FIN. CODE ANN. § 305.001(a) (providing that “a creditor who contracts for, charges, or receives interest that is greater than the amount authorized by this subtitle in connection with a transaction for personal, family, or household use is liable to the obligor”).
83 See, e.g., *MacDonell v. PHH Mortgage Co.*, 846 N.Y.S.2d 223, 224 (voluntary payment defense does not bar statutory causes of action in New York); *Indoor Billboard*, 170 P.3d at 24 (holding that “the voluntary payment doctrine is inappropriate as an affirmative defense” to Washington’s Consumer Protection Act).
that destroy marketplace confidence and operate as predators in violation of UDAP statutes.

In *Pratt v. Smart Corporation*, a patient brought a claim to recover payment under the Medical Records Act for excessive fees paid for obtaining medical records from a copy company and the company raised the VPD as an affirmative defense. The Tennessee Court of Appeals stated definitively that “the State has an interest in transactions that involve violations of statutorily-defined public policy, and, generally speaking, in such situations, the voluntary payment rule will not be applicable.” The court continued that “where public policy has been established by a legislative enactment, a transaction that is violative of that policy is subject to inquiry even though it may be fully consummated.” The court noted that in their case law the VPD “does not come into play in situations involving a transaction that violates public policy,” thus reversing the trial court’s judgment of summary judgment and dismantling the VPD on such claims. New York, Illinois, and Indiana followed Tennessee’s trend, with the latter stating that “we do not find it appropriate as a matter of policy for us to favor a private enterprise over private individuals” thereby stripping the VPD as a defense regarding a class action against a cable company for excessive late fees.

C. Facts

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87 *Pratt v. Smart Corporation*, 968 S.W.2d 868 (TN Ct. App. 1998)
88 Id.
89 Id.
90 *Pratt v. Smart Corporation*, 968 S.W.2d 868, 872 (TN Ct. App. 1998)
91 Id.
93 *Brown v. SBC Communications, Inc.*, 2007 WL 684133 (S.D.Ill.).
95 Id. at 892.
In a Missouri-based class action suit, Plaintiffs James Huch and Ryan Carstens alleged that the defendant cable company, Charter Communications Inc., committed a deceptive and unfair business practice by sending an unsolicited channel guide to its customers and then charging for the guide without notifying the customers that it had been added to their bill. Plaintiffs brought suit under the MMPA, Mo. Rev. Stat. § 407.025.2, which enables consumers who have suffered a loss stemming from an unlawful, unfair, or unethical business practice (as defined in Mo. Rev. Stat. § 407.200) which affected their purchase or lease of merchandise. Specifically Plaintiffs asserted that Charter had failed to give an option to customers to not receive the guide despite it not being included in the monthly rate, sent the guide unsolicited to customers, failed to disclose the charge as they were added to the monthly bill, and charged each customer $3 every month for this merchandise. In support of their allegations, Plaintiffs’ cited to two sources of law that made the sending of unsolicited merchandise a per se illegal act. Plaintiffs sought class certification, damages, and an injunction prohibiting Defendant from engaging in further unfair and deceptive trade practices.

D. Procedural History

At the trial court level, Defendant Charter moved to dismiss the claim citing the VPD as prohibiting any refund of money to Plaintiffs and Class. The trial court agreed with the Defendant, granting the motion and dismissing the claim with prejudice on May 21, 2007. In its rationale, the trial court stated that Plaintiffs knew or should have

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96 *Huch*, 290 S.W.3d at 721.
97 *Id.* at 723.
98 *Id.*
100 *Id.*
101 *Id.*
102 2008 WL 1721868 at *1 (Mo.App.E.D.)
known of the additional charges and, without evidence of mistake or duress, the doctrine of VPD precluded recovery. 103

On April 15, 2008, the Missouri Court of Appeals affirmed the motion to dismiss the claim in an opinion that outlined some of the historic reasons for the VPD. 104 The Court of Appeals stated that when a customer pays a fee, even if it is unfair or improper, payment operates as a waiver to any suit, claim, and recovery for a plaintiff class. 105 Despite Plaintiffs’ citations to cases from other states in which the VPD affirmative defense was found to be against public policy, the appellate court found those and many of the Missouri case cited in the brief to be not “on point” and “lacking merit.” 106 The court went further, asserting that the statutory framework of the MMPA to allowed affirmative defenses such as VPD. The Court cited a 1923 Missouri Supreme Court case that preceded the MMPA by 40 years. 107 Finally, the Court of Appeals held that despite Plaintiffs’ arguments that the alleged conduct constituted consumer fraud, thereby qualifying under the fraud exception to the VPD, the court held that the plaintiffs had not properly pled the elements of common law fraud. The court’s implication was clear: consumer fraud was not an exception to the VPD. The court concluded that since the charges were in Plaintiffs’ bill, they knew or should have known. Therefore due to the VPD, the claim was held to be precluded and the trial court was affirmed. 108 Plaintiffs petitioned for review and the Missouri Supreme Court granted transfer on June 24, 2008. 109

103 Id.
104 Id.
105 Id. at *5.
106 Id. at *5-6.
107 2008 WL 1721868 at *8.
108 Id. at *1.
109 Huch, 290 S.W.3d at 722.
E. Protect the Prey not the Predators: the Missouri Supreme Court’s Ruling

The Missouri Supreme Court, en banc, held that the VPD was not an available affirmative defense to Defendant’s alleged violations of the MPA. The Court reversed the trial court decision on the grounds of public policy and legislative intent.\textsuperscript{110} The Court based its rationale largely on the legislative intent, scope, and protections of the MMPA in disavowing certain legal principles such as waiver and the VPD.\textsuperscript{111}

Regarding legislative intent the Court stated that § 404.020 of the MMPA was intended to “supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions” thereby enacted to protect consumers in modern commerce transactions in a paternalistic fashion.\textsuperscript{112} The Court stated that the very nature of the MMPA and its language are clear and to be construed broadly. It held that to effectuate the protections prescribed in the statute certain legal principles are not available as defenses against consumer actions, including the VPD.\textsuperscript{113} Since the MMPA was designed to regulate consumer transactions in which businesses have superior access to resources, information, and remedies the waiver-based common law VPD defense stands in direct conflict with legislative intent of Missouri.\textsuperscript{114}

The MMPA was drafted and passed to provide clear relief to consumers. In keeping with this legislative intent various legal remedies had already been held by the Court to not be available under the MMPA prior to \textit{Huch}, establishing a clear trend towards limiting affirmative defenses to MMPA-based claims to protect injured

\begin{footnotesize}
\textsuperscript{110} Id. at 727. \\
\textsuperscript{111} Id. \\
\textsuperscript{112} Id. at 724 (quoting \textit{State ex rel. Danforth v. Independence Dodge, Inc.}, 494 S.W.2d 362, 368 (Mo.App.1973)). \\
\textsuperscript{113} Id. at 725-726. \\
\textsuperscript{114} \textit{Huch}, 290 S.W.3d at 726-727. \\
\end{footnotesize}
consumers. In 1991 the Eighth Circuit held in *Electrical and Magneto Service Co. v. AMBAC International Corp.* that the public policy behind the MMPA is “so strong that parties will not be allowed to waive its benefits” certifying the position that certain legal remedies are not available to protect consumers. One year later in *High Life Sales Co. v. Brown-Forman Corp.*, the Court held that enforcing a contract’s forum selection clause was unreasonable and based its holding on a vital state interest in protecting local liquor distributors from questionable and unjustified termination of their franchises. In addition, the Court held in *Whitney v. Alltel Communications Inc.* that an arbitration clause is unconscionable and unenforceable when clashing with unfair practices described in the MMPA and not even estoppel is allowed as a defense to fraudulent conduct. These cases reinforce the position that the MMPA is protectionist for classes of consumers and that waiver under these claims is against state policy, state law, and renders all Missouri statutory MMPA law meaningless.

In response to the Defendant’s arguments of the vitality and preeminence of the VPD in Missouri, the Court pointed out that in *Eisel v. Midwest BankCentre*, the Court held that the VPD is “not applicable in all situations.” In *Eisel*, the consumers paid fees for document preparation that was found to be an unauthorized practice of law and the VPD was held to be unavailable to the defendant. The Court specifically precluded the use of the VPD since the type of unfair and inequitable business practices outlined in the

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115 Id.
116 Id. at 725-726.
117 823 S.W.2d 493, 498 (Mo. en banc 1992).
118 Id. at 725.
119 Id. at 726-727.
120 *Huch*, 290 S.W.3d at 726-727.
121 230 S.W.3d 335, 339 (Mo. en banc 2007).
122 Id. at 727.
MMPA are not subject to “waiver, consent or lack of objection by the victim.”123 The Court held that allowing the VPD to be used by corporate defendants profanely distributes burden onto the least powerful and knowledgeable party and erodes very protections the statute in question created for consumers.124

In applying these cases and the legislative intent of the MMPA, the Missouri Supreme Court in *Hutch* found that Defendant’s practices of sending the unsolicited program guide to Plaintiffs and then charging them for it without notice, disclosure, or authorization, if proven, is an unfair practice.125 The fact that the Plaintiffs paid for the services under the VPD does not preclude the suit and any usage of the VPD in a consumer class action under the MMPA is against public policy.126 In addition, the Court held that Defendant’s use of the VPD as an affirmative defense was an attempt to undermine the very fabric of the consumer protection statute and defied clear Missouri legislative intent to protect both the consumers and business marketplace from unfair practices.127

IV. Doomed: The Impact of *Huch* & the Future of the VPD

Among the modern marketplace in which bargaining power is institutionally and systematically slanted towards corporations and against the consumer, amid decades of financial fraud, and in the face of rising protections by consumer statutes, the VPD is

123 *Id.*
124 *Id.*
125 *Id.*
126 *Huch*, 290 S.W.3d at 727.
127 *Id.*
simply a relic. Global trends, U.S. state court decisions, and recent corporate fraud scandals all argue for an end to the VPD and for the preservation of consumer rights.

**A. United Kingdom & Common Law World Abolishes the VPD**

The extermination of the VPD has already begun. In the very country that spawned the VPD two centuries ago, the VPD has been abolished as improper for modern jurisprudence. In the 1999 landmark decision *Kleinwort v. Lincoln City Council*, the House of Lords in the United Kingdom held that “the mistake of law (VPD) can no longer be allowed to survive.” In *Kleinwort*, appellate banks had made payments to local authorities using interest swap transactions. Both parties presumed these were proper transactions, but they were later voided by the House of Lords on ultra vires grounds. Lord Goff established a three prong rationale for destroying the two hundred year old VPD doctrine: 1) the VPD encourages unjust enrichment, 2) mistake of law and mistake of fact are no longer recognized and significant distinctions, and 3) judicial manipulation of the VPD to ensure variable results has left both the courts and litigants in a stream of unpredictable madness. Lord Berwick simply found the VPD to be “indefensible” to litigants of modest means and limited legal knowledge noting that the very reason there is a cause of action for unjust enrichment is because “[the] law, unlike facts, can change.” The House of Lords concluded that the long history of the VPD had run its course and that the “rule cannot survive in a [modern] rubric of the law.”

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128 *Kleinwort v. Lincoln City Council*, 2 A.C. 349 (H.L.).
129 *Id.*
130 *Id.*
131 *Kleinwort v. Lincoln City Council*, 2 A.C. at 361.
132 *Id.* at 371.
133 *Id.* at 361.
Around the world, the VPD has already met its fate in over 60% of common law countries.\textsuperscript{134} In its \textit{Kleinwort} opinion, the House of Lords noted that several European countries including Germany, France, and Italy had already done away with their form of the VPD.\textsuperscript{135} Despite the common fear of floodgate litigation if the VPD is lifted, in those three European countries, the House of Lords noted there had been no flood or disruption of judicial economy.\textsuperscript{136} Canada, Australia, South Africa, and Scotland abrogated the VPD judicially and New Zealand abolished it by statute.\textsuperscript{137} In its article “Mistake of Law Rule Abrogated,” the \textit{Hong Kong Lawyer} law journal stated that soon the Hong Kong courts would follow the trend of eliminating the VPD, asserting that “[a]fter all, it has never been disputed that the default rules of restitution can be superseded by voluntary agreement.”\textsuperscript{138} Together, there is a growing global consensus that the VPD doctrine has truly become an 18\textsuperscript{th} century theory that has no place and purpose in 21\textsuperscript{st} century global jurisprudence.

\section*{B. Current U.S. Status of the VPD}

Prior to \textit{Huch I}, many states had either never allowed the VPD to come into existence or judicially overruled its usage. As the 20\textsuperscript{th} century came to a close, so did the VPD in various courts across the nation\textsuperscript{139} providing the rationale,\textsuperscript{140} policy,\textsuperscript{141} and

\begin{thebibliography}{99}
\item\textsuperscript{134} Supra, note 73;
\item\textsuperscript{135} Kleinwort, 2 A.C. at 361.
\item\textsuperscript{136} Id.
\item\textsuperscript{138} Lusina Ho, \textit{Mistake of Law Rule Abrogated}, February HONG KONG LAWYER 34-35 (1999).
\item\textsuperscript{139} BMG Direct Marketing, Inc. v. Peake, 178 S.W.3d 763, 771 (Tex. 2005); Jeffrey A. Schafer, \textit{Restitution and Constructive Contracts: Recovery of Payments}, 55 CAL. JUR. 3D § 5.
\item\textsuperscript{140} Even in states where the doctrine was once rigorously enforced, there has been a steady retreat. Consider 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

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foundation for what became *Huch v. Charter Communication*. The requiem for the VPD had begun and the Missouri Supreme Court was not alone in valuing consumer protection and legislative intent over the shifty and rogue VPD defense.

1. The Aftermath of *Huch II* in U.S. courts

The aftermath of *Huch II* has inspired three states to revisit their position on the VPD already in the past year since the Missouri Supreme Court’s ruling. Georgia, Nevada, and Washington have followed *Huch II*, removing the VPD as a defense to consumer class action lawsuits noting the protections of the legislature override vague common law defenses like the VPD. In *McGinnis v. T-Mobile USA, Inc.* the U.S. District Court for the Western District of Washington stated that the VPD is inapplicable to class actions based on the Consumer Protection Act (CPA) about hidden international charges in customer’s phone bills. This January 2010 decision reinforced a 2007 Supreme Court of Washington ruling which held the VPD an inappropriate defense given the

affirmatively applied the rule only once in the last forty years, and that holding has itself been modified since.” *BMG Direct Marketing*, 178 S.W.3d at 763.

141 *Huch*, 290 S.W.3d at 721; *See Alvarez*, 890 N.E. at 444 (explaining that the VPD is “often harsh in its application”); Stephen Camp, *The Voluntary-Payment Doctrine in Georgia*, 16 GA.L.REV. 893 (1982); Brisbane, 5 Taunt at 147 (explaining that retention by the recipient of monies paid by mistake is only proper where “it be consistent with honor and conscience to retain it”); *Claflin*, 33 Mo. at 412; *Getto v. Chicago*, 426 N.E.2d 844, 850 (Ill. 1981).
142 *See also Time Warner Entertainment Co., L.P. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004) which is one of the more striking examples of the expansion of the duress exception. In *Time Warner Entertainment Co., L.P.* the Indiana Supreme Court held that the VPD did not prevent the plaintiff-cable television customers from recovering late-fee payments in excess of the actual damages suffered by the cable company as a result of the late payments. The Court’s rationale was that the plaintiffs were forced into a situation where they had to make the payment in order to receive the property promised to them under the contract, i.e. their cable TV, whereas plaintiffs in similar cases in which the VPD was applied had not been threatened with immediate deprivation of goods or services if they did not pay. Recent history shows a movement away from the VPD. In some states, the VPD has been literally or virtually abandoned. In California, for example, a review of recent case law revealed that the VPD is not actively applied by the courts.

143 *Southstar Energy Services, LLC v. Ellison*, 691 S.E.2d 203 (Ga. 2010).
145 *McGinnis v. T-Mobile USA, Inc.*, 2010 WL 276230 (W.D.Wash.).
146 Id.
The purpose of the CPA.\textsuperscript{147} The Supreme Court of Georgia, in March 2010, proclaimed that “it is clear that the purpose of the Natural Gas Act is to protect consumers”\textsuperscript{148} and that “[this] must prevail over the general...voluntary payment doctrine”\textsuperscript{149} in response to a class action about overpayments to a natural gas marketer.\textsuperscript{150} The Court cited to \textit{Huch II} in finding that allowing the VPD as a defense here would be “contrary to the intent of the legislature” and such protectionist private rights of action.\textsuperscript{151}

The impact of \textit{Huch II} is captured strongly in the case of \textit{Sobel v. Hertz Corporation} in late March 2010 where \textit{Huch II} was used as the very foundation to deny the VPD’s usage as an affirmative defense to a class action on airport concession fees.\textsuperscript{152} Despite otherwise finding that the Nevada Deceptive Trade Practices Act had not been violated, the Nevada District Court took it upon itself to thoroughly assess how Missouri’s rationale in supporting consumers over predatory business actions clearly precludes the usage of the VPD.\textsuperscript{153} Strangely enough, the defendant had relied upon the Missouri Appellate Western Court decision in finding the VPD did preclude a class action under the MPA, arguing Nevada should follow that reasoning and an 1887 Nevada Supreme Court case supporting usage of the VPD.\textsuperscript{154} During litigation the Missouri Supreme Court granted certification and delivered the \textit{Huch II} decision of which the Nevada court found “the reasoning of \textit{Huch II} and cases in line with \textit{Huch II} convincing”

\begin{footnotes}
\item[147] \textit{Id.} \\
\item[148] \textit{Southstar Energy Services}, 691 S.E.2d at 205. \\
\item[149] \textit{Id.} \\
\item[150] \textit{Id.} \\
\item[151] \textit{Id.} \\
\item[152] \textit{Sobel}, 2010 WL 1006882 at 4. \\
\item[153] \textit{Id.} \\
\item[154] \textit{Id.} at 3.
\end{footnotes}
to enforce “paternalistic legislation designed to protect those who otherwise could not otherwise protect themselves” denying the VPD defense.155

The actions of Nevada, Georgia, and Washington courts illustrate that the era of the VPD defense against statutory-based consumer rights is over. Already in over seven states, the VPD is abolished or relegated to antiquity.156 The modern trend and post-\textit{Huch} focus is to limit the VPD to common law claims and strip any affirmative defense against class actions where consumers are misled, deceived, or defrauded by corporations.

V. Deranged: The Usage of the VPD in an era of Corporate Greed and Market Meltdowns

A. Public Policy Concerns in the Age of Corporate Fraud

This is an era of corporate fraud, consumer fraud, and economic tension where public policy concerns warrant more protection for consumers. Spanning the past decade there have been an endless array of illegal conduct by some of the most prominent and sophisticated entities in our business markets.157 Meanwhile, on the consumer-level, there is a staggering amount of new and refined frauds perpetrated on the American public. These include identity fraud,158 a host of illegal activities regarding subprime loans,159 a growing number of debt adjusting scams,160 and rampant general consumer

\textsuperscript{155} Id. at 4.
\textsuperscript{157} Editorial, \textit{Corporate Fraud Scandals Since 2002}, L.A. TIMES, July 17, 2007 available at \url{http://www.latimes.com}.
\textsuperscript{159} \textsc{U.S. Senate, Joint Economic Committee}, \textit{Subprime Mortgage Market Crisis Timeline}, July 2008.
fraud ranging from deceptive advertising to “cramming” of charges on bills.\textsuperscript{161} As mass transactions conducted over long distances by phone, mail, fax, or online become the norm, the vulnerability of the American consumer increases. In response to this, legislatures, based largely on the Federal Trade Commission’s policies regarding consumer fraud, have enacted more and more consumer statutes that enable recovery.\textsuperscript{162} As discussed, these statutes often referred to collectively as “mini-FTCs” or Unfair and Deceptive Acts and Practices statutes (“UDAPs”) are designed to supplement common law fraud remedies, thereby providing a more flexible tool to hold companies accountable.\textsuperscript{163} Most of these statutes provide for class actions, making certain that a company which extracts a few dollars from millions of consumers can still be held accountable despite the fact that an individual claim would make no economic sense.

It is true that corporate fraud and scandal is not exclusive to the 21\textsuperscript{st} century, but the last decade has seen consumers and the economy as a whole, damaged by schemes that once were only conceived of in movies and novels.\textsuperscript{164} In the world of telecommunications, WorldCom, after merging with MCI (one of the largest mergers to date) was found in 2000 to have committed fraud in under-representing line costs and

inflating revenues in bogus accounting entries. 165 This was only the beginning of a decade marked by ever larger scandals and collapses.

Immediately following WorldCom, in 2002, Fortune magazine’s “Most Admired” innovative energy company, Enron, completely imploded as the world learned of its illegal actions: bribing of foreign officials, false accounting, and manipulation of energy markets to artificially inflate electricity costs for consumers on the west coast of the U.S. 166 In 2002 alone, there were over twenty corporate scandals with illegal, fraudulent, and improper conduct from such companies as AOL Time Warner, Arthur Andersen, Duke Energy, Halliburton, Kmart, Qwest, Tyco, and Xerox, just to name a few. 167 This massive pattern of fraud by parties that were sophisticated and entrusted with billions of dollars of securities, pensions, and employee livelihoods established the need for regulatory action. The free market was not solving its own problems; it was drowning in greed. 168

The corporate greed spilled over, or in some cases began, in the consumer markets. Confidence scams and identity theft alone affect over 30 million victims per year; 169 in the U.S. there are 8.5 million victims. 170 The forms range from primitively

168 Andrew R. Sorkin, TOO BIG TO FAIL: THE INSIDE STORY ON HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM--AND THEMSELVES (2009); Sebastian Mallaby, MORE MONEY THAN GOD: HEDGE FUNDS AND MAKING OF A NEW ELITE (2010); William D. Cohan, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (2010); John Cassiday, HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES (2009);
169 Supra, note 153.
deceptive to scams so complex that it takes several governmental agencies to put an end to the conduct.\textsuperscript{171} The fraud in the subprime market was almost too pervasive to recount. While Wall Street companies invented derivatives and figured out ways to turn bundles of subprime loans into AAA rated securities, consumers were in the cross-hairs at the ground level.\textsuperscript{172} To fuel Wall Streets’ need for more and more subprime paper an almost endless string of frauds was committed.\textsuperscript{173} Appraisers over-appraised homes, talking heads promised a housing market that would never decline, “liars loans”\textsuperscript{174} in which no documents are required to vet a loan became the norm, pre-payment penalties were imbedded in almost loan, adjustable rates that could only go up (exploding ARMS) were buried in fine print, and companies like Countrywide and Ameriquest sponsored Super Bowls and other events while building a true house of cards grounded upon subprime loans.\textsuperscript{175}

To say consumer fraud is rampant is probably an understatement. In the last major FTC study on fraud using national data in 2005 there was a reported level of 48.7 million incidents of fraud on consumers.\textsuperscript{176} The trust in products, companies, and

\textsuperscript{170} Id.
\textsuperscript{172} Supra, note 154; Ben S. Bernanke, Chairman of the Federal Reserve, Speech at UC Berkeley/UCLA Symposium: “The Mortgage Meltdown, the Economy, and Public Policy” (October, 31 2008).
\textsuperscript{174} Id.; Bob Ivry, Subprime ‘Liar Loans’ Fuel Bust With $1 Billion Fraud, BLOOMBERG.COM, April 27, 2007, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aN2DPRuRs93M.
\textsuperscript{176} Supra, note 153.
services has waned as the scams and predators have grown.\textsuperscript{177} Although it is fair to suggest that consumer confidence is largely eroded by economic conditions, one cannot discount the effect perpetual reports of fraud have on consumer confidence indices.\textsuperscript{178}

According to the FTC the top scams are weight-loss products, foreign lotteries, prize promotions, and work-at-home programs.\textsuperscript{179} Far more disturbing is the population segment that is targeted. Data suggests that those hit hardest tend to be those with less education and lower income. In some cases consumer fraud target those who have already been defrauded with over 11.7 million people being preyed on by more than one scheme.\textsuperscript{180} Common examples include loan restructuring, credit refinancing, or debt consolidation scams that take an already-vulnerable and financially damaged party, promise help, and then instead catapult them into complete bankruptcy and desperation.\textsuperscript{181}

Against even this cursory look at an ocean of fraudulent behavior, it is evident there is no place for the VPD in modern consumer transactions. The VPD rests upon the premise that a part may sometimes keep illegal gains because the other party knew it was overpaying (or at least could have known) and paid anyway. In today’s fast-paced world, where consumers do battle with sophisticated companies, and billing occurs through mass mailings, online bill payments, and credit card swipes, there is no place for the “finders keepers” mentality the VPD fosters.


\textsuperscript{179} Supra, note 153.  

\textsuperscript{180} Id.  

\textsuperscript{181} Id.
As noted in the Amicus brief for *Huch*, the demise of the VPD has correlated with a rise in protectionist statutes passed by states for their resident consumers.\footnote{182} Legislatures throughout the country have made clear that in a market in which bargaining power has shifted considerably into the hands of the corporations and modern merchants, there must be meaningful remedies for consumers who are harmed. The profit motive is amoral, not immoral, and so long the legal structure must make certain that economic incentives encourage playing by the rules, not cheating. Legislatures recognize this, and through the creation of UDAPs, have placed the economic incentives squarely on playing by the rules by ensuring that businesses can face claims that could cost them actual damages, punitive damages and attorneys fees. This creates a level playing field for consumers and for businesses, and in doing so allows consumers to trust that they can spend freely.

The VPD is antithetical to these ideals and stands as an antiquated doctrine in today’s modern world. It is almost an absurd concept that in the 21\textsuperscript{st} century a consumer who was the victim of fraud or even negligent billing by a powerful corporation would be barred from recovery simply because they did not immediately catch the deception or mistake. Yet, the VPD demands that outcome. It is a license to steal in an era of powerful thieves that, if allowed, would eradicate far too many consumer claims. The VPD places an economic incentive on tack-on charges or excessive fees, and in doing so, is antithetical to the intent of the legislatures and the express will of the people.

\footnote{182} *Huch*, 290 S.W.3d at 727.
VI. Conclusion

The courts, the legislatures, even the very country that spawned the VPD have started the funeral procession for the VPD. As the House of Lords and several U.S. State Supreme Courts have stated, the VPD has no place in modern jurisprudence. Born in an era of commerce and mercantilism when the consumer may have known as much as or more than the seller and deals were carried out face to face over a handshake, the VPD is outdated and ill-suited to the modern, mass transaction, automated world. Small predatory companies litter the marketplace buying information from third parties to create schemes that are streamlined to leave consumers with nothing. Huge monoliths of the business world actively engage in sophisticated fraud that leaves stock markets crashed, gatekeepers and regulators astounded or indicted, and the American consumer at risk. Although many critics may call for deregulation and Keynesian adherence to the idea that markets, sacred and perfect with minimal governmental regulation, will protect consumers, it is time to put such quant ideas aside. Markets will work, but only when hard-work and fair-dealing are guaranteed a reward, and slight-of-hand and carelessness are guaranteed to cost money. Strong consumer remedies must be part of the antidote to the growing wave of fraud. The VPD threatens these simple ideals, and as such, must be fully eliminated from the consumer realm for the good of market, including all of its participants.