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Articles

HUCH V. CHARTER COMMUNICATIONS, INC.: CONSUMER PREY, CORPORATE PREDATORS, AND A CALL FOR THE DEATH OF THE VOLUNTARY PAYMENT DOCTRINE DEFENSE

John E. Campbell* & Oliver Beatty**

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

-Adam Smith, *Wealth of Nations*¹

“[T]he 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.”

-Bernard Madoff²

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¹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 288 (Edwin Cannan ed., 1994) (1776).

² See *The Future of the Stock Market*, PHILOCTETES (Oct. 20, 2007, 2:30 PM), http://philoctetes.org/event/the_future_of_the_stock_market (providing Bernard Madoff’s statements during a panel discussion at the Philoctetes Center, including his view that “when you take the human being out of the equation, you solve your regulatory problems because 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”).

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 thing to do, but our parents had never heard of the voluntary payment doctrine (“VPD”). The VPD is an ancient equitable defense that leaves most attorneys scratching their heads;³ and until recently, it 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.

The 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.⁴ 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.⁵ Under the version of the VPD that companies sought to create, if the clerk gave a purchaser too much money in return, then the purchaser could keep it. When the store sought a refund, that person could keep the money even though she did not deserve it, because the clerk had given her too much change with full knowledge of the facts in the absence of fraud or duress. 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.⁶ Courts applied this doctrine even if the company engaged in consumer fraud.⁷ As a result, the VPD posed a very real threat to the effectiveness of consumer fraud acts.

³ See generally *Bilbie v. Lumley*, (1802) 2 East 469 (1802 ER 448) (establishing this rule in England in the 1800s).

⁴ See, e.g., *Clafin v. McDonough*, 33 Mo. 412, 416 (1863) (“[T]he plaintiffs paid the money with a full knowledge of all the facts and circumstances, and well knowing that they were under no legal obligations to pay it. It must, therefore, be regarded as a voluntary payment, and not a payment under duress.”)

⁵ See, e.g., *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1171 (Ill. 2005); *Harris v. ChartOne*, 841 N.E.2d 1028, 1031 (Ill. App. Ct. 2005); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 23 (Wash. 2007).

⁶ See *Time Warner Entm’t Co. v. Whiteman*, 802 N.E.2d 886, 891-93 (Ind. 2004) (noting that Warner took affirmative steps to induce payments through late fee provisions, which Warner argued constituted valid liquidated damage clauses); *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335, 339 (Mo. 2007) (en banc) (arguing that the voluntary payment doctrine barred plaintiffs’ recovery because they voluntarily paid document preparation fees); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 871 (Tenn. Ct. App. 1998) (asserting the VPD defense to bar plaintiff’s recovery after voluntarily paying an invoice).

⁷ See *Time Warner*, 802 N.E.2d at 893; *Eisel*, 230 S.W.3d at 339-40.

Although the VPD had equitable justifications and had roots reaching back almost 400 years,⁸ 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 the 1990s and early 2000s,⁹ 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.¹⁰

The wave of pro-business VPD decisions reached full swell in *Huch v. Charter Communications, Inc.* (“*Huch I*”). The Missouri Court of Appeals for the Eastern District held that the VPD allowed Charter, a cable company, to keep charges that it collected for merchandise that people never requested.¹¹ 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 plaintiffs’ allegations—that Charter Communications, Inc. (“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.¹² Indeed, defendants in other cases immediately cited the affirmation by the appellate court as a reason to throw a number of claims out of court.¹³ 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 rebuild waning consumer confidence, and in doing so, it would become a powerful defense to many consumer fraud claims regarding tacking on of charges, cramming, illegal renewal, and a host of other forms of

⁸ See generally *Bilbie*, 2 East 469.

⁹ See *supra* note 5 (providing cases where courts examined the VPD anew in the early 2000s).

¹⁰ See *supra* note 5 (presenting cases involving courts that recognized the VPD as a viable defense).

¹¹ *Huch v. Charter Commc’ns, Inc.*, No. ED 89926, 2008 WL 1721868, at *9 (Mo. Ct. App. Apr. 15, 2008).

¹² See *id.* (holding that the trial court did not err in granting Charter’s motion to dismiss, as the VPD barred recovery).

¹³ *E.g.*, *Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218, 1222 (D. Nev. 2010).

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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, Inc.* (“*Huch II*”), however, the en banc Missouri Supreme Court reversed the lower court and fully discussed the collision between the VPD and modern consumer fraud statutes.¹⁴ The court held that the VPD does not apply to Missouri’s unfair deceptive acts and practices (“UDAP”) statute, known as the Merchandising Practices Act.¹⁵ The Missouri Supreme Court’s decision is seminal, and subsequent courts around the country are already citing it.¹⁶ However, the VPD’s future is not fully written. 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 Part II, this Article addresses the history of the VPD, including its roots in England. Part III discusses the likely trajectory of the VPD both in the United States and internationally. In conclusion, Part IV addresses the public policy concerns that require the VPD to be fully eliminated from consumer jurisprudence, thereby fully adopting the logic of a previous court, which stated that “[s]uch 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.”¹⁷

II. THE HISTORY OF THE VPD

A. England

America inherited the VPD from England in its early history. It is closely related to the mistake of law doctrine,¹⁸ and in many states today, the VPD is only available as a defense when the mistake that induced

¹⁴ See *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721, 727 (Mo. 2009) (en banc) (addressing VPD and its applicability to a violation of the Merchandising Practices Act).

¹⁵ *Id.*; see also MO. REV. STAT. §§ 407.010–407.1129 (2006 & Supp. 2012).

¹⁶ See *Sobel*, 698 F. Supp. 2d at 1222–23; *Southstar Energy Servs., LLC v. Ellison*, 691 S.E.2d 203, 206–07 (Ga. 2010).

¹⁷ *Lamar Twp. v. City of Lamar*, 169 S.W. 12, 16 (Mo. 1914) (citing *Sheldon v. S. Sch. Dist. in W. Soc. of Suffield*, 24 Conn. 88 (1855)); see *Norton v. Marden*, 15 Me. 45 (1838); *City of Baltimore v. Lefferman*, 4 Gill 425 (Md. 1846); *Preston v. City of Boston*, 29 Mass. (12 Pick.) 7, 13 (Mass. 1831); *Clarke v. Dutcher*, 9 Cow. 674 (N.Y. Sup. Ct. 1824).

¹⁸ See *Duncan Sheehan, The Origins of the Mistake of Law Bar in English Law* 8 (Univ. of E. Anglia Norwich Law Sch., Working Paper No. NLSWP 08/01, 2008), available at <http://ssrn.com/abstract=1113723> (providing a complete discussion of the development of the mistake of law doctrine—including its relationship to the VPD—in England).

payment was one of law, rather than fact.¹⁹ A mistake of law occurs when a party is “ignorant 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.”²⁰

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*.²¹ It was not until 1802, in *Bilbie v. Lumley*, that Lord Ellenborough indicated that a mistake of law that induced payment would not allow for the recovery of money paid with full knowledge of all facts.²² This maxim was imported from England’s criminal law, where a defendant’s ignorance of the illegality of his conduct was no defense.²³ 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.²⁴ His concern was that parties who 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, “[e]very 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.”²⁵

Bilbie proved to be a turning point. The English cases that followed *Bilbie* continued to allow recovery of payments when they were made under mistake of fact or induced by fraud or duress, but precluded recovery if the mistake was one of law. For example, in *Kelly v. Solari*,²⁶ agents of the insurance company had forgotten that the defendant’s policy had lapsed because a premium had gone unpaid, and the plaintiff, a director of a life insurance company, made payment on the policy

¹⁹ See *Clafin v. McDonough*, 33 Mo. 412, 416 (1863) (citing multiple state cases where plaintiffs were denied recovery because the mistake that induced payment was not a mistake of law, even though the various plaintiffs made the payment with a full knowledge of all the facts and circumstances).

²⁰ 27 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 70:123 (4th ed. 2003).

²¹ LAW REFORM COMM’N, *COMMUNITY LAW REFORM PROGRAM: ELEVENTH REPORT – RESTITUTION OF BENEFITS CONFERRED UNDER MISTAKE OF LAW* 53, § 2.2–2.3 (1987), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R53TOC>.

²² (1802) 2 East 469, 470–72.

²³ 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 & Maris*, 4 H. & J. 531, 533 (Md. 1819) (citing *Bilbie*, 2 East at 471).

²⁴ See *Bilbie*, 2 East at 471–72.

²⁵ *Id.* at 472.

²⁶ (1841) 9 M. & W. 54, 54.

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under the mistake of fact.²⁷ The court held that the plaintiff was entitled to recover.²⁸ The court took a firm stance, stating that “it is in every case unconscientious to retain money paid under a mistake of fact.”²⁹

B. The United States

Even though some justices found the principle laid out in *Bilbie* controversial, it was eventually adopted in the New World.³⁰ 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.³¹ In Missouri, for example, the VPD emerged during the Civil War in the case of *Clafin v. McDonough* in 1863.³² In *Clafin*, the plaintiffs paid a city tax collector the full amount demanded under threat that they would be indicted if they did not pay.³³ 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.”³⁴ Based on this articulation, the court held that the plaintiffs were barred from recovering the overpayment.³⁵

Although decisions like *Clafin* were not uncommon, even during this early period, courts in some states opposed the VPD. For example, Kentucky and Connecticut rejected the doctrine from the outset.³⁶ Under Connecticut common law any time a party obtained money that it was not owed, that money should be disgorged.³⁷ The Supreme Court of Connecticut held in *Northrop v. Graves*:

[W]e 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

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 57.

³⁰ See *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 57–58 (1838); *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. (8 Wheat.) 174, 211–12, 215–16 (1823).

³¹ See, e.g., *Beck v. Thompson & Maris*, 4 H. & J. 531, 533 (Md. 1819).

³² 33 Mo. 412 (1863).

³³ *Id.* at 414.

³⁴ *Id.* at 415.

³⁵ *Id.* at 416.

³⁶ *Northrop’s Ex’rs v. Graves*, 19 Conn. 548, 560 (1849); *Underwood v. Brockman*, 39 Ky. (4 Dana) 309, 319–20 (1836).

³⁷ See *Northrop’s Ex’rs*, 19 Conn. at 548.

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.³⁸

Connecticut's outright rejection was the exception, not the rule. Many states and courts adopted the VPD, allowing recovery only when there was a mistake of fact, fraud, or duress.³⁹ However, 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 applications of the rule itself."⁴⁰ The three exceptions articulated by courts were: mistake of fact, fraud, and duress.

1. Mistake of Fact

The line between a mistake of law and a mistake of fact is a blurry one, and the distinction is often painfully difficult to elucidate.⁴¹ As discussed above, a payor's mistake about a fact material to the payment will preclude the voluntary payment defense,⁴² since the payor did not make the payment voluntarily.⁴³ A mistake of fact occurs where a party possesses "unconscious ignorance or forgetfulness of" a material fact.⁴⁴

³⁸ *Id.* at 554. The *Northrop* court was generally concerned that the distinction between a mistake of law and a mistake of fact promoted form over substance. *Id.* When discussing maxims such as "every man is bound, and therefore 'presumed, to know the law,'" the court stated:

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 553-54.

³⁹ See *Jones v. Watkins*, 1 Stew. 81 (Ala. 1827); *Mayor of Baltimore v. Lefferman*, 4 Gill 425, 436-37 (Md. 1846); *Robinson v. City Council of Charleston*, 31 S.C.L. (2 Rich.) 317, 319 (S.C. Ct. App. 1846); *Lewis v. Cooper*, 3 Tenn. (Cooke) 467, 473-74 (1814).

⁴⁰ LAW REFORM COMM'N, *supra* note 21, at 53, § 1.3 (footnote omitted).

⁴¹ See Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction* 11 (Boston Univ. Sch. of Law, Working Paper No. 08-32, 2008), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/SimonsMistakeofFact.html>.

⁴² *Claflin v. McDonough*, 33 Mo. 412 (Mo. 1863).

⁴³ *Wheeler v. Bd. of Comm'rs*, 91 N.W. 890, 890 (Minn. 1902).

⁴⁴ *Kowalke v. Milwaukee Electric Ry. & Light Co.*, 79 N.W. 762, 763 (Wis. 1899) (internal quotation marks omitted).

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For example, in *Aetna Life Insurance Co. v. Nix*, the defendant-policy holder misrepresented to the plaintiff-insurance company that her husband's injury was not employment-related, as he had fallen off a horse on his personal time.⁴⁵ Had the husband's injury arisen out of employment, the defendant and plaintiff's health insurance contract would not have covered his medical expenses.⁴⁶ 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.⁴⁷ 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.⁴⁸ Similar to the *Nix* case, taxes paid under a mistake of fact have often been held recoverable by the taxpayer.⁴⁹

2. Fraud

A look at early American cases demonstrates that the VPD was not intended to allow intentional wrongdoers to profit from their illegal actions.⁵⁰ Courts almost immediately recognized that the fraud exception was a broad protection, which applied even when no common law fraud had occurred.⁵¹ 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."⁵² 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

⁴⁵ 512 P.2d 1251, 1252 (N.M. 1973).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1252-53.

⁴⁸ *Id.* at 1253.

⁴⁹ See *Wheeler v. Bd. of Comm'rs*, 91 N.W. 890, 890 (Minn. 1902).

⁵⁰ See *supra* Part II.B (discussing early American cases where the VPD could not be used to bar recovery when intentional wrongdoers profited from their illegal actions).

⁵¹ See *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838); *Hunt v. Rousmanier's Adm'rs*, 21 U.S. (8 Wheat.) 174, 211 (1823).

⁵² *Nat'l Enameling & Stamping Co. v. City of St. Louis*, 40 S.W.2d 593, 595 (Mo. 1931).

the payee, voluntarily and without compulsion pays money on a demand not legally enforceable against him, he can not [sic] recover it back.⁵³

Many states followed the “fraud or improper conduct” formulation.⁵⁴ Thus, the traditional formulation of the VPD limited its application to situations in which there was no improper conduct on the part of the payee.⁵⁵ Therefore, a payor-plaintiff was not necessarily required to have a colorable claim for common law fraud against the payee-defendant to come within the protection of this exception.⁵⁶ *Huch I* called this rule into question where the court held that claims of consumer fraud were not sufficient to defeat the VPD defense.⁵⁷

3. Duress

A payor who is under compulsion or duress at the time of payment may recover such payment from the payee if the payee was the source of the duress.⁵⁸ Duress traditionally consists of a threat by a party to do something that he has no legal right to do.⁵⁹ Courts have held that duress undermines the voluntary nature of the payment.⁶⁰ The decisions in many of these early cases focused on the unequal bargaining power between the two parties and the violation of basic public policy that results from retaining monies paid under duress.⁶¹

By and large, the degree of coercion necessary to prevent the application of the VPD decreased over time.⁶² In other words, alleged

⁵³ *Id.* (internal quotation marks omitted).

⁵⁴ *Woodmen of the World Life Ins. Soc’y v. Am. Soc’y of Composers, Authors & Publishers*, 19 N.W.2d 540, 545 (Neb. 1945); *see, e.g., Evans v. Gale*, 17 N.H. 573, 575 (1845); *Craig v. Lininger*, 61 Pa. Super. 339, 343 (1915); *Nelson v. Swenson*, 124 A. 468, 468–69 (R.I. 1924); *Hawkinson v. Conniff*, 334 P.2d 540, 543 (Wash. 1959).

⁵⁵ *See, e.g., Pingree v. Mut. Gas Co.*, 65 N.W. 6, 7 (Mich. 1895) (holding that “artifice, fraud, or deception” are exceptions).

⁵⁶ *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (“It is not necessary in order to establish ‘unlawful practice’ [under Missouri’s Merchandising Practices Act (“MMPA”)] to prove the elements of common law fraud.”).

⁵⁷ *See Huch v. Charter Commc’ns, Inc.*, No. ED 89926, 2008 WL 1721868, at *9 (Mo. Ct. App. Apr. 15, 2008).

⁵⁸ *Smith v. Prime Cable of Chi.*, 658 N.E.2d 1325, 1330 (Ill. App. Ct. 1995).

⁵⁹ 28 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 71:26 (4th ed. 2003).

⁶⁰ *See, e.g., Galesburg & Great E. R.R. Co. v. West*, 108 Ill. App. 504, 509 (Ill. App. Ct. 1903) (describing a transaction, which “is attended by a degree of financial coercion or business duress which deprives the transaction of every vestige of a voluntary payment”).

⁶¹ *Id.*

⁶² *Id.*

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victims of duress are offered more protection today than in the past.⁶³ Indeed, many courts did not take long to expand the duress exception beyond threats of physical harm to include moral duress,⁶⁴ business/economic duress,⁶⁵ and legal duress,⁶⁶ which can be less than the threat of criminal prosecution.⁶⁷ For example, in *Albany v. Abbott*,⁶⁸ the New Hampshire Supreme Court held that because “[t]he law properly regards the lender on usury as 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.⁶⁹

C. Modern Trends

Despite the general trend toward 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 though its parameters were somewhat unclear.

By the early 1990s, 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.⁷⁰ In several cases, courts recognized the defense, and in some of the first examples, entire classes of claims were swept away as a result.⁷¹

⁶³ See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (1981) (“Courts first recognized [duress] as improper threats of physical violence and later included wrongful seizure or detention of goods.”).

⁶⁴ See *Ark. Natural Gas Co. v. Norton Co.*, 263 S.W. 775, 778 (Ark. 1924); *Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 761 (Cal. Dist. Ct. App. 1909); *Rees v. Schmits*, 164 Ill. App. 250, 258 (1911); *Niedermeyer v. Curators of the Univ. of Mo.*, 61 Mo. App. 654, 660 (1895); *Albany v. Abbott*, 61 N.H. 157, 158 (1881).

⁶⁵ See *Ark. Natural Gas Co.*, 263 S.W. at 778; *Am. Mfg. Co. v. City of St. Louis*, 192 S.W. 402, 403 (Mo. 1917) (en banc).

⁶⁶ See *City of Maysville v. Melton*, 42 S.W. 754, 755 (Ky. 1897); *Cox v. Welcher*, 36 N.W. 69, 69 (Mich. 1888); *Miss. Valley Trust Co. v. Begley*, 252 S.W. 76, 78 (Mo. 1923) (en banc); *Forrest v. Mayor of New York*, 13 Abb. Pr. 350, 352 (N.Y. Sup. Ct. 1861).

⁶⁷ See *Newberry v. City of Detroit*, 150 N.W. 838, 839–40 (Mich. 1915) (holding that a 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).

⁶⁸ 61 N.H. at 158.

⁶⁹ *Id.*

⁷⁰ See *Telescripps Cable Co. v. Welsh*, 542 S.E.2d 640, 643 (Ga. Ct. App. 2000); *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 790 N.E.2d 1155, 1156 (N.Y. 2003); *McWethy v. Telecomms., Inc.*, 988 P.2d 356, 357–58 (Okla. Civ. App. 1999); *Putnam v. Time Warner Cable of Se. Wis., Ltd. P’ship*, 649 N.W.2d 626, 637 (Wis. 2002).

⁷¹ See cases cited *supra* note 70.

Although each case had a slightly different set 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 before 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.⁷² Just like that, the VPD resurfaced as a renewed tool of choice for defendants who have allegedly cheated customers. The caveat emptor tone of the court decisions signified a potential erosion of consumer rights.

In addition to the cable companies mentioned above, several other corporate defendants have utilized the VPD as a defense to consumer class action claims. They also prevailed. For example, in 2006 the Supreme Court of Wisconsin held that customers were at fault for not inquiring about an illegal sales tax that Ameritech, a telecommunications company, was collecting contrary to state statutes. As a result, the VPD eliminated the customers' right to seek recovery.⁷³ The cell phone industry followed, prevailing in a 2007 decision in the United States District Court for the Western District of Washington striking down a class action challenging extra-contractual and undisclosed surcharges in cell phone bills.⁷⁴ The string of consumer defeats continued with similar holdings in New York and Texas.⁷⁵ As a result, in the years just before *Huch I*, the VPD had become a staple corporate defense—a ready-made antique doctrine that could excuse even fraudulent billing. *Huch I* 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.⁷⁶

III. *HUCH V. CHARTER COMMUNICATIONS, INC.*

A. *The Rise of the UDAP Statutes*

Statutory protection for consumers, in the form of UDAP provisions, started with the Federal Trade Commission Act in 1914 ("FTC Act").⁷⁷ The FTC Act banned deceptive acts and practices and became the template for many of the state-based consumer protection statutes

⁷² See cases cited *supra* note 70.

⁷³ See *Butcher v. Ameritech Corp.*, 727 N.W.2d 546, 556 (Wis. Ct. App. 2006).

⁷⁴ See *Riensch v. Cingular Wireless, LLC*, No. C06-1325Z, 2007 WL 3407137 (W.D. Wash. Nov. 9, 2007).

⁷⁵ See *Spagnola v. Chubb Corp.*, No. 06 Civ. 9960(HB), 2007 WL 927198, at *3 (S.D.N.Y. Mar. 27, 2007); *Dall. Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 876–88 (Tex. 2005).

⁷⁶ See *supra* note 3 and accompanying text (discussing *Huch I*).

⁷⁷ See 15 U.S.C. §§ 41–58 (2006).

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spanning several decades, including the 1960s and 1970s.⁷⁸ The rise of these state-based UDAP statutes is significant for two reasons: (1) the original FTC Act did not allow for state or private enforcements; and (2) these state statutes curb the doctrine of caveat emptor, in the process establishing a level of fairness in the marketplace.⁷⁹ By enacting these statutes, legislators sought to offer consumers broad protection from a wide range of dishonest and abusive business practices. Courts tend to guard the UDAP provisions and draft them with broad applicability to the extent that “[a]lmost any abusive business practice aimed at consumers is at least arguably a UDAP violation.”⁸⁰ Nowadays, every state in the union has some sort of legislation designed to address unfair and deceptive acts and practices.⁸¹

Missouri’s UDAP statute is called the Missouri Merchandising Practices Act (“MMPA”).⁸² It was designed to protect consumers and to preserve fundamental honesty, fair play, and right dealings in public transactions.⁸³ The MMPA was enacted in 1967 as a shield against predatory business practices and as a supplement to the preexisting common-law fraud cause of action; it is broad in purpose, language, and application.⁸⁴ The Missouri Supreme Court has described the definition of an unfair practice as “all-encompassing and exceedingly broad. For

⁷⁸ See Brief for Gateway Legal Servs., Inc. et. al. as Amicus Curiae Supporting Appellants, *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721 (Mo. 2009) (No. SC 89361), available at [http://www.courts.mo.gov/SUP/index.nsf/0/59519718166b0a8d862574cc00743185/\\$FILE/SC89361_Gateway_Legal_Services_Amicus_Brief.pdf](http://www.courts.mo.gov/SUP/index.nsf/0/59519718166b0a8d862574cc00743185/$FILE/SC89361_Gateway_Legal_Services_Amicus_Brief.pdf) (noting that the UDAP “statutory provisions are enforced in all 50 states . . . [and] were enacted in the 1960s and 1970s”).

⁷⁹ NAT’L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (7th ed. 2008).

⁸⁰ *Id.* at 2. For example, New York prohibits “[d]eceptive 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(a) (McKinney 2011); see also *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (“It is the defendant’s conduct, not his intent, which determines whether a violation has occurred.”); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 18 (Wash. 2007) (construing Washington UDAP statute as prohibiting acts and practices that have the mere “capacity” to deceive, and rejecting any intent requirement (emphasis omitted)).

⁸¹ See NAT’L CONSUMER LAW CTR., *supra* note 79, at 1033–54.

⁸² MO. REV. STAT. § 407.010–407.1129 (2006 & Supp 2012).

⁸³ See *Ports Petroleum Co. of Ohio v. Nixon*, 37 S.W.3d 237, 241 (Mo. 2001) (en banc); *State ex rel. Nixon v. Cont’l Ventures Inc.*, 84 S.W.3d 114, 117 (Mo. Ct. App. 2002); *State ex rel. Ashcroft v. Mktg. Unlimited of Am., Inc.*, 613 S.W.2d 440, 445 (Mo. Ct. App. 1981); Brief for the Attorney Gen. of Mo. as Amicus Curiae Supporting Appellants, *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721 (Mo. 2009) (No. SC 89361), 2008 WL 3852934.

⁸⁴ Brief for the Attorney Gen. of Mo., *supra* note 83, at 6.

better or worse, the literal words cover every practice imaginable and every unfairness to whatever degree.”⁸⁵

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

Some statutes explicitly eliminate the VPD as a defense.⁸⁶ In other words, the payor may obtain relief even if he or she made the payment 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.⁸⁷ One example is the Supreme Court of Washington stating that “the [VPD] 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.”⁸⁸ Additionally, both of Tennessee’s appellate courts and the Indiana Supreme Court have similarly held that the VPD will not bar consumer claims against businesses that destroy marketplace confidence and operate as predators in violation of UDAP statutes.⁸⁹

In *Pratt v. Smart Corp.*,⁹⁰ 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.⁹¹ The Tennessee Court of Appeals stated definitively that “the [s]tate 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.”⁹² The court continued, stating 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

⁸⁵ *Nixon*, 37 S.W.3d at 240.

⁸⁶ *See, e.g.*, TEX. FIN. CODE ANN. § 305.001(a) (West 2006) (“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.”).

⁸⁷ *See, e.g.*, *MacDonell v. PHH Mortg. Corp.*, 846 N.Y.S.2d 223, 224 (App. Div. 2007) (explaining VPD does not bar statutory causes of action in New York); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 24 (Wash. 2007) (holding that “the [VPD] is inappropriate as an affirmative defense” to Washington’s Consumer Protection Act).

⁸⁸ *Indoor Billboard*, 170 P.3d at 24.

⁸⁹ *See* *Time Warner Entm’t Co. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997).

⁹⁰ 968 S.W.2d at 868.

⁹¹ *Id.* at 869-71.

⁹² *Id.* at 872.

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consummated.”⁹³ The court noted that in its case law, the VPD “does not come into play in situations involving a transaction that violates public policy,” thus reversing the trial court’s grant of summary judgment and dismantling the VPD on such claims.⁹⁴ New York, Illinois, and Indiana followed Tennessee’s trend, with the latter stating that “we do not believe that it is appropriate as a matter of policy for us to favor a private enterprise over private individuals,” thereby stripping the VPD as a defense to a class action against a cable company for excessive late fees.⁹⁵

C. *The Facts of Huch*

In a Missouri-based class action suit, plaintiffs James Huch and Ryan Carstens alleged that the defendant cable company, Charter, committed a deceptive and unfair business practice by sending an unsolicited channel guide to its customers and charging for the guide without notifying the customers that it had been added to their bill.⁹⁶ Plaintiffs brought suit under the MMPA, section 407.025, which enables consumers who have suffered a loss stemming from an unlawful, unfair, or unethical business practice (as defined in section 407.200), which affected their purchase or lease of merchandise.⁹⁷ Specifically, plaintiffs asserted that Charter had failed to give customers the option to receive the guide despite it not being included in the monthly rate; sent the guide unsolicited to customers; failed to disclose the charges as they were added to the monthly bill; and charged each customer three dollars every month for this merchandise.⁹⁸ In support of their allegations, plaintiffs cited two sources of law that made sending unsolicited merchandise an illegal act *per se*.⁹⁹ Plaintiffs sought class certification, damages, and an injunction prohibiting defendant from engaging in further unfair and deceptive trade practices.¹⁰⁰

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Time Warner Entm’t Co. v. Whiteman*, 802 N.E.2d 886, 892 (Ind. 2004); *see Brown v. SBC Commc’ns, Inc.*, No. 05-cv-777-JPG, 2007 WL 684133 (S.D. Ill. Mar. 1, 2007); *MacDonnell v. PHH Mortg. Corp.*, 846 N.Y.S.2d 223, 224 (App. Div. 2007) (barring the VPD when plaintiffs assert a statutory cause of action).

⁹⁶ *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721, 723 (Mo. 2009) (en banc).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 723, 725 (citing MO. REV. STAT. §§ 407.025, 407.200 (2006); MO. CODE REGS. ANN. tit. 15, § 60-8.060 (2011)).

¹⁰⁰ *Huch*, 290 S.W.3d at 723.

D. Procedural History

At the trial court level, Charter moved to dismiss the claim, citing the VPD as a defense.¹⁰¹ The trial court granted the motion and dismissed the claim with prejudice on May 21, 2007.¹⁰² In its rationale, the trial court stated that plaintiffs knew or should have known of the additional charges and, without evidence of mistake or duress, the 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, or recovery for a plaintiff class.¹⁰⁵ The appellate court found that the plaintiffs' citations to cases from other states, which held that the VPD affirmative defense was against public policy, and many of the Missouri cases cited in the brief lacked merit and were "not on point."¹⁰⁶ Further, the court concluded that the MMPA's statutory framework allowed affirmative defenses such as the VPD. The court cited a 1923 Missouri Supreme Court case that preceded the MMPA by more than forty years.¹⁰⁷ Finally, despite the plaintiffs' arguments that the alleged conduct constituted consumer fraud and qualified 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 the plaintiffs' bill, they knew or should have known of these charges. Therefore, the VPD precluded the claim and the court affirmed the trial court's judgment.¹⁰⁸ The plaintiffs petitioned for review, and the Missouri Supreme Court ordered transfer on June 24, 2008.¹⁰⁹

¹⁰¹ Order and Judgment, *Huch v. Charter Commc'ns, Inc.*, No. 06CC-3434, 2007 WL 5086331, at A15 (Mo. Cir. Ct. May 21, 2007).

¹⁰² *Id.* at A16.

¹⁰³ *Id.* at A15.

¹⁰⁴ *Huch v. Charter Commc'ns, Inc.*, No. ED 89926, 2008 WL 1721868, at *1 (Mo. Ct. App. Apr. 15, 2008).

¹⁰⁵ *Id.* at *4.

¹⁰⁶ *Id.* at *5.

¹⁰⁷ *Id.* at *8 (citing *Ferguson v. Butler Cnty.*, 247 S.W. 795, 796-97 (Mo. 1923)).

¹⁰⁸ *Id.* at *1.

¹⁰⁹ *Huch v. Charter Commc'ns Inc.*, 290 S.W.3d 721, 722 (Mo. 2009) (en banc).

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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 available as an affirmative defense to the defendant's violations of the MMPA. The court reversed the trial court decision on the grounds of public policy and legislative intent.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.¹¹¹ When considering legislative intent, the court stated that section 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.'" Thus, the MMPA was enacted to protect consumers in modern commerce transactions in a paternalistic fashion.¹¹² The court stated that the very nature of the MMPA and its language is 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.¹¹³ The MMPA was designed to regulate consumer transactions in which businesses have superior access to resources, information, and remedies. Therefore, the waiver-based common law VPD defense stands in direct conflict with the Missouri legislature's intent.¹¹⁴ The legislature drafted and passed the MMPA to provide clear relief to consumers. Concerting with this legislative intent, Missouri courts had already rejected various legal remedies under the MMPA before *Huch*, establishing a clear trend toward limiting affirmative defenses to MMPA-based claims to protect injured consumers.¹¹⁵ The court recognized "the Eighth Circuit[s] . . . holding 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.¹¹⁶ The court also recognized this principle one year later, in *High Life Sales Co. v. Brown-Forman Corp.*¹¹⁷ It 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

¹¹⁰ *Id.* at 727.

¹¹¹ *Id.*

¹¹² *Id.* at 724 (quoting *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. Ct. App. 1973)).

¹¹³ *Id.* at 725-26.

¹¹⁴ *Id.* at 726-27.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 725-26 (quoting *Elec. & Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991)).

¹¹⁷ 823 S.W.2d 493, 498 (Mo. 1992) (en banc).

franchises.¹¹⁸ In addition, the *Huch* court acknowledged the court's holding in *Whitney v. Alltel Communications, Inc.* that an arbitration clause was unconscionable and unenforceable when clashing with unfair practices described in the MMPA, and recognized that not even estoppel is allowed as a defense to fraudulent conduct.¹¹⁹ 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.¹²⁰

The Missouri Supreme Court responded to defendant's argument that the VPD remained vital and preeminent by pointing out that in *Eisel v. Midwest BankCentre* it had already "held that the [VPD] is 'not applicable in all situations.'"¹²¹ In *Eisel*, the consumers paid fees for document preparation, which the court found was an unauthorized practice of law, rendering the VPD unavailable to the defendant.¹²² The court specifically precluded the use of the VPD because the type of unfair and inequitable business practices outlined in the 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 the burden onto the least powerful and knowledgeable party and erodes the very protections the statute in question created for consumers.¹²⁴

The Missouri Supreme Court in *Huch II* applied these cases along with the legislative intent of the MMPA. The court found that the defendant's practices of sending the unsolicited program guide to the plaintiffs and charging them without notice, disclosure, or authorization was an unfair practice.¹²⁵ The plaintiffs' paying 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 Moreover, the court held that the defendant's use of the VPD as an affirmative defense was an attempt to undermine the very fabric of the consumer protection statute, and it defied clear Missouri legislative

¹¹⁸ *Huch*, 290 S.W.3d at 725.

¹¹⁹ *Id.* at 726 (citing *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005)).

¹²⁰ *Id.* at 726-27.

¹²¹ *Huch*, 290 S.W.3d at 727 (quoting *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. 2007) (en banc)).

¹²² *Id.*

¹²³ *Id.* (quoting *Eisel*, 230 S.W.3d at 339) (internal quotation marks omitted).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

intent to protect both the consumers and business marketplace from unfair practices.¹²⁷

IV. DOOMED: THE IMPACT OF *HUCH* AND THE FUTURE OF THE VPD

The VPD is a relic: Bargaining power is institutionally and systematically slanted toward corporations; consumer statutes have increased the amount of protection available to consumers; and financial fraud has been present for decades. 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 and Common Law World Abolishes the VPD*

The extermination of the VPD has already begun. The very country that spawned the VPD's existence two centuries ago has now abolished it because it is improper for modern jurisprudence.¹²⁸ In the 1999 landmark decision *Kleinwort Benson Ltd. 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."¹²⁹ In *Kleinwort*, appellant 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.¹³⁰ 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 as 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.¹³¹ 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."¹³² The House of Lords concluded that the long history of the VPD had run its course and that the "rule . . . cannot sensibly survive in a [modern] rubric of the law."¹³³ Around the world, over sixty percent of common law

¹²⁷ *Id.*

¹²⁸ *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.) (appeal taken from Eng.).

¹²⁹ *Id.* at 373.

¹³⁰ *Id.* at 353-54.

¹³¹ *Id.* at 372-73.

¹³² *Id.* at 390-92.

¹³³ *Id.* at 373.

countries have already abolished the VPD.¹³⁴ In its *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.¹³⁵ Germany, France, and Italy shared a common fear of floodgate litigation as a result of lifting the VPD; however, the House of Lords noted there had been no flood or disruption of judicial economy.¹³⁶ Canada, Australia, South Africa, and Scotland abrogated the VPD judicially, and New Zealand abolished it by statute.¹³⁷ In her article, *Mistake of Law Rule Abrogated*, Louisa Ho 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.”¹³⁸ There is a growing global consensus that the VPD doctrine has truly become an eighteenth century theory that has no place and purpose in twentieth century global jurisprudence.

B. *Current United States Status of the VPD*

Before *Huch I*, many states had either never allowed the VPD to come into existence or judicially overruled its usage. As the twentieth century came to a close, so did the VPD in various courts across the nation. These courts provided the rationale,¹³⁹ policy,¹⁴⁰ and foundation

¹³⁴ See *supra* notes 77–79 (discussing the rise of UDAP provisions to protect consumers).

¹³⁵ *Kleinwort*, [1999] 2 A.C. at 374.

¹³⁶ *Id.*

¹³⁷ Aedit Abdullah, *The Abrogation of the Rule Against Recovery in Mistake of Law*, 1998 SING. J. LEGAL STUD. 469, 469 (1998).

¹³⁸ Lusina Ho, *Mistake of Law Rule Abrogated*, H.K. LAW., Feb. 1999, at 34–35.

¹³⁹ See *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 771 (Tex. 2005). 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 affirmatively applied the rule only once in the last forty years, and that holding has itself been modified since.

Id.

¹⁴⁰ *Huch v. Charter Commc’ns Inc.*, 290 S.W.3d 721, 721 (Mo. 2009); see *Alvarez v. Pappas*, 890 N.E.2d 434, 444 (Ill. 2008) (explaining that the VPD is “often harsh in its application”); *Getto v. City of Chicago*, 426 N.E.2d 844, 850 (Ill. 1981) (noting that the threat of shutting off phone service due to nonpayment of charges resulted in an obligation that would bar application of the VPD); see also *Brisbane v. Dacres*, (1813) 5 Taunt. 143, 147 (explaining that retention by the recipient of monies paid by mistake is only proper where “it be consistent with honour and conscience to retain it”); S.L.C., Note, *The Voluntary-Payment Doctrine in Georgia*, 16 GA. L. REV. 893, 916 (1982) (reiterating that Georgia relies on

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for what became *Huch II*.¹⁴¹ 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 United States Courts

Huch II has already inspired three states to revisit their position on the VPD in the past year. Georgia, Nevada, and Washington have followed *Huch II* by removing the VPD as a defense to consumer class action lawsuits and noting that the protections of the legislature override vague common law defenses like the VPD.¹⁴² In *McGinnis v. T-Mobile USA, Inc.*,¹⁴³ the U.S. District Court for the Western District of Washington stated that the VPD is inapplicable to class actions based on the CPA about hidden international charges in customers' phone bills. This January 2010 decision reinforced a 2007 Supreme Court of Washington ruling, which held the VPD was an inappropriate defense given the purpose of the CPA.¹⁴⁴ The Supreme Court of Georgia, in March 2010, proclaimed that "the clear purpose of the Natural Gas Act is to protect natural gas consumers . . . [and that this] must prevail over the

the unjust enrichment principles, rather than the VPD because it lacks clarity and uniformity).

¹⁴¹ 290 S.W.3d at 721; see *Time Warner Entm't Co. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004) (providing one of the more striking examples of the expansion of the duress exception). In *Time Warner Entertainment Co.*, 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. *Id.* at 893. The court's rationale was that the plaintiffs were forced into a situation where they had to make the payment to receive the property promised to them under the contract, i.e., their cable TV, whereas plaintiffs in similar cases where the VPD was applied had not been threatened with immediate deprivation of goods or services if they did not pay. *Id.* at 891. Recent history shows a movement away from the VPD. See *id.* (noting that the old version of the Restatement of Restitution supports the VPD, the new draft of the Restatement "eliminates it"). In some states, the VPD has been literally or virtually abandoned. See, e.g., *Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218, 1224 (D. Nev. 2010); *McGinnis v. T-Mobile USA, Inc.*, No. C08-106Z, 2010 WL 276230, at *1 (W.D. Wash. Jan. 20, 2010); *Brown v. SBC Commc'ns, Inc.*, No. 05-cv-777-JPG, 2007 WL 684133, at *9 (S.D. Ill. Mar. 1, 2007); *Southstar Energy Servs., LLC v. Ellison*, 691 S.E.2d 203, 205 (Ga. 2010); *Alvarez*, 890 N.E.2d at 444 (explaining that the VPD is "often harsh in its application"); *Getto*, 426 N.E.2d at 850 (noting that the threat of shutting off phone service due to nonpayment of charges resulted in an obligation that would bar application of the VPD); *Time Warner Entm't Co.*, 802 N.E.2d at 892; *MacDonell v. PHH Mortg. Corp.*, 846 N.Y.S.2d 223, 224 (App. Div. 2007); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997); *BMG Direct Mktg., Inc.*, 178 S.W.3d at 771.

¹⁴² See *Sobel*, 698 F. Supp. 2d at 1222-24; *McGinnis*, No. C08-106Z, 2010 WL 276230, at *1; *Southstar Energy Servs., LLC*, 691 S.E.2d at 206.

¹⁴³ *McGinnis*, 2010 WL 276230, at *1.

¹⁴⁴ *Id.*

general . . . [VPD],” in response to a class action suit involving overpayments to a natural gas marketer.¹⁴⁵ The court cited to *Huch II* and found that allowing the VPD as a defense would be “contrary to the intent of the legislature” and such protectionist private rights of action.¹⁴⁶

Sobel v. Hertz Corp., decided in late March 2010, strongly captured *Huch II*'s impact. The Nevada District Court used *Huch II* as the very foundation to deny the VPD's usage as an affirmative defense to a class action on airport concession fees.¹⁴⁷ Despite otherwise finding that the Nevada Deceptive Trade Practices Act had not been violated, the 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.¹⁴⁸ Strangely enough, the defendant had relied upon the Missouri Appellate Western Court decision that found the VPD precluded a class action under the MMPA, and it argued that Nevada should follow that reasoning along with the reasoning in an 1887 Nevada Supreme Court case supporting usage of the VPD.¹⁴⁹ During litigation, the Missouri Supreme Court delivered the *Huch II* decision; the Nevada court denied the VPD defense after finding “the reasoning of *Huch II* and the cases in line with *Huch II* convincing . . . [to enforce] ‘paternalistic legislation designed to protect those that could not otherwise protect themselves.’”¹⁵⁰

The actions of the Nevada, Georgia, and Washington courts illustrate that the era of the VPD defense against statutory-based consumer rights is over. Furthermore, the VPD is already abolished or relegated to antiquity in at least seven states.¹⁵¹ The modern trend and post-*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.

¹⁴⁵ *Southstar Energy Servs.*, 691 S.E.2d at 205.

¹⁴⁶ *Id.* at 206 (quoting *Huch v. Charter Communications*, 290 S.W.3d 721, 727 (Mo. 2009)) (internal quotation marks omitted).

¹⁴⁷ *Sobel*, 698 F. Supp. 2d at 1223–24.

¹⁴⁸ *Id.* at 1218, 1224.

¹⁴⁹ *Id.* at 1230; see also *id.* at 1222–23 (noting the defendant's reliance on *Huch I* and a Nevada Supreme Court decision in 1887).

¹⁵⁰ *Id.* at 1223–24 (quoting *Huch v. Charter Commc'ns*, 290 S.W.3d 721, 727 (Mo. 2009)).

¹⁵¹ See *Sobel*, 698 F. Supp. 2d at 1224; *McGinnis v. T-Mobile USA, Inc.*, No. C08-106Z, 2010 WL 276230, at *1 (W.D. Wash. Jan. 20, 2010); *Brown v. SBC Commc'ns, Inc.*, No. 05-cv-777-JPG, 2007 WL 684133, at * 9 (S.D. Ill. Mar. 1, 2007); *Southstar Energy Servs., LLC v. Ellison*, 691 S.E.2d 203, 205 (Ga. 2010); *Time Warner Entm't Co. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004); *MacDonell v. PHH Mortg. Corp.*, 846 N.Y.S.2d 223, 224 (App. Div. 2007); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997).

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V. DERANGED: THE USAGE OF THE VPD IN AN ERA OF CORPORATE GREED
AND MARKET MELTDOWNS

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, some of the most prominent and sophisticated entities in our business markets have engaged in an endless array of illegal conduct.¹⁵² Meanwhile, on the consumer-level, there is a staggering amount of new and refined frauds perpetrated on the American public. These include identity fraud,¹⁵³ a host of illegal activities regarding subprime loans,¹⁵⁴ a growing number of debt adjusting scams,¹⁵⁵ and rampant general consumer fraud ranging from deceptive advertising to “cramming” of charges on bills.¹⁵⁶ The vulnerability of the American consumer increases as mass transactions conducted over long distances by phone, mail, fax, or internet become the norm. In response to this, legislatures, based largely on the Federal Trade Commission’s policies regarding consumer fraud, have enacted more consumer statutes that enable recovery.¹⁵⁷ As discussed, these statutes—often referred to collectively as “Little FTC Acts” or UDAP statutes—are designed to supplement common law fraud remedies, thereby providing a more flexible tool to hold companies accountable.¹⁵⁸ Most of these statutes provide for class actions, making certain that a company that 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.

¹⁵² Associated Press, *Corporate Fraud Scandals Since 2002*, U.S.A. TODAY (July 17, 2007, 4:46 PM), http://www.usatoday.com/news/topstories/2007-07-17-3330759536_x.htm.

¹⁵³ FED. TRADE COMM’N, CONSUMER FRAUD IN THE U.S.: AN FTC SURVEY 8–9 (2004).

¹⁵⁴ JOINT ECON. COMM., SUBPRIME MORTGAGE MARKET CRISIS TIMELINE 1–2 (July 2008), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=4cdd7384-dbf6-40e6-adbc-789f69131903.

¹⁵⁵ *Credit-Repair Scams*, MO. ATT’Y GEN. CHRIS KOSTER, <http://ago.mo.gov/publications/creditrepair.htm> (last visited Jan. 13, 2011); *Frauds and Scams*, ATT’Y GEN. OF TEX. GREG ABBOTT, <http://www.oag.state.tx.us/consumer/scams.shtml> (last updated Apr. 5, 2011); *Frequently asked Questions – Debt Adjuster*, STATE OF N.J. DEP’T OF BANKING AND INS., <http://www.state.nj.us/dobi/banklicensing/debtadjusterfaq.html> (last visited Jan. 13, 2008); Herb Weisbaum, *Debt Relief Deals ‘Preying on Consumer’s Trust’*, MSNBC.COM, <http://www.msnbc.msn.com/id/18155301/> (last updated Apr. 17, 2007).

¹⁵⁶ *Cramming: Mystery Phone Charges*, FED. TRADE COMM’N (Feb. 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro18.shtm>; *Unauthorized, Misleading, or Deceptive Charges Placed on Your Telephone Bill – “Cramming”*, FED. COMM’N, <http://transition.fcc.gov/cgb/consumerfacts/cramming.pdf> (last visited Jan. 13, 2011).

¹⁵⁷ NAT’L CONSUMER LAW CTR., *supra* note 79, at 1–3.

¹⁵⁸ *Id.*

It is true that corporate fraud and scandal is not exclusive to the twenty-first 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.¹⁵⁹ 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.¹⁶⁰ 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 foreign officials, false accounting, and manipulating energy markets to artificially inflate electricity costs for consumers on the west coast of the United States.¹⁶¹ In 2002 alone, there were over twenty corporate scandals with illegal, fraudulent, and improper conduct from companies such as AOL Time Warner, Arthur Andersen, Duke Energy, Halliburton, Kmart, Qwest, Tyco, and Xerox, just to name a few.¹⁶² 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.¹⁶³ 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;¹⁶⁴ there are nearly 10 million victims in the

¹⁵⁹ BOILER ROOM (New Line Cinema 2000); FUN WITH DICK AND JANE (Colum. Pictures 2005); WALL STREET (Twentieth Century Fox 1987).

¹⁶⁰ Susan Pulliam & Deborah Soloman, *How Three Unlikely Sleuths Exposed Fraud at WorldCom: Firm’s Own Employees Sniffed Out Cryptic Clues and Followed Hunches*, WALL ST. J., Oct. 30, 2002, 4:58 PM, <http://online.wsj.com/article/SB1035929943494003751.html>.

¹⁶¹ See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1357–59 (2002); Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3, 3 (2003); *Tapes: Enron Plotted to Shut Down Power Plant*, CNN.COM (Feb. 3, 2005, 11:28 PM), <http://www.cnn.com/2005/US/02/03/enron.tapes/>.

¹⁶² Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM (Aug. 26, 2002, 5:30PM), www.forbes.com/2002/07/25/accountingtracker_print.html.

¹⁶³ See JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* (2009); WILLIAM D. COHAN, *HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET* (2009); SEBASTIAN MALLABY, *MORE MONEY THAN GOD: HEDGE FUNDS AND THE MAKING OF A NEW ELITE* (2010); ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES* (2009).

¹⁶⁴ FED. TRADE COMM’N, *CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY S-1* (2007).

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United States.¹⁶⁵ The forms range from primitively deceptive to scams so complex that it takes several governmental agencies to put an end to the conduct.¹⁶⁶ 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.¹⁶⁷ Perpetrators committed an almost endless string of frauds to fuel Wall Street's need for more subprime paper.¹⁶⁸ Appraisers over-appraised homes; talking heads promised a housing market that would never decline; "liar loans" in which no documents are required to get a loan became the norm;¹⁶⁹ pre-payment penalties were imbedded in almost every 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.¹⁷⁰ Therefore, to

¹⁶⁵ See SYNOVATE, FEDERAL TRADE COMMISSION—2006 IDENTITY THEFT SURVEY REPORT 3 (2007) (reporting 8.3 million fraud victims in 2005); Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U. L. REV. 1061, 1078 (2007) (explaining that technological advances have caused identity theft cases to soar); Kamaal Zaidi, *Identity Theft and Consumer Protection: Finding Sensible Approaches to Safeguard Personal Data in the United States and Canada*, 19 LOY. CONSUMER L. REV. 99, 109-10 (2007) (explaining that there were 10 million reported cases of identity theft in 2004); Jennifer Lynch, Note, *Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 BERKELEY TECH. L.J. 259, 261 (2005) (reporting that 9.9 million Americans were victims in 2002).

¹⁶⁶ See De Armond, *supra* note 165, at 1078-79 (explaining typical identity theft cases); Christopher P. Couch, *Forcing the Choice Between Commerce and Consumers: Application of the FRCA to Identity Theft*, 53 ALA. L. REV. 583, 584-86 (2002) (describing common types of identity theft); Thomas L. Friedman, *Gonna Need a Bigger Boat*, N.Y. TIMES, Nov. 16, 2008, at 12; 'Malicious' Mortgage Fraud: More Than 400 Charged Nationwide, FBI (June 19, 2008), http://www.fbi.gov/page2/june08/malicious_mortgage061908.html.

¹⁶⁷ See Ben S. Bernanke, Chairman, Fed. Reserve, Speech at UC Berkeley/UCLA Symposium: The Mortg. Meltdown, the Econ., and Pub. Policy (Oct., 31 2008).

¹⁶⁸ *Id.*; see Associated Press, *FBI Investigating Potential Fraud by Fannie Mae, Freddie Mac, Lehman, AIG*, FOX NEWS (Sept. 23, 2008), <http://www.foxnews.com/story/0,2933,426783,00.html>; Chris Arnold, *Former Ameriquest Workers Tell of Deception*, NPR (May 14, 2007), <http://www.npr.org/templates/story/story.php?storyId=10165859>.

¹⁶⁹ Bob Ivry, *Subprime 'Liar Loans' Fuel Bust with \$1 Billion Fraud (Update 1)*, BLOOMBERG.COM (Apr. 25, 2007, 4:21PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aN2DPRuRs93M>.

¹⁷⁰ See *Ameriquest Accused of 'Boiler Room' Tactics*, ASSOCIATED PRESS (Feb. 5, 2005), http://educationcenter2000.com/Articles_Folder/Ameriquest.htm; Kevin Bohn, *FBI Probes Countrywide for Possible Fraud*, CNN MONEY (Mar. 8, 2008), http://money.cnn.com/2008/03/08/news/companies/countrywide_fbi/?postversion=2008031003; Chris Isidore, 'Liar Loans': Mortgage woes beyond subprime, CNNMONEY (Mar. 18, 2007, 5:01 pm), http://money.cnn.com/2007/03/19/news/economy/next_subprime/index.htm. See generally MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010) (describing the rampant frauds that occurred in the early 2000s).

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.¹⁷¹ Consumers’ trust in products, companies, and services has waned as the scams and predators have grown.¹⁷² 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.¹⁷³ According to the FTC, the top scams are “weight-loss products,” “foreign lotteries,” “prize promotions,” and “work-at-home programs.”¹⁷⁴ 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 targets those who have already been defrauded with over 11.7 million people being preyed on by more than one scheme.¹⁷⁵ Common examples include loan restructuring, credit refinancing, or debt consolidation scams that take an already-vulnerable and financially damaged party, promise them help, and then catapult them into complete bankruptcy and desperation.¹⁷⁶

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 party may sometimes keep illegal gains because the other party knew it was overpaying (or at least could have known) and paid anyway. There is no place for the “finders keepers” mentality fostered by the VPD in today’s fast-paced world where consumers battle with sophisticated companies and billing occurs through mass mailings, online bill payments, and credit card swipes. As noted in the amicus brief for *Huch II*, the demise of the VPD has correlated with a rise in protectionist statutes passed by states for their resident consumers.¹⁷⁷ Legislatures throughout the country have made clear that in a market in which bargaining power has

¹⁷¹ FED. TRADE COMM’N, *supra* note 164, at S-1.

¹⁷² Lauren L. Sullins, Comment, “Phishing” for a Solution: *Domestic and International Approaches to Decreasing Online Identity Theft*, 20 EMORY INT’L L. REV. 397, 403 (2006) (explaining that as scams such as phishing increase consumer confidence decreases); *American’s Consumer Confidence in Sharp Decline*, BLOOMBERG.COM, <http://www.bloomberg.com/apps/data?pid=avimage&iid=i.hcOXt8LDF4> (last visited Jan. 13, 2011).

¹⁷³ *United States Consumer Confidence*, TRADING ECONOMICS, <http://www.tradingeconomics.com/united-states/consumer-confidence> (last visited Feb. 2, 2012).

¹⁷⁴ FED. TRADE COMM’N, *supra* note 164, at S-1-S-2.

¹⁷⁵ *See id.* at 15 (“11.7 million [victims] experienced one or both of the two more general frauds covered in the survey – paying for a product or service that was never received or being billed for a service . . . the customer had not agreed to purchase.”).

¹⁷⁶ *Id.* at 53.

¹⁷⁷ *Huch v. Charter Commc’ns Inc.*, 290 S.W.3d 721, 727 (Mo. 2009).

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shifted considerably into the hands of the corporations and modern merchants, there must be meaningful remedies for harmed consumers. The profit motive is amoral, not immoral, and the legal structure must make certain that economic incentives encourage playing by the rules, not cheating. Legislatures recognize this, and through the creation of UDAP statutes, they 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 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 twenty-first century a consumer who was the victim of fraud, or even negligent billing by a powerful corporation, would be barred from recovery simply because she 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.

VI. CONCLUSION

The courts, the legislatures, and 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. The VPD was 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. Thus, 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 quaint 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

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simple ideals, and as such, must be fully eliminated from the consumer realm for the good of the market, including all of its participants.