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Leveraging the Voluntary Payment Doctrine in Litigation: Protecting Client Funds From Recoupment or Return

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VOLUNTARY PAYMENT DOCTRINE – A SHIELD

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INTRODUCTION TO THE VOLUNTARY PAYMENT DOCTRINE

1. Origins of the Voluntary Payment Doctrine
2. Rationale in support of Voluntary Payment Doctrine
3. Legal definition and elements of the Voluntary Payment Doctrine
4. Implications for Class Certification.

ORIGINS OF THE VOLUNTARY PAYMENT DOCTRINE

1. English Common law and underpinnings of doctrine.

    a. Ignorance of the law is no excuse.

    b. *Bilbie v. Lumley,* 2 East 469, 472 (102 ER 448)(1802).

2. Recognition of the foundational doctrine by the U.S. Supreme Court.

    a. Mistake of law principle in civil matters "well established." *Bank of the United States v. Daniel,* 37 U.S. 32, 55 (1838)(citing an 1823 case).

    b. There is not a single court with the power to create binding precedent that has not addressed the Voluntary Payment Doctrine. Practitioner's Guide to the Voluntary Payment Doctrine, Colin E. Flora, 37 S. Ill. L.J. 91 (Fall 2012).

RATIONALE IN SUPPORT OF VOLUNTARY PAYMENT DOCTRINE

1. "Every man must be taken to be cognizant of the law; otherwise there is not saying to what extent the excuse of ignorance might not be carried." *Bilbie,* 2 East at 472,

2. Entities who receive payment for services can rely on the funds for future activities.

3. A means to settle disputes without litigation requiring the party contesting the payment to notify the recipient of their concerns.

4. No recovery for injury which would not have occurred but for the negligence of the paying party.

5. Allocation of risks between contracting parties.

ELEMENTS OF THE APPLICATION OF THE VOLUNTARY PAYMENT DOCTRINE

1. Substantially all courts state the defense as "Money voluntarily paid on a claim of right with full knowledge of all the facts, in the absence of fraud, duress or compulsion, cannot be recovered back merely because the party, at the time of payment was ignorant of or mistook the law as to his liability." *Meeker R&D, Inc., v. Evenflo Co.,* 52 N.E.3d 1207, 1218 (Ohio Dist. 2016); *see also,* 37 S. Ill. U.L. 91, 98 n. 56.

2. The voluntary payment doctrine is an affirmative defense, not an independent cause of action.

3. Knowledge of the facts – Examples.

    a. Common for courts to decline to find mistakes of fact.

    b. Lack of sufficient information to determine how much is owed is mere ignorance of facts not likely a mistake of fact.

    c. If the facts are not obscured, then a failure to recognize an error in payment is not likely a mistake of fact.

    d. Uncertainty as to the existence of a debt or the extent of an obligation is likely not a mistake of fact.

ELEMENTS OF THE APPLICATION OF THE VOLUNTARY PAYMENT DOCTRINE (cont.)

4. Absence of Fraud – Doctrine does not apply to cases where payment induced by fraudulent content.

   a. The fraud must be alleged in the complaint.

   b. The fraud must be stated with requisite particularity.

5. Absence of Duress or Compulsion – A payment cannot be voluntary if it is forced.

   a. The traditional contract formation law duress concept applies.

   b. Jurisdictions differ on whether payment under protest is a form of duress or compulsion.

6. Mistake of law – one court defined as "[a] mistake of laws happens when a person, having full knowledge of the facts comes to an erroneous conclusion as to their legal effect . . .."

II. Defenses (Exceptions) to the Voluntary Payment Doctrine

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First Things First: Burdens & Pleading

- The voluntary payment doctrine is not an independent cause of action. Instead, it is an affirmative defense to a claim for repayment of money that was not actually owed.
  - *Fradis v. Savebig.com*, No. CV 11-07275 GAF (JCx), 2011 U.S. Dist. LEXIS 154915, at *18-19 (C.D. Cal. Dec. 2, 2011); *Webster v. LLR, Inc.*, No. 2:17cv225, 2018 U.S. Dist. LEXIS 232832, at *10, 2018 WL 10230741 (W.D. Pa. Aug. 20, 2018).
- That means a handful of important points:
  - 1. It can be waived by failure to timely raise it.
    - *Intermec, Inc. v. IBM*, No. C11-0165-JCC, 2012 U.S. Dist. LEXIS 192693, at *8-9 (W.D. Wash. Aug. 10, 2012); Parsons v. City of Phila., No. 13-0955, 2014 U.S. Dist. LEXIS 170934, at *6-7, 2014 WL 6973024 (E.D. Pa. Dec. 9, 2014); *JPMorgan Chase Bank, N.A. v. SFR Invests. Pool 1, LLC*, 433 P.3d 263 (Table), No. 70423 (Nev. 2019) (unpublished).
  - 2. It need not be anticipated and rebutted by a pleading. Meaning it is ordinarily an inappropriate basis for a motion to dismiss for failure to state a claim.
    - *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 560 (D.C. 2016); *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App'x 972, 978-79 (11th Cir. 2015); Schojan v. Papa John's Int'l, Inc., 34 F. Supp. 3d 1206, 1211 (M.D. Fla. 2014); *Franze v. Bimbo Foods Bakeries Distribution, LLC*, No. 7:17-cv-03556(NSR)(JCM), 2019 U.S. Dist. LEXIS 43432, at *12-13, 2019 WL 1244293 (S.D.N.Y. Mar. 15, 2019).
  - 3. Burden: Because it is an affirmative defense, the initial burden rests on the party invoking the doctrine to resist repayment. If the party is able to meet the initial burden, then the burden shifts to the party seeking repayment to establish an exception to the doctrine.
    - *Bank of N.Y. Mellon Tr. Co., Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, No. 2:18-cv-00978-APG-DJA, 2019 U.S. Dist. LEXIS 205354, at *5, 2019 WL 6307606 (D. Nev. Nov. 25, 2019); *McIntosh v. Walgreens Boots Alliance, Inc.*, 135 N.E.3d 73, 79 (Ill. 2019); *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Ct. of Nev.*, 338 P.3d 1250, 1254 (Nev. 2014) ("Because the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability. Once a defendant shows that a voluntary payment was made, the burden shifts to the plaintiff to demonstrate that an exception to the voluntary payment doctrine applies." (citations omitted)).
  - 4. Because of the burden shifting, it is not uncommon for courts to refer to the methods to defeat the doctrine as defenses, which is an important fact to be mindful of while conducting research, as it is easy to overlook very valuable caselaw due to the mixing of terms. In a perfect world, courts would refer to these "defenses" as "exceptions," as some courts do.

Traditional Exceptions: Mistake of Fact

- The exceptions of fraud and mistake of fact are considered to be the traditional exceptions to the doctrine.
  - *Alexian Bros. Health Providers Ass'n v. Humana Health Plan, Inc.*, 277 F. Supp. 2d 880, 891 (N.D. Ill. 2003) ("[T]he most traditional defenses to the voluntary payment doctrine are fraud and mistake of fact[.]")
- They are so well entrenched into voluntary payment doctrine jurisprudence that many courts' enunciations of the doctrine explicitly mention them: "Absent fraud, coercion or mistake of fact, monies paid under a claim of right to payment but under a mistake of law are not recoverable."
  - *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1330 (Ill. App. 1st Dist. 1995)
- Where the definition of a voluntary payment specifically requires that the payment not be made pursuant to a mistake of fact and in the absence of fraud, the argument against application is essentially that the payment was not itself voluntary.
  - *See Liberty Mut. Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 235 F. App'x 213, 217 (5th Cir. 2007) ("In contrast, an involuntary payment is one not proceeding from choice. Thus, payments made by virtue of a legal obligation, by accident, by mistake, or under compulsion are not considered voluntary and thus are not barred from recovery under the voluntary payment doctrine." (cleaned up)).

Traditional Exceptions: Mistake of Fact

- The origin of the doctrine was to create a civil corollary to the criminal-law concept that mistakes of law are not defenses.
  - *Bilbie v. Lumley*, 2 East 469 (102 ER 448) (1802); *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 667-68 (7th Cir. 2001).
- That left open a distinction between mistake of fact and mistake of law.
- Mistake of fact is a universally recognized exception.
- Examples of Successful Invocation of the Exception:
  - *Parino v. BidRack, Inc.*, 838 F. Supp. 2d 900, 908-09 (N.D. Cal. 2001) — On motion to dismiss, court found that, where a plaintiff made payment of her credit card bill despite the appearance of an unapproved charge, the plaintiff could sustain a defense of mistake. The specific facts alleged that the plaintiff disputed the charge "immediately after noticing that her account had been charged." Moreover, the court found that even if the plaintiff had made a "payment to her credit card company," she did "so that she could stay in good standing with creditors while pursuing this action," and thus her claim would not be barred. The latter basis we will discuss more later.
    - Although whether a sufficient mistake of fact has occurred is generally a question of fact, inappropriate for resolution on a motion to dismiss, where a pleading sufficiently demonstrates the absence of mistake, dismissal may be proper. *Compare Rickenbach v. Wells Fargo Bank, N.A.*, 635 F. Supp. 2d 389, 395 (D.N.J. 2009) (denying motion because court cannot resolve on pleadings whether there was a mistake of fact), *with Cook v. Home Depot U.S.A., Inc.*, No. 2:06-cv-00571, 2007 U.S. Dist. LEXIS 15679, at *25, 2007 WL 710220 (S.D. Ohio Mar. 6, 2007) ("Plaintiff's own conduct belies the claim of mistake of fact....").
  - *Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C.*, 15 A.D. 3d 233 (N.Y. App. Div. 2005) — Affirming denial of motion to dismiss "where the overpayments were clearly made to defendants based on a mistake of fact, namely, the amount of fees actually owed by plaintiff to defendants."
  - *In re Universal Service Fund Telephone Billing Practices Litigation*, No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727, at *110-111 (D. Kan. June 30, 2008) — On motion for summary judgment, court ruled doctrine did not apply where "[t]he very nature of th[e] claim is that customers who paid the [telephone] bills did so while operating under a mistake of fact . . . ." The claimed mistaken fact was that the Universal Connectivity Charge (UCC) charged to the plaintiff class was a tax-like surcharge that AT&T was required to bill its customers, instead of an optional surcharge assessed at the discretion of AT&T.
    - Courts also split over a fine line of when mistakes of fact are matters properly resolved on summary judgment. *See Cappalli v. BJ's Wholesale Club*, 904 F. Supp. 2d 184, 194-95 (D.R.I. 2012) (analyzing cases).

Traditional Exceptions: Mistake of Fact cont'd

- There are no shortage of cases in which conduct was deemed insufficient to amount to a cognizable mistake of fact sufficient to invoke the exception.
- Examples of Unsuccessful Invocation of the Exception:
  - *Horne v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 629 (S.D. Miss. 1999) — On motion to dismiss, court found that there was no sufficient mistake of fact where the plaintiffs "lacked sufficient knowledge to determine the validity of [a cable bill] late payment fee or how the amount of the fee was determined." The court went on to state, "[W]hen the payor is aware that he lacks []sufficient information to allow him to determine how much he owes, he is merely ignorant of the facts, but has not made a mistake of fact sufficient for the mistake exception to apply."
  - *Ergo v. International Merchant Services, Inc.*, 519 F. Supp. 2d 765, 773-74 (N.D. Ill. 2007) — On cross-motions for partial summary judgment, counterclaim could not survive the voluntary payment doctrine under a mistake of fact defense where the "[d]efendants' only argument against application of th[e] doctrine is the[ ] contention that they were not aware of the alleged overpayments until they examined payroll records during the discovery phase of this action." Because the defendants had all of the records within their possession, they could not claim a mistake of fact. The court went on to note: the "failure to recognize error in making a voluntary payment does not constitute mistake of fact under the doctrine when the relevant facts were not obscured or inaccessible."
  - *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816, 821 (7th Cir. 2010) — Affirming summary judgment, the Seventh Circuit found that there no sufficient mistake of fact where the purported mistake was that a husband believed the anomalous charges on his credit card statements had been incurred by his wife.
  - *Salling v. Budget Rent-A-Car*, 672 F.3d 442, 445 (6th Cir. 2012) — Affirming motion to dismiss, the Sixth Circuit decision held plaintiff had not claimed a mistake of fact where he "paid the charge *in anticipation of filing suit* . . . ." The court surmised the purpose of the plaintiff incurring the charge was to provide him standing to bring the claim. Because his payment was incurred with such intent the court found he was fully aware of the charge and voluntarily paid it.
    - Oddly, the plaintiff also contended that the doctrine was inapplicable to his breach of contract claim "because the voluntary payment doctrine does not apply where a party breaches a provision of a written contract." *Id.* at 445. But, as the court stated, "A payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and if voluntary cannot be recovered back." *Id.* (quoting Nationwide Life Ins. Co. v. Myers, 425 N.E.2d 952, 956 (Ohio Ct. App. 1980)) (internal quotations marks omitted).

Traditional Exceptions: Mistake of Fact cont'd

- There are some outliers in applying this exception:
  - New York
    - NY CPLR § 3005 (2012): "Relief against mistake of law. When relief against a mistake is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."
    - Enacted in 1942 as section 112-f of the Civil Practice Act, it was argued that the language of NY CPLR § 3005 removed the distinction between mistakes of fact and mistakes of law, thereby abrogating the voluntary payment doctrine. The New York Court of Appeals rejected a wholesale abrogation of the mistake-of-law defense to payment of money—i.e. the voluntary payment doctrine. *Mercury Machine Importing Corp. v. City of New York*, 144 N.E.2d 400, 3 N.Y.2d 418 (N.Y. 1957). Instead, a court may, in the undefined "appropriate case[]," permit recovery despite a mistake of law, not fact. *Id.* at 3 N.Y.2d 427; *accord Gimbel Bros., Inc. v. Brook Shopping Ctrs.*, Inc., 118 A.D.2d 532, 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986).
  - Michigan
    - Under Michigan law, "[a] mistake of either law or fact will entitle a party to restitution unless it is inequitable or inexpedient for restitution to be granted." "The equity exception arises in the situation where the party receiving the money has changed position in consequence of the payment, and it would be inequitable to allow a recovery."
      - *Hofmann, D.C. v. Auto Club Ins. Ass'n*, 162 Mich. App. 424, 413 N.W.2d 455, 457 (1987); *see also Durant v. ServiceMaster Co.*, 159 F. Supp. 2d 977, 981 n.2 (E.D. Mich. 2011); *Tara Homes, Inc. v. Nash*, No. 252460, 2005 Mich. App. LEXIS 2084, at *5 (Mich. Ct. App. Aug. 25, 2005) (unpublished) (citing *Wilson v. Newman*, 617 N.W.2d 318, 321 (Mich. 2000)).
  - Restatement (Third) of Restitution & Unjust Enrichment (2011)
    - The Restatement (Third) § 6 provides, "Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due." As made clear in comment c, "Relief is available . . . without regard to whether the mistake might be characterized as mutual or unilateral, a mistake of fact or a mistake of law."
    - Other common-law nations such as Canada and England have abrogated the distinction.
      - Sagi Peari, *Improperly Collected Taxes: The Border Between Private and Public Law*, 23 CAN. J.L. & JURIS. 125, 128 (2010); Hofmann v. Auto Club Ins. Ass'n, 413 N.W.2d 455, 457 (Mich. App. 1987) ("A mistake of either law or fact will entitle a party to restitution unless it is inequitable or inexpedient for restitution to be granted.");

Traditional Exceptions: Fraud

- Of the traditional defenses, the defense of fraud is far less well-developed than mistake of fact.
- There is no question that the voluntary payment doctrine does not apply to fraud. The doctrine also does not apply in the context where "a plaintiff's claim is predicated on a lack of full disclosure by defendant."
  - *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 649 (S.D.N.Y. 2011) (citing *Spagnola v. Chubb Corp.*, 574 F.3d 64, 73 (2d Cir. 2009); *Samuel v. Time Warner, Inc.*, 809 N.Y.S.2d 408, 418 (N.Y. Sup. Ct. 2005))
- A key question in applying the fraud exception is what burden a plaintiff carries to overcome the doctrine on a claim of fraud. The fundamental question is whether the plaintiff, by merely alleging fraud, is able to prevent summary disposition against him as a result of the doctrine, or whether he must prove his fraud claim in order to withstand application. What appears clear from the few cases having dealt with the issue is that, in order to use the defense of fraud to overcome the doctrine, a plaintiff must sufficiently plead facts upon which a court can find a basis for fraud. Moreover, it would appear that the plaintiff ought to plead a specific cause of action based in fraud.
  - *Flournoy v. Ameritech*, 814 N.E.2d 585, 589 (Ill. App. Ct. 2004) — Court reversed a dismissal where plaintiff pleaded a claim for fraud, holding that because the plaintiff pleaded "[h]is cause of action . . . in the nature of fraud . . . . the voluntary payment doctrine does not bar [his] claim."
  - *Horne v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 628-31 (S.D. Miss. 1999) — Dismissed the plaintiffs' case as barred by the voluntary payment doctrine where plaintiffs failed to plead a claim for fraud with sufficient particularity in accordance with Federal Rule of Civil Procedure 9.
- It also appears that the defense is only viable so long as the specific claim based upon fraud survives.
  - *RMA Ventures v. SunAmerica Life Insurance*, No. 2:03-CV-740, 2007 U.S. Dist. LEXIS 86692, at *12-13 (D. Utah Nov. 26, 2007) — Finding in favor of defendants on summary judgment where the facts were insufficient for the plaintiffs' fraud claim to survive to a jury.
  - *Stone v. Mellon Mortgage Co.*, 771 So. 2d 451, 458-59 (Ala. 2000) — Upheld summary judgment for defendant where plaintiff did not allege a misrepresentation in its complaint.
- Best Practice: Plead a claim based in fraud in the complaint with sufficient particularity so as to satisfy the pleading requirements for fraud. So long as that claim survives, the court should be unable to find for a defendant under the voluntary payment doctrine, and the claim can progress to trial.

Other Exceptions: Duress

- Although not one of the two "traditional" exceptions, like fraud and mistake, it is often explicitly reference in the definition of the doctrine. As in the case of the traditional defenses, where the definition of a voluntary payment includes a requirement that it be without duress, the argument for duress is fundamentally an argument that the payment was not voluntary.
  - *See, e.g.*, Curtis Lumber Co. v. La. Pac. Corp., 618 F.3d 762, 782 (8th Cir. 2010) ("A payment is deemed voluntary, and thus not recoverable, 'when a person without mistake of fact or fraud, duress, coercion, or extortion pays money on a demand which is not enforceable against him.'" (quoting Ritchie v. Bluff City Lumber Co., 110 S.W. 591, 592 (Ark. 1908))); *Emp'rs Ins. of Wausau v. United States*, 764 F.2d 1572, 1575 (Fed. Cir. 1985) ("A payment under duress can be recovered as it is not considered voluntary if made because of the wrongful acts or threats of the payee government.").
- "The coercion or duress exception applies when (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) circumstances were the result of coercive acts of the opposite party."
  - *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Ct. of Nev.*, 338 P.3d 1250, 1254 (Nev. 2014) (quoting *Emp'rs Ins. of Wausau v. United States,* 764 F.2d 1572, 1576 (Fed. Cir. 1985) (cleaned up)).
- Stemming from contract law, duress has found a unique existence in the realm of the voluntary payment doctrine, expanding beyond mere physical duress into the realm of economic duress. This has resulted in courts identifying specific circumstances under which a person may make a payment which is not considered voluntary due to the nature of the service that would be lost but for the payment.
  - *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 668 (7th Cir. 2001) (At the common law duress meant duress only of person, and nothing short of a reasonable apprehension of imminent danger to life, limb, or liberty sufficed as a basis for an action to recover money paid. The doctrine became gradually extended, however, to recognize duress of property as a sort of moral duress, which, equally with duress of person, entitled one to recover money paid under its influence. Today the ancient doctrine of duress of person (later of goods) has been relaxed, and extended so as to admit of compulsion of business and circumstances.").
- The most thorough enunciation of duress as a defense to the application of the doctrine comes from the Seventh Circuit opinion in *Randazzo v. Harris Bank Palatine, N.A.* The court noted that "[a]lthough the issue of duress is generally one of fact, to be judged in light of all the circumstances surrounding a given transaction, Illinois courts have pinpointed several circumstances in which duress is commonly found." The Seventh Circuit identified three categories of specific circumstances in which duress may readily be found:
  - (1) payment of money under pressure of a disastrous effect to business;
  - (2) payment of money where the payor is an intermediary party in the sale of goods or real estate; and
  - (3) payment for items deemed to be necessities.
    - *See also Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Ct. of Nev.*, 338 P.3d 1250, 1254 (Nev. 2014) (recognizing exceptions of "(1) coercion or duress caused by a business necessity and (2) payment in defense of property.").

Other Exceptions: Duress — Payment of Money Under Pressure of a Disastrous Effect to Business

- The most frequent form of a "disastrous effect to business" is the impact of rent.
  - *Best Buy Co. v. The Harlem-Irving Cos.*, 51 F. Supp. 2d 889, 898 (N.D. Ill. 1999) — The "company's payment of disputed rent charges [were] sufficient evidence of duress to withstand summary judgment where [the] landlord threatened to pursue all remedies under the lease, including eviction, if the payments were not made[.]"
  - *Kanter & Eisenberg v. Madison Associates*, 508 N.E.2d 1053, 1056-57 (Ill. 1987) — Finding that "payment of disputed rent made under duress where nonpayment would result in the 'termination of a valuable leasehold on which [the plaintiffs] had apparently spent a million dollars in improvements'" was sufficient to find duress.
- Other business necessities:
  - *Ross v. City of Geneva*, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976) — Finding duress where the "defendant was the sole provider of electricity to the class members' commercial enterprises" and "[t]here was evidence that it was defendant's policy to terminate, and it ha[d] terminated, the supply of electricity to users for non-payment of imposed charges."
  - *Illinois Glass Co. v. Chicago Telephone Co.*, 85 N.E. 200, 201-02 (Ill. 1908) — Not finding duress, but "not[ed] that the 'telephone has become an instrument of such necessity in business houses that a denial of its advantages would amount to a destruction of the business.'"
  - *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 782-84 (8th Cir. 2010) — Duress may be found where a company paid rebates to its customers and then sought return of those rebates. The court found that the owner, who was new to the business, made the rebate payments out of fear of losing future patronage from customers representing seventy-five percent of his business. Michigan has also found that payments were "made under compulsion or duress" where plaintiff would be "denied the right to continue its business unless it paid the [defendant's] unlawful" building permit fees.
- Restatement (Third) of Restitution and Unjust Enrichment § 14, cmt. g (2011) approach permits a finding of duress even where what is being threatened "would normally be a legal right . . . ." One such example is the threat to bring civil litigation. Even though civil litigation generally holds a privileged status exempting it from coercion, "[t]he threat or instigation of legal proceedings in pursuit of a claim known to be unjustified is wrongful prima facie; such acts constitute duress and a transfer induced thereby is voidable."
  - *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) — Looking to the Restatement (Third) approach, concluding that "economic duress" or a "business compulsion" were sufficient grounds to withstand application of the doctrine. The court, noting "that duress can occur even if the defendant had a legal right to take a threatened action[,]" held that "[e]conmoic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement."
  - *See also Behm v. City of Cedar Rapids*, No. 16-1031, slip op. 90, 2018 Iowa Sup. LEXIS 85 (Aug. 31, 2018), *on reh'g*, 922 N.W.2d 524 (Iowa 2019)

Other Exceptions: Duress — Payment of Money Where the Payor is an Intermediary Party in the Sale of Goods or Real Estate

- "Duress need not . . . reach the level of disaster to preclude application of the voluntary payment doctrine." *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 669 n.1 (7th Cir. 2001). It extends to circumstances in which the plaintiff was involved in the purchase of property with a contract to sell that property to a third-party.
  - *Schlossberg v. E.L. Trendel & Associates, Inc.*, 380 N.E.2d 950, 954 (Ill. App. Ct. 1978) — "[T]he buyer of a parcel of land had in turn agreed to resell the property to a third party. After tender of the purchase price, the seller demanded an additional $30,000. Because the buyer was already obligated to sell the property to the third party and would be in default if he could not obtain the deed, the buyer had no choice but to pay the additional funds and then sue for recovery of them. The court determined that the buyer's complaint contained 'sufficient factual allegations to warrant an evidentiary hearing on the issue of business duress.'"
  - *Pemberton v. Williams*, 87 Ill. 15, 17-18 (1877) — "[D]uress [is a] question for [the] jury when a buyer ha[s] paid nearly all the contract price for a parcel of land, . . . contracted to resell the property to a third party, and the original seller demand[s] as a condition of the delivery of the deed a sum larger than was set forth in the contract[.]"
  - *Ball v. Vill. of Streamwood*, 665 N.E.2d 311, 318 (Ill. App. Ct. 1996) — Finding "duress excused plaintiffs' payment[s] of a tax where their homes were subject to contracts to sell to third parties, and the village code provided civil penalties and fines for failure to pay the tax[.]"
  - *DeBruyn v. Elrod*, 418 N.E.2d 413, 417 (Ill. 1981) — Finding plaintiffs subject to duress where they "were confronted with the choice of payment of [a] sheriff's fees or his refusal to effect the requested sale, execution or redemption[.]"
  - *Peterson v. O'Neill*, 255 Ill. App. 400, 401-02 (1930) — Concluding plaintiff's payment of money was not voluntary due to duress when he "had contracted for the resale of property, the defendant was obligated to furnish the deed, and the defendant demanded that the plaintiff pay for the deed, knowing that the plaintiff had contracted for the sale of the property[.]"

Other Exceptions: Duress — Payment for Items Deemed to be Necessities

- "If the asset is a necessity and the consequences of nonpayment would adversely affect the asset, a case might be made for duress as a motivating factor in payment."
  - *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 669 n.1 (7th Cir. 2001)
- Categories Deemed Necessities
  - Loss of Home
    - *Arra v. First State Bank & Trust Co.*, 621 N.E.2d 128, 132 (Ill. App. Ct. 1993)
  - Feminine hygiene products
    - *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344, 348-53 (Ill. 1989)
  - Telephone services, both landline and cellular
    - *Getto v. City of Chicago*, 426 N.E.2d 844, 851 (Ill. 1981); *Ikechi v. Verizon Wireless*, Civil No.: 10-cv-4554 (JNE/SER), 2011 U.S. Dist. LEXIS 57016, at *24-25, 2011 WL 2118797 (D. Minn. Apr. 7, 2011); *but see Dreyfus v. Ameritech Mobile Commc'ns, Inc.*, 700 N.E.2d 162, 167 (Ill. App. Ct. 1998) (holding that cellular service is not a necessity due to availability and access to landline alternatives).
  - The loss of utilities such as electrical services
    - *Ross v. City of Geneva*, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976)
  - Another instance in which a necessity might be found is where a "person [is] trying to check out of a hotel in a foreign country."
    - *Shaw v. Marriott Int'l, Inc.*, 474 F. Supp. 2d 141, 151 (D.D.C. 2007), *rev'd in part on other grounds*, 605 F.3d 1039 (D.C. Cir. 2010)
- Categories Often Deemed Not Necessities
  - Cable Television
    - *BMG Direct Mktg. v. Peake*, 178 S.W.3d 763, 772 (Tex. 2005); *Horne v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 628 (S.D. Miss. 1999); *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1332-33 (Ill. App. Ct. 1995); *but see Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 890-93 (Ind. 2004) (finding duress for potential loss of cable TV)
  - Inability to use a Discount Coupon
    - *Lusinski v. Dominick's Finer Foods, Inc.*, 483 N.E.2d 587, 591 (Ill. App. Ct. 1985)
  - Potential Disappointment' a Child
    - *Isberian v. Vill. of Gurnee*, 452 N.E.2d 10, 14 (Ill. App. Ct. 1983)

Other Exceptions: Payments Under Protest

- Perhaps the most confusing area of voluntary payment doctrine jurisprudence is whether a payment made under protest preserves the would-be plaintiff's right to later seek recovery of the payment. Authority is split as to whether protestation is sufficient to make the payment involuntary.
- Protest Preserves Repayment
  - *See, e.g.*, *Bishop v. Bishop*, 250 S.W.3d 570, 573 (Ark. Ct. App. 2007); *Avianca, Inc. v. Corriea*, Civ. A. No. 85-3277 (RCL), 1992 WL 93128, at *7 (D.D.C. April 13, 1992); *Silver Buckle Mines, Inc. v. United States*, 132 Fed. Cl. 77, 85 (2017) ; *Cmty. Convalescent Ctr., Inc., v. First Interstate Mortg. Co.*, 537 N.E.2d 1162, 1164 (Ill. App. Ct. 1989); *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Ct. of Nev.*, 338 P.3d 1250, 1253 (Nev. 2014); *Putnam v. Time Warner Cable of Se. Wis., L.P.*, 649 N.W.2d 626, 636 (Wis. 2002); *cf. Adkins v. Comcast Corp.*, No. 16-cv-05969-VC, 2017 U.S. Dist. LEXIS 137881, at *6, 2017 Wl 3491973 (N.D. Cal. Aug. 1, 2017) ("It's questionable whether the voluntary payment doctrine should apply at all in a case like this, where a consumer faces a choice between paying under protest, or refusing to pay and facing late fees and a negative item on his credit report.")
- Protest Does Not Preserve Repayment
  - *See, e.g.*, *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 725 (Mo. 2009) (en banc); *Rowe v. Union Central Life Insurance Co.*, 12 So. 2d 431, 433-34 (Miss. 1943); *FirstEnergy Sols. Corp. v. Allegheny Ludlum LLC*, No. 16-694, 2017 U.S. Dist. LEXIS 56517, at *12 (W.D. Pa. Apr. 13, 2017) (Ohio law); Williams v. Enter. Holdings, Inc., No. 12-05531, 2013 U.S. Dist. LEXIS 38897, at *7, 2013 WL 1158508 (E.D. Pa. Mar. 20, 2013) (Pennsylvania law); *Ignatovig v. Prudential Ins. Co.*, 16 F. Supp. 764, 764 (D. Pa. 1935) ("The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intent to claim the money back."); *D.R. Horton, Inc. v. Bd. of Sups. for Cnty. of Warren*, 737 S.E.2d 886, 889 (Va. 2013).
  - At least one commentator has designated this view as the "traditional rule." Many older cases treat protest as evidence of duress, but not as itself preserving a right to seek repayment.
    - Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. Rev. 1397, 1423 (2009)
- Modern Trend
  - Restatement (Third) of Restitution & Unjust Enrichment § 34 (2011)
    - (1) If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the disputed obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.
    - (2) The claim described in subsection (1) is available only to a party acting in good faith in the reasonable protection of its own interests. It is not available where there has been an accord and satisfaction, or where a performance with reservation of rights is inadequate to discharge the claimant's obligation to the recipient.
  - The Restatement (Third) contends that this "common-sense solution" acts to promote justice and efficiency. Given the authoritative weight of the Restatements, it is highly likely that the modern trend may be to permit a payment under protest as a preservation of right to seek repayment. As a practical matter, it is of the utmost importance to determine your state's approach to this rule before advising a client on making payment.
    - Restatement (Third) of Restitution & Unjust Enrichment § 35 cmt. a; *see also City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) (citing favorably to Restatement (Third) of Restitution & Unjust Enrichment § 35(1))
- Even in jurisdictions where payment under protest is not sufficient to preserve the right to repayment, a payor may still be able to make payment and preserve the right to repayment. If both the payor and the recipient "agree[ ] that the payment is conditional upon the validity of the [recipient's] claim[,]" then the payor will not be barred from subsequent litigation seeking repayment.
  - Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. Rev. 1397, 1423 n.111 (2009) (quoting Restatement (First) of Restitution § 45 cmt. e (1937)); *see also Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677, 685-86 (10th Cir. 1991).

Other Exceptions: Public Policy/Equity

- If a payor is unable to challenge application of the doctrine on the basis of the payment not having been voluntary, he may still avail himself of arguments of equity or public policy.
- Recall that the New York Code grants a judge the discretion to allow a claim to proceed where money was paid due to a mistake of law. That discretion is principally one of equitable authority to which a judge is not bound.
  - N.Y. C.P.L.R. § 3005; *Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc.*, 499 N.Y.S.2d 435, 439 (N.Y. App. Div. 1986)
- Allowing for repayment of money voluntarily paid on public policy grounds is far from a new concept. As such, it has seen specific carve-outs and enunciations as to what constitutes public policy against application of the doctrine.
- It is against public policy to apply the doctrine where the money was paid to public officers from public funds.
  - *In re* Peschel, 4 N.W.2d 194, 199 (N.D. 1942)
- In a more modern trend, courts have begun to find that the doctrine is inapplicable to cases where the payment was demanded in violation of the defined public policy of a statute.
  - *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997) — "[T]he State has an interest in transactions that involve violations of statutorily defined public policy, and, generally speaking, in such situations, the voluntary payment rule will not be applicable."
  - Jackson v. Novastar Mortg.,Inc., 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) — Holding the voluntary payment doctrine inapplicable because application would contradict the defined public policy against racial discrimination found in 42 U.S.C. §§ 1981 & 1982
  - *Helms v. Consumerinfo.com, Inc.*, 236 F.R.D. 561, 565 (N.D Ala. 2005) — Finding the doctrine inapplicable to a plaintiff's claims under the Credit Repair Organizations Act because to do otherwise "would totally undermine the statute and its purpose." (15 U.S.C. §§ 1679-1679j)
  - *U-Haul Co. of Ala., Inc. v. Johnson*, 893 So.2d 307, 313 (Ala. 2004) — Directing trial court to consider whether the defendant's conduct in potential contravention of various statutes "violates public policy as established by the Legislature so that a public-policy exception to the voluntary-payment doctrine applies in this case."
  - *MacDonell v. PHH Mortgage Corp.*, 45 A.D.3d 537, (N.Y. App. Div. 2007) — Doctrine does not apply to Real Property Law § 274-a(2) and General Business Law § 349(a), even though applying to common-law causes of action.
  - Eisel v. Midwest Bankcentre, 230 S.W.3d 335, 339-40 (Mo. 2007) (en banc) — Doctrine inapplicable to payments made for services in the course of the unauthorized practice of law.
  - *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 810 (Ill. App. Ct. 2007) — Determining that Illinois, like Tennessee, "has an interest in transactions that violate 'statutorily-defined public policy,'" and that "[t]he effect of such transgressive acts, generally speaking, is that the voluntary payment rule will not be applicable." — Called into question by *McIntosh v. Walgreens Boots Alliance, Inc.*, 135 N.E.3d 73, 82-83 (Ill. 2019)
    - *See also McIntosh v. Walgreens Boots Alliance, Inc.*, 135 N.E.3d 73, 86 (Ill. 2019) (Kilbride, J., dissenting)

Other Exceptions: Consumer Protection Acts

- "The single biggest development in voluntary payment doctrine jurisprudence in decades has been the determination by a handful of courts that the voluntary payment doctrine is inapplicable to bar claims for repayment predicated upon the violation of a consumer protection statute."
  - *Braan v. Wells Fargo Home Mortg., Inc.*, Civil Action No. PX-17-0380, 2017 U.S. Dist. LEXIS 122154, at *17-18, 2017 WL 3315253 (D. Md. Aug. 3, 2017) (quoting Colin E. Flora, *Practitioner's Guide to the Voluntary Payment Doctrine*, 37 S. ILL. U. L.J. 91, 113 (2012)); *Graiser v. Visionworks of Am., Inc.*, No. 1:15-CV-2306, 2016 U.S. Dist. LEXIS 109213, at *12 n.47, 2016 WL 4379301 (N.D. Ohio Aug. 17, 2016) (same); *see also Behm v. City of Cedar Rapids*, No. 16-1031, slip op. 90, 2018 Iowa Sup. LEXIS 85 (Aug. 31, 2018), *on reh'g*, 922 N.W.2d 524 (Iowa 2019); *McIntosh v. Walgreens Boots Alliance, Inc.*, 135 N.E.3d 73, 86 (Ill. 2019) (Kilbride, J., dissenting).
- It is an outgrowth into a specific application of the public-policy exception. Nevertheless, courts were slow to create a categorical carveout for consumer protection statutes.
  - *See, e.g.*, *Edwards v. Danka Indus., Inc.* , No. 3: 03-0575, 2006 U.S. Dist. LEXIS 106306, at *17-20 (M.D. Tenn. Oct. 13, 2006) ("[T]he Court does not find that Defendant's conduct, which is not directly addressed in the language of the statute, to be in violation of the public policy embodied in the TCPA.").
- It was first signaled in *Brown v. SBC Commc'ns, Inc.*, No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, at *29 n.3, 2007 WL 684133 (S.D. Ill. Mar. 1, 2007): "The Court also expresses some skepticism about the applicability of the voluntary payment doctrine to Brown's claim under the [Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)]. The ICFA is of course remedial legislation that is construed broadly to effect its purpose, namely, to eradicate all forms of deceptive and unfair business practices and to grant appropriate remedies to defrauded consumers."
- What was signaled in *Brown* was established in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10, 23-24 (Wash. 2007) ("We agree with Indoor Billboard that the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.")
- Since *Indoor Billboard*, the strong trend has been for courts to find that the doctrine does not apply to consumer protection statutes.
  - *Mounce v. CHSPSC, LLC*, No. 5:15-CV-05197, 2017 U.S. Dist. LEXIS 160673, at *24, 2017 WL 4392048 (W.D. Ark. Sep. 29, 2017); *Bautista v. Valero Mktg. & Supply Co.*, No. 15-cv-05557-RS, 2018 U.S. Dist. LEXIS 221854, at *8-10 (N.D. Cal. Dec. 4, 2018); *Southstar Energy Servs., LLC v. Ellison*, 691 S.E.2d 203, 206 (Ga. 2010); *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 32 (Iowa 2013); *Braan v. Wells Fargo Home Mortg., Inc.*, Civil Action No. PX-17-0380, 2017 U.S. Dist. LEXIS 122154, at *17-18, 2017 WL 3315253 (D. Md. Aug. 3, 2017); *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. 2009) (en banc); *Bissonette v. Enter. Leasing Co.-West, LLC*, 30 F. Supp. 3d 1002, 1024 (D. Nev. 2014); *Graiser v. Visionworks of Am., Inc.*, No. 1:15-CV-2306, 2016 U.S. Dist. LEXIS 109213, at *12 n.47, 2016 WL 4379301 (N.D. Ohio Aug. 17, 2016); *MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc.*, 809 N.W.2d 857, 872 (Wis. 2012); *cf. Soule v. Hilton Worldwide, Inc.*, 1 F. Supp. 3d 1084, 1104 n.14 (D. Haw. 2014) ("Although the Court need not decide whether the Voluntary Payment Rule is inapplicable against consumer protection statutes, the Court notes that several jurisdictions find that the Voluntary Payment Rule does not apply to statutes like H.R.S § 480-2."); *Bhasker v. Kemper Cas. Ins. Co.*, 284 F. Supp. 3d 1191, 1238-40 (D.N.M. 2018) (confining doctrine to claims for restitution, refusing to extend to statutory claims); *Allen v. Holiday Universal*, 249 F.R.D. 166, 180 n.13 (E.D. Pa. 2008) ("There do not appear to be any cases applying the voluntary payment doctrine to transactions allegedly in violation of a Pennsylvania consumer protection statute.").

Other Exceptions: Consumer Protection Acts continued

- There is an important outlier: *McIntosh v. Walgreents Boots Alliance, Inc.*, 135 N.E.3d 73 (Ill. 2019)
  - In *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 810 n.2 (Ill. App. Ct. 2007):
    - "The intent and purpose of that Act lend additional support to our refusal to apply the voluntary payment doctrine to this case. See 815 ILCS 505/1 et seq. (West 1998). The Consumer Fraud Act is a regulatory and remedial statute intended to give broad protection to consumers, borrowers, and business people against fraud, unfair methods of competition, and other unfair and deceptive business practices. 815 ILCS 505/2 (West 1998). The object of the statute is the protection of the public interest. Thus, Smart's allegedly excessive charges would violate the fairness requirements of the Consumer Fraud Act as well. requirements of the Consumer Fraud Act as well." (further citations omitted).
  - *McIntosh* Majority: Common Law Right Must be ***Expressly*** Abrogated
    - We find nothing in either *Nava* or *Ramirez* that lends support to McIntosh's argument that claims brought under the Consumer Fraud Act are categorically exempt from the voluntary payment doctrine. The "public policy" referenced by *Nava* amounts to nothing more than recognition that a payment charged and collected in contravention of the Consumer Fraud Act is unlawful. Merely characterizing an act or practice as illegal is insufficient to defeat application of the doctrine. Indeed, the voluntary payment doctrine specifically applies where the payment sought to be recovered was obtained illegally. *Id.* This court has repeatedly rejected an argument that the voluntary payment doctrine cannot be used to defeat public policy in circumstances where the payment was not the result of fraud or a misrepresentation of fact.
      Moreover, McIntosh's assertion that Consumer Fraud Act claims are exempt from the voluntary payment doctrine is in direct conflict with well-established principles that govern a legislative abrogation of a common-law rule. Common-law rights and remedies remain in full force in this state unless expressly repealed by the legislature or modified by court decision. A legislative intent to alter or abrogate the common law must be plainly and clearly stated. As a consequence, "Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least— rather than the most— alteration in the common law."
      Nothing in the language of the Consumer Fraud Act reflects a legislative intent to alter the voluntary payment doctrine or its applicability to claims brought under the statute. Therefore, it cannot be said that the Consumer Fraud Act abrogates the voluntary payment doctrine. To the extent that *Nava* and *Ramirez* suggest otherwise, they are overruled. Accordingly, we reject McIntosh's assertion that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine.
    - *Id.* at 82-83; *see also Nieves v. All Star Title, Inc.*, C.A. N10C-03-191 PLA, 2010 Del. Super. LEXIS 319 (Del. Sup. Ct. July 27, 2010)
  - *McIntosh* Dissent – Justice Kilbride:
    - In my view, application of the voluntary payment doctrine to claims brought under the Consumer Fraud Act is not only in direct conflict with the public policy underlying that Act, but its application as an affirmative defense to Consumer Fraud Act claims undermines the legislature's intent in enacting the consumer protection statute. Use of the doctrine thus poses a threat to the effectiveness of the Consumer Fraud Act.
    - Dissent looked to numerous other discussions we've discussed and *Brown*. The majority looked no further than *Ramirez* and the subsequent *Nava* decision, which was based on *Ramirez*.

Other Exceptions: Miscellaneous

- Additional exceptions have been carved out that are not easily classified.
- Subrogation (Successful): Doctrine is inapplicable to conventional subrogation. This is based in the concept that "[e]ven if the decision to pay a claim is legally or economically questionable, the 'desire to preserve customer relations and avoid a complex and costly coverage litigation is . . . sufficient to prevent the [insurer] from being considered a mere volunteer." Additionally, courts have found that to hold otherwise would contradict public policy by incentivizing insurers to withhold prompt payment of claims.
  - *Jorge v. Travelers Indem. Co.*, 947 F.Supp. 150, 156 (D. N.J. 1996); *Cont'l Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 970-71 (N.D. Ohio 2006) (citing *Commercial Std. Ins. Co. v. Am. Emp'rs, Ins. Co.*, 209 F.2d 60, 65 (6th Cir. 1954)).
- Government as Payee (Unsuccessful): One approach that did not succeed was an attempt to contend that the government is exempt from application of the doctrine. In *United States v. Hadden*, the federal government sought repayment of funds "paid by mistake to a war contractor . . . ." The government contended that the doctrine was inapplicable because "public funds have always been zealously guarded, and that there is a long established rule that such funds wrongfully, erroneously, or illegally paid may be recovered from the person to whom the payments were made." The Sixth Circuit found that the act under which the funds were paid did not provide for a right to restitution, and that "[t]he controversy [wa]s, therefore, governed by the general law of restitution . . . ." Looking to the general law of restitution, the court found no exception to the doctrine for payments made by the government.
  - *United States v. Hadden*, 192 F.2d 327, 327-31 (6th Cir. 1951).


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LEVERAGING THE VOLUNTARY PAYMENT DOCTRINE IN LITIGATION: PROTECTING CLIENT FUNDS FROM RECOUPMENT OR RETURN

April 22, 2020

Mark Rotatori, Partner

Voluntary Payment Doctrine Bars Claim (latest cases)

MCINTOSH v. WALGREENS BOOTS ALL., INC., 135 N.E.3D 73 (ILL. 2019)

- Class action, under Illinois's Consumer Fraud and Deceptive Business Practices Act, against Walgreens Boots Alliance for the alleged unlawful collection of bottled-water tax on exempt purchases
- McIntosh argued that the voluntary payment doctrine is inapplicable under the Act
- Held: Supreme Court **rejects** claim that the doctrine is categorically inapplicable for statutory fraud claims
    - Abrogation of common law "must be plainly and clearly stated" by statute
    - Nothing in **text** of the Act suggests legislature sought to eliminate defense

MCINTOSH v. WALGREENS BOOTS ALL., INC., 135 N.E.3D 73 (ILL. 2019)

- Court further holds that granting motion to dismiss was proper, as McIntosh's complaint fails to allege sufficient facts showing that the fraud exception applies
- Receipt listed the tax as a separate line item, so no misrepresentation of facts

*"**Because all persons are presumed to know the law**, a mistake or misrepresentation of law will not avoid application of the voluntary payment doctrine. Because McIntosh is charged with knowledge of the law, he cannot claim to have been deceived by the information disclosed on the receipt. **McIntosh had the ability to investigate the ordinance to determine if the bottled water tax applied to his purchases of carbonated or flavored water**."*

FIRSTENERGY SOLS. CORP. v. ALLEGHENY LUDLUM LLC, NO. CV 16-694, 2017 WL 1383927 (W.D. PA. APR. 13, 2017)

- FirstEnergy, an electrical producer, issues a series of surcharges to Allegheny Ludlum, a steel manufacturer
- Allegheny initially withholds payment, but then pays under protest when FirstEnergy threatens to cancel agreement providing electricity
- Allegheny deducts charges it paid under protest from final payment over a year later
- Held: Protest was insufficient
    - (1) No duress: Evidence in record that Allegheny contemplated economic benefits of cancelling agreement instead of paying surcharges
    - (2) Protest does not *per se* preserve right to collect later, and Allegheny waited too long to seek to vindicate its rights

EASTER v. CITY OF ORLANDO, 249 SO. 3D 723 (FLA. DIST. CT. APP. 2018)

- Class action arising from collection of red light camera fines
- Named plaintiff received fine, argued that it was unlawful before hearing officer, and then paid fine under protest
- Held: Trial court did not abuse its discretion in denying class certification based on voluntary payment doctrine
    - Commonality/Typicality: Unlike Easter, most members of the class simply paid fine without first challenging ordinance's lawfulness
    - Predominance issue: Issue of coercion/duress normally requires a fact-intensive, case-by-case determinations

NEVADA ASS'N SERVS., INC. v. EIGHTH JUD. DIST. CT., 338 P.3D 1250 (NEV. 2014)

- Property owner paid lien on property arising from community association fee
- Property owner later claims that lien amount was unlawful, contending that business necessity (*i.e.*, duress) precluded application of the voluntary payment doctrine
- Held: Business necessity exception applies where there is only one "commercially reasonable course of action." Not the case here
  - Owner could have sought arbitration/mediation prior to paying lien
  - Distinguishable from paying a utility that threatened to cut off electricity services, particularly where utility is the sole provider of service

AFFORDABLE COMMUNITIES OF MISSOURI v. FED. NAT. MORTG. ASS'N, 815 F.3D 1130 (8TH CIR. 2016)

- Contract dispute over Fannie Mae's decision to levy a defeasance fee for prepayment of loan
- Mortgagor (borrower) then brings breach of contract claim, contending that, under loan agreement, it was exempt from such penalties
- Held: Affirmed district court's judgment that voluntary payment doctrine bars claim
    - Court rejects mortgagor's mistake-of-fact argument predicated on the fact that it did not know of exemption when it paid defeasance penalty
    - Emphasized that mortgagor had full access to loan documents, was well-versed in real estate transactions, and was represented by counsel at time of transaction

TURNER NETWORK SALES, INC. v. DISH NETWORK L.L.C., 413 F. SUPP. 3D 329 (S.D.N.Y. 2019)

- Dispute over licensing agreement between Turner and DISH
- DISH's counterclaim sought to recoup alleged overpaid licensing fees that it paid to Turner
- Held: Summary judgment was proper based on voluntary payment doctrine

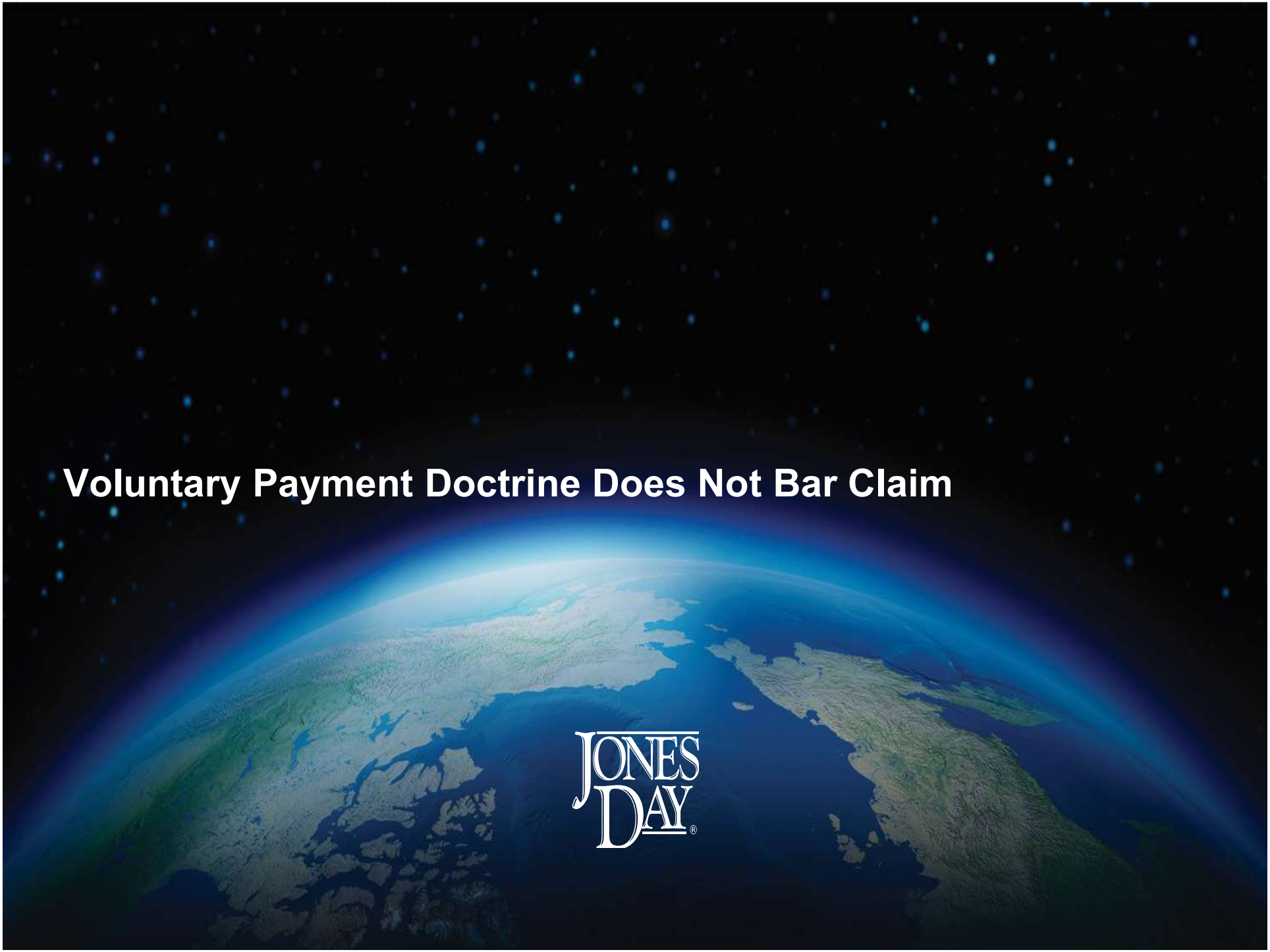
*"The record is clear that DISH, **a sophisticated entity**, was solely responsible for generating its own subscriber data and calculating its own fees, without any involvement—let alone fraud or duress—from TNS at all. **DISH cannot now claim, after years of voluntary payments**, that it is entitled to recoup fees that it was solely responsible for calculating based on its **own understanding of its obligations under the Agreement**."*

LAW OFFICES OF PAUL A. CHIN, P.C. v. SETH A. HARRIS, PLLC, 159 A.D.3D 637 (N.Y. APP. DIV. 2018)

- Plaintiff agreed to do legal work on behalf of defendant, but with a hard hours cap. But plaintiff billed—and defendant paid for—hours in excess of that cap
- Plaintiff brought a claim for unpaid legal work, and defendant sought to recoup fees that it had paid to plaintiff
- Held: Voluntary payment doctrine bars defendant's counterclaim

"While defendant alleges that the payments were made by its office manager (who had check-signing authority), without the approval of defendant's principal, this would not constitute a mistake of material fact affording grounds to recover a voluntarily made payment."

Voluntary Payment Doctrine Does Not Bar Claim



WHITTON v. DEFFENBAUGH DISPOSAL, INC., NO. 12-2247-CM, 2014 WL 11485715, AT *1 (D. KAN. OCT. 28, 2014)

- Dispute over motion to certify a class—under Federal Rule of Civil Procedure 23—against defendant for breach of contract, among other claims
- Defendant argues that some class members' claims may be barred under voluntary payment doctrine, and thus individual issues predominated
- Held: Availability of defense does not, by itself, defeat predominance

> "*It is not the law that any time a voluntary payment doctrine issue is raised that certification must be denied . . . "*

SOUTHSTAR ENERGY SERVS., LLC v. ELLISON, 691 S.E.2D 203 (GA. 2010)

- Class action alleging defendant overcharged for natural gas, in violation of Georgia's Natural Gas Act
- Trial court grants motion to dismiss because of voluntary payment doctrine
- Held: Affirms reversal of trial court and opts to bar voluntary payment doctrine defense based on Act's "remedial purpose"

*"[B]ecause the [Natural] Gas Act's **purpose** is clearly remedial . . .it should be liberally construed . . . In light of its **remedial purpose**, the voluntary payment doctrine should not be applied to bar actions by gas consumers to recover overpayments made to the gas marketer."*

MIDCONTINENT COMMC'NS v. MCI COMMC'NS SERVS., INC., NO. 4:16-CV-04070-KES, 2018 WL 1370257 (D.S.D. MAR. 16, 2018)

- Dispute between Midco and Verizon over invoices that MCI paid over long distance phone service
- Midco argues that MCI's claims are barred by the voluntary payment doctrine. Verizon counters that, because MCI billed under an FCC-approved tariff, filed-rate doctrine bars defense
- Held: The filed-rate doctrine supersedes a potential voluntary-payment defense

"The filed rate doctrine prohibits a carrier from collecting charges for services that are not described in its tariff . . . Thus, the filed-rate doctrine bars Midco's equitable defenses because Midco cannot keep charges that it collected in violation of the tariffs."

ROADEPOT, LLC v. HOME DEPOT, U.S.A., INC., 163 A.3D 513 (R.I. 2017)

- Dispute between commercial landlord (Roadepot) and tenant (Home Depot) over which party is responsible for paying a municipal tax
- Home Depot pays the tax but later seeks reimbursement, arguing that Roadepot is responsible under the lease
- Trial court finds that Home Depot paid the tax to avoid imposition of lien or eviction by landlord or municipality
- Held: Voluntary payment doctrine does not apply
    - Distinction between claim against recipient of payment and seeking reimbursement from a third party
    - One of doctrine's policy considerations—promoting stability of transactions—inapposite here since ultimate recipient still retains the money

ORTIZ v. CIOX HEALTH LLC, NO. 17CV4039(DLC), 2018 WL 1033237 (S.D.N.Y. FEB. 22, 2018)

- Class action against defendants for allegedly overcharging patients for copies of medical records, in violation of New York law
- In response to defendants' motion to dismiss, Ortiz contends that voluntary payment doctrine is inapplicable because she paid for copies under protest
- Held: Voluntary payment doctrine inapplicable (motion denied)
    - Ortiz informed hospital that it could not charge more than statutory maximum, but paid the charged amount anyway
    - "Plausibly construed" as a "protest" under New York law

MAOR v. DOLLAR THRIFTY AUTO. GRP., INC., 303 F. SUPP. 3D 1320 (S.D. FLA. 2017)

- Class action against rental car company for collection of "administrative fee" for fines that stem from failure to pay tolls
- As alleged, (1) the administrative fee exceeded the costs that the rental company passed on to toll authorities, and (2) company's FAQs suggested to the contrary
- Held: Court denied motion to dismiss because
  - (1) Applicability of the voluntary payment doctrine is uncertain at motion to dismiss stage
  - (2) In any event, complaint alleged sufficient facts suggesting that company misrepresented purpose of administrative fee

TAKEDA PHARM. U.S.A., INC. v. SPIREAS, 400 F. SUPP. 3D 185 (E.D. PA. 2019)

- Takeda's predecessor in interest enters into a licensing agreement and pays royalties to Spireas for drug formulations with "liquisolid technology"
- Suit against Spireas for breach of contract and fraud, among other claims, based on allegation that the formulations provided did not in fact contain the liquisolid technology
- Held: Court rejects Spireas's VPD argument (made in connection with summary judgment) that Plaintiff made license payments and cannot be recovered
    - Dispute over whether fraud was committed by Spireas - whether Spireas induced royalty payments by fraudulently misrepresenting the content of drug formations and that he had a role in preparing them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V. Choice of Law & Choice of Forum

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Most Federal Courts Are Bound by State Law in Applying the Doctrine

- The Voluntary Payment Doctrine is a creature of state law and state law on the issue governs even in federal courts.
  - *See, e.g., Helms v. Consumerinfo.com, Inc.*, 236 F.R.D. 561, 565 (N.D. Ala. 2005); *Wurtz v. Rawlings Co.*, LLC, No. 12-CV-1182 (JMA) (AKT), 2016 U.S. Dist. LEXIS 172680, at *18, 2016 WL 7174674 (E.D.N.Y. Nov. 17, 2016); *Dover v. British Airways, PLC (UK)*, No. 12 CV 5567 (RJD) (CLP), 2017 U.S. Dist. LEXIS 160981, at *22, 2017 WL 4358726 (E.D.N.Y. Sep. 28, 2017)
- Choice of Law
  - Court's apply traditional choice-of-law analyses.
    - *See, e.g., Scottsdale Ins. Co. v. Ala. Mun. Ins. Co.*, No. 2:11-cv-0668-MEF, 2012 U.S. Dist. LEXIS 139928, at *10, 2012 WL 4477656 (M.D. Ala. Sep. 28, 2012); *SEC v. Price*, No. 1:12-cv-2296 -TCB, 2015 U.S. Dist. LEXIS 184049, at *32-33, 2015 WL 11198937 (N.D. Ga. Mar. 31, 2015) (applying Georgia choice of law to determine Florida voluntary-payment statute governed).
  - If a contract governs, the law that governs the contract controls the doctrine
    - *Dover v. British Airways, PLC (UK)*, No. 12 CV 5567 (RJD) (CLP), 2017 U.S. Dist. LEXIS 160981, at *22, 2017 WL 4358726 (E.D.N.Y. Sep. 28, 2017)
  - Choice of Law Provisions
    - *Taylor, Bean & Whitaker Mortg. Corp. v. GMAC Mortg. Corp.*, No. 5:05-cv-260-Oc-GRJ, 2007 U.S. Dist. LEXIS 27061, at *8-19, 2007 WL 1114045 (M.D. Fla. Apr. 12, 2007) (where underlying agreement included Pennsylvania choice-of-law provision, Pennsylvania voluntary-payment-doctrine law governed unless doing so would violate public policy of Florida); *Sunpro, Inc. v. Rice Drilling B. LLC*, No. 5:12CV409, 2013 U.S. Dist. LEXIS 20892, at *12-14, 2013 WL 610695 (N.D. Ohio Feb. 15, 2013) (utilizing Ohio view toward choice-of-law and applying Pennsylvania law as set forth in provision of underlying agreement); *Rawson Food Servs. v. TD Bank, N.A.*, No. 13-3084 (MAS) (DEA), 2014 U.S. Dist. LEXIS 25906, at *7-9 & *18-19, 2014 WL 809210 (D.N.J. Feb. 28, 2014) (applying New York choice of law to voluntary payment doctrine)
  - If there's no actual conflict between the potentially applicable law, then a court may not need to decide the question of which state's law governs.
    - *See, e.g., Aqua Pharm., LLC v. Park Irmat Drug Corp.*, No. 17-2273, 2018 U.S. Dist. LEXIS 83652, at *5-7, 2018 WL 2288287 (E.D. Pa. May 17, 2018)

Notable State Variations to Keep in Mind

- Although the doctrine is nearly universally recognized in the United States, that does not mean it is treated equally among states.
- Some key distinctions between states:
  - Is there a robust body of caselaw?
    - Illinois, Missouri, Nevada, and Washington are among the states with the most well-developed caselaw.
  - Is it limited to restitution/unjust-enrichment claims?
    - Alabama & New Mexico
      - Wurtz v. Rawlings Co., LLC, No. 12-CV-1182 (JMA) (AKT), 2016 U.S. Dist. LEXIS 172680, at *18, 2016 WL 7174674 (E.D.N.Y. Nov. 17, 2016) (citing *Helms v. Consumerinfo.com, Inc.*, 236 F.R.D. 561, 565 (N.D. Ala. 2005)); *Bhasker v. Kemper Cas. Ins. Co.*, 284 F. Supp. 3d 1191, 1238-40 (D.N.M. 2018).
  - Does it apply to consumer protection statutes? (See earlier slides)
  - Is the state open to adopting the Restatement (Third) § 6 Approach?
    - Money paid in the face of a recognized uncertainty cannot be recovered back.
      - *Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 892 (Ind. 2004); *CSX Transp., Inc. v. Appalachian Railcar Servs.*, 509 F.3d 384, 386 (7th Cir. 2007) (Indiana law); *see also BMG Direct Mktg. Inc. v. Peake*, 178 S.W.3d 763, 774 (Tex. 2005); *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 558-59 (D.C. 2016) ; *Liberty Life Ins. Co. v. Myers,* No. CV 10-2024-PHX-JAT, 2013 U.S. Dist. LEXIS 18694, at *18-32, 2013 WL 530317 (D. Ariz. Feb. 11, 2013); *Dowling Family P'ship v Midland Farms, LLC*, 865 N.W.2d 854, 864 (N.D. 2015); *Viele Contracting, Inc. v. Performance Pipelining, Inc.*, No. A15-0875, 2016 Minn. App. Unpub. LEXIS 439 (Minn. Ct. App. May 2, 2016) (unpublished)
  - Is there a governing statute?
    - Florida has abrogated the doctrine by statute. *See* FLA. STAT. § 725.04; *see also Prudential Ins. Co. v. Clark*, 456 F.2d 932, 935 (5th Cir. 1972) (FLA. STAT. § 725.04 "negates the common law defense of voluntary payment"); *SEC v. Price*, No. 1:12-cv-2296 - TCB, 2015 U.S. Dist. LEXIS 184049, at *32-33, 2015 WL 11198937 (N.D. Ga. Mar. 31, 2015).
    - Georgia has codified it as a defense to repayment. *See* GA. CODE ANN. § 13-1-13; *see also Anthony v. Am Gen. Fin. Servs.*, 626 F.3d 1318, 1322 (11th Cir. 2010)
- Another key issue: Can foreign law apply instead?
  - By 2012, "over sixty percent of common law countries have already abolished the VPD." Including Australia, Canada, England, France, Germany, New Zealand, South Africa, and Scotland.
    - John E. Campbell & Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense,* 46 VAL. U. L. REV. 501, 518-19 (2012); *Dover v. British Airways, PLC (UK)*, No. 12 CV 5567 (RJD) (CLP), 2017 U.S. Dist. LEXIS 160981, at *22, 2017 WL 4358726 (E.D.N.Y. Sep. 28, 2017)

Further Resources

- Resources from Today's Speakers
  - James D. Abrams & Erica L. Cook, *Voluntary Payment Doctrine: A Useful Affirmative Defense or Instrument of Evil?*, ABA Litigation Section (June 2016)
  - Mark P. Rotatori et al., *The Voluntary Payment Doctrine Defense is Alive and Well in Illinois* (Aug. 2016)
  - Colin E. Flora, *Practitioner's Guide to the Voluntary Payment Doctrine*, 37 S. ILL. U. L.J. 91 (2012)
  - Colin E. Flora, *The Voluntary Payment Doctrine – The Most Profoundly Evil Legal Doctrine*, HOOSIER LITIG. BLOG (Sep. 28, 2012)
- Other Resources
  - David J. Marchitelli, *Voluntary Payment Doctrine as Bar To Recovery of Payment of Generally Unlawful Tax*, 1 A.L.R.6th 229 (2005)
  - 66 AM. JUR. 2d *Restitution and Implied Contracts* §§ 90–173
  - John E. Campbell & Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 VAL. U. L. REV. 501 (2012)
  - Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397 (2009)
  - Joe Forward, *Voluntary payment doctrine is not a viable defense to deceptive telecommunications billing*, STATE BAR OF WIS. (Feb. 24, 2012)
  - Stephen L. Camp, Note, *The Voluntary-Payment Doctrine in Georgia*, 16 GA. L. REV. 893 (1982)
  - D. C. Toedt III, *Made an erroneous-but-voluntary contract payment? Too bad, says Eighth Circuit*, ON CONTRACTS (Feb. 26, 2016)
  - Richard M. Silverman & Scott J. Heyman, *Voluntary Payment Doctrine: Illinoisans' Shield Against Consumer Clawbacks*, PRAIRIE STATE PERSPECTIVES 935 (Sep. 2, 2019)
  - 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)

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