SUPREME COURT OF WISCONSIN

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THOMAS H. SCHMITT, CPA, d/b/a METROPOLITAN BUSINESS SERVICES, and MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

WISCONSIN BELL, INC., d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, AMERICATEL CORPORATION and LOCAL BIZ USA, INC.,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' BRIEF

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I. **INTRODUCTION**

Plaintiffs-Appellants, Thomas H. Schmitt, CPA d/b/a Metropolitan Business Services and MBS-Certified Public Accountants, LLC (collectively "Schmitt"), appeal from a decision of the Court of Appeals, District I, entered on August 10, 2010 (the "Decision"). The Decision affirmed orders of the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz presiding, dismissing Schmitt's damage claims under Wisconsin statutes that specifically prohibit the unlawful conduct at issue here – namely, the billing of unauthorized charges to telecommunications customers, an illegal practice sometimes referred to as "cramming."

On motions to dismiss, the Circuit Court concluded that Schmitt's complaint adequately alleged violations of Wis. Stat. § 100.207, which makes cramming illegal and provides a statutory damages remedy for those harmed by the practice. In addition, Schmitt alleged damage claims under Wis. Stat. § 100.18 and the Wisconsin Organized Crime Control Act, Wis. Stat. § 946.80, *et seq.* ("WOCCA"). Even though Schmitt properly alleged statutory violations in his complaint, the Circuit Court concluded that his statutory damage remedies were barred by the common law voluntary payment doctrine.

The Court of Appeals affirmed the dismissal of Schmitt's statutory damage claims, stating that it considered itself bound by *Putnam v. Time Warner Cable of SE Wis. Ltd. P'ship*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626, and *Butcher v. Ameritech Corp.*, 2007 WI App 5, 298 Wis. 2d 468, 727 N.W.2d 546. *See* Decision ¶ 9, *citing Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (Court of Appeals may not overrule, modify or withdraw language from a previously published decision). In both *Putnam* and *Butcher*, however, the specific issues raised by this appeal were neither presented by the parties nor decided by the courts. *See* 1999 WL 33733712 (appellants' brief to Supreme Court in *Putnam*).[1]

[1] The claims in *Butcher* did not involve damage remedies under statutes, but were based on common law. The *Butcher* plaintiffs cited a Wisconsin statute in their complaint, Wis. Stat. § 77.52(2)(a)5, but the legislature did not authorize a private right of action for damages under that statute, unlike the statutes at issue here. *See* 2006 WL 6141451 (appellants' brief to Court of Appeals in *Butcher*).

There are no published decisions from any appellate court in Wisconsin analyzing the issues presented by this appeal or holding that that the voluntary payment doctrine bars statutory damage claims. Moreover, to the extent one might attempt to read *Putnam* or *Butcher* to *imply* such a holding, any such implied holding would conflict with more recent *express* holdings of the Supreme Court, which has decided that a common law doctrine (such as the economic loss doctrine) cannot undermine public policy determinations made by the legislature when enacting statutes. *See Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, 308 Wis. 2d 103, ¶ 33, 746 N.W.2d 762 (economic loss doctrine did not apply to statutory claim); *see also Novell v. Migliaccio*, 2008 WI 44, ¶ 27, 309 Wis. 2d 132, 749 N.W.2d 544 (common law element of reasonable reliance not required to state a proper claim under Wis. Stat. § 100.18).

On March 16, 2011, the Supreme Court granted Schmitt's petition for review as to three questions involving the interaction between the common law voluntary payment doctrine and the statutory claims at issue on this appeal.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Supreme Court granted review with respect to the following issues:

1. Does the common law voluntary payment doctrine bar Schmitt from seeking damages under Wisconsin statutes (including Wis. Stat. §§ 100.18, 100.207 and WOCCA), where the legislature, by enacting the statutes, specifically created private rights of action for damages for victims of the prohibited practices?

Circuit Court and Court of Appeals answered "yes."

2. Must individuals pay illegal charges or fees "under protest" to preserve the right to bring a statutory claim for damages under Wis. Stat. §§ 100.18, 100.207 and WOCCA, even though the legislature did not include a protest requirement in the statutes?

Circuit Court and Court of Appeals answered "yes."

3. Is there an exception to the voluntary payment doctrine that prevents those who violate Wis. Stat. §§ 100.18, 100.207 and WOCCA from availing themselves of that doctrine to escape liability for statutory damages resulting from their wrongful conduct?

Circuit Court and Court of Appeals answered "no."

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Schmitt contends that oral argument and publication are appropriate in this case.

IV. STATEMENT OF THE CASE

A. The Nature of the Case

In the complaint,[2] Schmitt alleged that certain telecommunications companies routinely engage in unlawful "cramming," which involves deceptively inserting relatively small, unauthorized charges into customers' telephone bills. A. 21, ¶ 1.[3] The telecommunications companies alleged to engage in this illegal practice include defendants-respondents, Wisconsin Bell, Inc. d/b/a AT&T Wisconsin ("AT&T") and ILD Telecommunications, Inc. d/b/a ILD Teleservices ("ILD") (collectively, "Defendants").

The complaint alleged claims for damages based on: (1) Wis. Stat. § 100.207, Wisconsin's anti-cramming statute; (2) Wis. Stat. § 100.20(5); (3) Wis. Stat. § 100.18; (4) WOCCA; and (5) common law unjust enrichment. A. 34-44. This appeal, however, involves only Schmitt's statutory

[2] Although Schmitt brought this case as a putative class action, the Circuit Court dismissed the case before any issues related to class certification were decided. Accordingly, at this time, the case is an individual action, not a class action.

[3] Throughout this brief, "A.__" shall refer to the Appendix filed herewith, and "R.__" shall refer to the docket entries of record in the Circuit Court below.

damage claims under Wis. Stat. §§ 100.207, 100.18 and WOCCA. None of the damage claims at issue on appeal are based on common law.

B. <u>Procedural History of the Case</u>

On November 12, 2007, the Circuit Court heard motions to dismiss filed by Defendants, who argued, *inter alia*, that Schmitt's damage claims should be dismissed based on the voluntary payment doctrine. Before ruling on the voluntary payment issue, the Circuit Court considered whether the complaint adequately pled causes of action under the pertinent statutes. A. 80-89.

After deciding that the complaint properly alleged statutory claims, the Circuit Court ruled that Schmitt's damage claims under those statute must be dismissed based on the voluntary payment doctrine, subject to a narrow exception for certain charges not at issue on this appeal. A. 17, ¶ 3. In dismissing these claims, the Circuit Court acknowledged Schmitt's assertion that the common law voluntary payment doctrine should not trump private rights of action specifically created by the legislature. A. 89. Regardless of whether this argument might make "good policy sense," the Circuit Court stated that the argument did not "find[] enough support in the law." A. 90. In the Circuit Court's view, if the legislature had intended to abrogate or "override" the common law doctrine, it needed to include express statutory language to this effect in the relevant statutes. A. 90.

Thereafter, Schmitt voluntarily dismissed his claims seeking injunctive relief (R. 66) and filed timely Notices of Appeal on July 23, 2008 (as to ILD) and September 10, 2008 (as to AT&T). R. 72, 76. These appeals were consolidated and decided by the Court of Appeals, without oral argument, on August 10, 2010. In its unpublished Decision, the Court of Appeals applied the voluntary payment doctrine to affirm the Circuit Court's dismissal of Schmitt's statutory damage claims under Wis. Stat. §§100.207, 100.18, and WOCCA.

In its ruling, the Court of Appeals stated that the Wisconsin legislature needed to amend the pertinent statutes to specifically abrogate the voluntary payment doctrine. Decision ¶ 15. Presumably, if the Decision stands, absent legislative action, all damage claims would be barred under the three pertinent statutes (and others) unless the victims of the illegal activity (in this case, cramming) discover the wrongful conduct and pay illegal charges under protest. *See*, Decision ¶ 11 (customer can still sue for damages if the deceptive charges are discovered and paid under protest). In essence, a protest requirement is written into the pertinent statutes, even though they contain no such requirement.

The Court of Appeals based its Decision entirely on the voluntary payment doctrine. None of the other issues raised by the parties on appeal were considered or addressed, and no such issues were the subject of Schmitt's petition for review. On March 16, 2001, the Supreme Court granted that petition.

C. <u>Statement of Facts</u>

Schmitt alleges that Defendants knowingly engage in cramming, a deceptive practice that has long plagued the telecommunications industry. A. 21, ¶ 1; A. 27, ¶ 23. As alleged in the complaint, telecommunications companies that engage in cramming fall into three categories: (1) local exchange carriers ("LECs"), such as AT&T, which bill their customers for local telephone services; (2) billing aggregators or consolidators, such as ILD, which consolidate charges and forward them on to LECs for inclusion in local telephone bills; and (3) alleged service providers, including, in some cases, ILD. A. 25, ¶¶ 15, 16, R. 37 (including copies of telephone bills filed by AT&T and considered by the Circuit Court and Court of Appeals below, which show that ILD was an alleged service provider in some cases).

Schmitt alleges that the persistence of cramming requires the knowing participation of telecommunications companies at all levels. A. 25, ¶ 16. The alleged service providers (including ILD, in some cases) wrongfully initiate the bogus charges, and then forward them on to billing aggregators (including ILD, in some cases), which consolidate and knowingly incorporate the unauthorized charges into certain billing formats and forward them on to LECs for inclusion in customers' telephone bills. A. 25-27, ¶¶ 15-23. The LECs (such as AT&T) then knowingly pass the unauthorized charges on to their customers. *Id.* Along the way, each of these companies receives a portion of the payments made by customers on these unauthorized charges. The portion of the cramming revenue that flows to each Defendant is governed by contracts. A. 27, ¶ 23. In light of these arrangements, Defendants lack the financial incentive to prevent cramming. Indeed, it is alleged that they have much to gain from continuing the illegal practice, which is why it persists. A. 28, ¶ 24.

In 1998, AT&T and other telecommunications companies drafted guidelines that they claimed would address the cramming problem, which they titled "Anti-Cramming Best Practices Guidelines" (hereinafter "Guidelines"). A. 21, ¶ 2, *Exh. A*. In the Guidelines, AT&T admitted that cramming (defined as the "submission or inclusion of unauthorized, misleading or deceptive charges for products or services on consumers' local telephone bills") is a serious problem in the industry. *Id.* The Guidelines outlined a series of reasonable steps that could be taken by LECs and billing consolidators (such as AT&T and ILD) to identify or flag charges generated by troublesome service providers, including those whose charges result in a substantial number of consumer complaints. A. 30-31, ¶ 30. Nonetheless, despite these "best practices," Defendants chose not to implement them, thereby allowing cramming to persist. *Id.*

By participating in cramming schemes, Defendants have systematically stolen millions of dollars from thousands of customers, including Schmitt and other Wisconsin residents. A. 28, ¶ 24. The Complaint seeks to hold Defendants financially responsible for this illegal activity, and to obtain damages on behalf of Schmitt and others who have been harmed by the unlawful conduct.

V. <u>ARGUMENT</u>

A. <u>A *De Novo* Standard of Review Applies</u>

The Circuit Court granted motions to dismiss filed by Defendants under Rule 802.06. At the motion hearing, the Circuit Court suggested that it had the authority to convert Defendants' motions to summary judgment motions because AT&T had attached copies of telephone bills to a brief (though not under an affidavit). R. 37. The parties agreed, however, that the motions should not be converted to summary judgment motions.[4] The possibility of converting Defendants' motions was not raised until the day of the hearing. A.112-114. Even then, it was not clear whether the Circuit Court was actually converting the motions. A. 139. ("I would deny the motion to dismiss, and in fact, the motion for summary judgment insofar as I'm treating it as such."). For these reasons, on this appeal, Schmitt contends that Defendants' motions should be treated as motions to dismiss, rather than summary judgment motions.

Regardless of how the motions are characterized, a *de novo* standard of review applies. *See Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, ¶ 14, 281 Wis. 2d 39, 697 N.W.2d 61, 2005 WI 6 (decisions on Rule 802.06 motions are reviewed *de novo*, without deference to the circuit court's decision); *Tews v. NHI, LLC*, 2010 WI 137, ¶ 40, 330 Wis. 2d 389, 793 N.W.2d 860 (summary judgment decisions reviewed *de novo*).

When reviewing decisions on motions to dismiss filed under Rule 802.06, an appellate court assumes that the facts alleged in the plaintiff's complaint are true and liberally construes the pleading, dismissing only if "it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." *Peterson*, 2005 WI 6, ¶ 16.

Similarly, when reviewing a summary judgment decision, appellate courts use the same approach as the Circuit Court. *See Tews*, 2010 WI 137, ¶ 41 (describing summary judgment methodology). Summary judgment will not be granted "unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy," or, in other words, summary judgment is appropriate "beyond a reasonable doubt." *Grams v. Boss*, 97

[4] When briefing the motions, the parties agreed that the Circuit Court could consider the telephone bills filed by AT&T without converting the motions to dismiss to ones for summary judgment, as those bills were referenced in Schmitt's complaint and were central to his claims. R.15, 29; *see Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint, and are central to her claim"); *see also Neylan v. Vorwald*, 124 Wis. 2d 85, 99, 368 N.W.2d 648 (1985) ("[W]here a Wisconsin Rule of Civil Procedure is based on a Federal Rule of Civil Procedure, decisions of the federal courts, to the extent they show a pattern of construction, are considered to be persuasive authority.").

Wis. 2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). Any doubt as to the existence of a genuine issue of material fact should be resolved against the moving party. *Id.*

B. **<u>The Circuit Court Erred as a Matter of Law By Dismissing Schmitt's Statutory Damage Claims Based on the Voluntary Payment Doctrine</u>**

Since the Circuit Court granted Defendants' motions to dismiss in November 2007, the Supreme Court has twice considered whether common law defenses apply to defeat statutory claims. *See Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22 (involving common law economic loss doctrine); *Novell v. Migliaccio*, 2008 WI 44 (involving common law reliance element). In both *Stuart* and *Novell*, the Supreme Court held that common law defenses would not be applied because doing so was contrary to the public policy interests expressed by the legislature in enacting the pertinent statutes. *Id.*

In *Stuart*, the Supreme Court considered whether the economic loss doctrine applied to a claim brought under the Home Improvement Protection Act ("HIPA"), Wis. Admin Code § ATCP 110 and Wis. Stat. § 100.20(5). The Supreme Court held that the economic loss doctrine did not apply because allowing the common law defense "would be ignoring the public policies that are the basis for the HIPA." *Stuart*, 2008 WI 22 at ¶ 33. Consistent with Schmitt's position on this appeal, the Supreme Court held that applying a common law defense to statutory claims would improperly defeat the public policy objectives embodied in the statutes. *Id.* ("We are satisfied that the ELD cannot apply to statutory claims, including those under HIPA, because of such public policies.").

Two months after *Stuart*, the Supreme Court, in *Novell*, again considered whether a common law principle applied to limit a statutory claim. There, the plaintiff sought damages under Wis. Stat. § 100.18, and the Supreme Court was asked to decide whether reasonable reliance (an element of common law misrepresentation) applied to a § 100.18 claim. The Supreme Court concluded that common law reliance was not required under the statute, as the plain statutory language did not contemplate reliance as an element.

Id. ¶ 27 ("A plain reading of the statute reveals that reasonable reliance is not an element of a statutory false representation claim."). In addition, the Supreme Court explained that the legislative purpose of the statute did not support applying a reliance requirement. *Id.* ¶ 31 ("In addition, the purpose of § 100.18 does not support the proposition that reasonable reliance is an element of a § 100.18 claim."). Given the goal of § 100.18 to deter false and misleading representations, the Supreme Court concluded that engrafting a reliance requirement onto the statute would not advance this legislative objective. *Id.* ¶ 32.

Similarly, in this case, applying the voluntary payment doctrine would be contrary to the plain language and purpose of the pertinent statutes, and would effectively rewrite those statutes to include protest requirements, where none exist. For instance, when enacting Wis. Stat. § 100.207, the legislature clearly prohibited the very practice at issue in this case – the unauthorized billing of telecommunications services, or cramming. Wis. Stat. § 100.207(3). The legislature also made it illegal to insert "untrue, misleading or deceptive" statements or representations into telephone bills. Wis. Stat. § 100. 207(2). Nothing in the language of the statute suggests that a protest is required before unauthorized or misleading charges are paid by customers.

It would be contrary to the clear purpose of Wis. Stat. § 100.207 to allow Defendants to engage in the very conduct that the legislature prohibited (cramming), only to avoid liability for statutory damages simply because their deceptive conduct had the desired effect – specifically, causing customers to unwittingly pay unauthorized changes. There is nothing in the language of § 100.207 suggesting that a customer must locate unauthorized or deceptive charges and pay them "under protest" before he or she can seek monetary relief. If the legislature had intended to include a protest requirement in the statute, it certainly could have done so.[5] Construing the statute to include a protest requirement where

[5] Where the legislature intends to require a protest before the filing of a lawsuit, it has shown that it knows how to do so. *See* Wis. Stat. § 426.110 (under the Wisconsin Consumer Act, before filing a class action, a plaintiff must provide notice and an opportunity to cure the statutory violation). No similar requirement was included in the relevant statutes. *See* Wis. Stat. § 100.207(6)(a) (recognizing that class actions are appropriate to enforce the anti-cramming statute, without requiring a protest or any opportunity to cure).

none exists would significantly undermine the legislative purpose of § 100.207(2) and (3).

The same is true with respect to Wis. Stat. § 100.18. There is no protest requirement in that statute. Moreover, as the Supreme Court held in *Novell*, § 100.18 was intended to deter misrepresentations and deceptive conduct. *Novell*, 2008 WI 44, ¶ 31. Allowing the voluntary payment doctrine to be used as a defense to § 100.18 claims certainly would not deter such conduct, especially since wrongdoers could avoid liability for damages whenever their misrepresentations were effective, as only those who were not deceived – specifically, those who detected the misleading charges before paying their bills – could sue for damages. Writing a protest requirement into § 100.18 (and other statutes prohibiting deceptive trade practices) would dramatically change the nature and scope of the relief afforded by those statutes, contrary to the express wishes of the legislature.

Similarly, the legislative purpose behind WOCCA would be undermined if the voluntary payment doctrine could be used as a defense. As in this case, a party could steal money through mail fraud (which does not have a reasonable reliance component) and avoid statutory liability merely because it succeeded in tricking the victim into paying the deceptive or misleading charges. *See Maryland Staffing Serv., Inc. v. Manpower, Inc.*, 936 F. Supp. 1494, 1500 (E.D. Wis. 1996) (outlining elements of mail fraud). Again, as with the other statutes discussed above, the plain language of WOCCA does not include a protest requirement, and allowing the voluntary payment rule as a defense to damage claims under WOCCA would significantly undermine the clear statutory remedies that the legislature intended to provide.

If the Decision below stands, then, presumably, no statutory damage claim would ever lie under Wis. Stat. §§ 100.207, 100.18 or WOCCA (and, presumably, other statutes) unless the deceptive conduct outlawed by those statutes was discovered by the victim at the outset and illegal charges were paid "under protest." But, if a person discovers illegal charges before paying a bill, one can ask why that individual would bother to pay those charges at all (rather than "under protest"). Moreover, if a customer notices the charges and does not pay them, then presumably no claim for damages could be brought because there would be no pecuniary harm. As a result, applying the voluntary payment doctrine as the Court of Appeals did will result in the fundamental purpose of many consumer protection statutes being undermined.

For these reasons, as in *Stuart* and *Novell*, the Supreme Court should decline to extend a common law defense to protect wrongdoers from liability for statutory damages. Applying the voluntary payment rule to the damage claims at issue here would be contrary to the express language and purpose of the pertinent statutes, and would seriously undermine statutory damage remedies that the legislature intended to provide.

C. <u>The Decisions of Courts in Other Jurisdictions Overwhelmingly Support Schmitt's Position</u>

The Court of Appeals considered itself bound by *Putnam* and *Butcher*, which were decided in 2002 and 2007, respectively. As set forth above, in neither of those cases were the appellate courts presented with the specific issues raised by this appeal. *See* 1999 WL 33733712 (appellants' brief to Supreme Court in *Putnam*); 2006 WL 6141451 (appellants' brief to Court of Appeals in *Butcher*). For that reason, the issues presented by this appeal were not decided in *Putnam*. *See State v. Johnson*, 153 Wis. 2d 121, 124, 449 N.W.2d 845 (1990) (appellate courts need not consider arguments that the parties fail to advance).[6]

Since *Putnam* and *Butcher* were decided, the Supreme Court decided *Stuart* and *Novell*, both of which support Schmitt's position here. Likewise, in the last several years, appellate courts in other states have repeatedly concluded that the voluntary payment doctrine does not apply to statutory claims similar to those alleged by Schmitt in this case. For example, in *Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 727 (Mo. 2009), the Supreme Court of Missouri reversed a decision of the Missouri Court of Appeals,

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[6] It is axiomatic that courts will not rely upon as binding precedent, appellate decisions that do not squarely address or resolve the issues at hand. *See Fox v. Smith*, 159 Wis. 2d 581, 586, 464 N.W.2d 845 (Ct. App. 1990) *citing Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor relied upon, are not to be considered as having been decided as to constitute precedents.").

explaining that the voluntary payment doctrine is a "principle based on waiver and consent that is not always available when its application would be contrary to public policy…." *Id*. at 727. As the Missouri Supreme Court concluded, "[t]o allow Charter to avoid liability for this unfair practice through the voluntary payment doctrine would nullify the protections of the act and be contrary to the intent of the legislature." *Id.*

As in *Huch*, this case involves consumer protection statutes that will be largely nullified if a protest requirement is judicially written into the legislation. Any such result certainly should be avoided, particularly given that Wisconsin courts have consistently held that remedial statutes are to be construed broadly to promote the remedies intended by the legislature. *See Garcia v. Mazda Motor of America, Inc.*, 2004 WI 93, ¶ 8, 273 Wis. 2d 612, 682 N.W.2d 365 ("[W]e will liberally construe remedial statutes to suppress the mischief and advance the remedy that the legislature intended to afford."). Courts in other jurisdictions have applied similar reasoning in refusing to apply the voluntary payment doctrine to consumer protection statutes. *See Indoor Billboard/Wash. Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, ¶ 65, 170 P.3d 10, 24 (Wash. 2007) (*en banc*) ("[T]he voluntary payment doctrine is inappropriate as an affirmative defense in the [Consumer Protection Act] context, as a matter of law, because we construe the [Act] liberally in favor of plaintiffs."); *see also Southstar Energy Services, LLC v. Ellison*, 286 Ga. 709, 713, 691 S.E.2d 203, 206 (Ga. 2010) (*general* statute creating voluntary payment rule did not apply to *specific* statutory claim created by legislature).

There are numerous other decisions from courts in other states supporting Schmitt's position that the voluntary payment doctrine does not bar the statutory damage claims at issue here. *See Sobel v. Hertz Corp.*, 698 F.Supp.2d 1218, 1223-24 (D. Nev. 2010) (applying voluntary payment doctrine would effectively nullify relief provided under Nevada Deceptive Trade Practices Act); *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 309 Ill. Dec. 168, 863 N.E.2d 800, 810 (Ill. App. 3rd Dist. 2007) ("[T]his state has an interest in transactions that violate 'statutorily –defined public policy.' The effect of such transgressive acts, generally speaking, is that the voluntary payment rule will not be applicable."); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. 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.").

In each of these cases, the courts applied reasoning similar to that of the Supreme Court in *Stuart* and *Novell*, concluding that the application of a common law defense to statutory claims would improperly undermine the legislative purpose of the statutes involved. In addition, most of these cases were decided after *Putnam* and *Butcher*, which shows that the clear trend and weight of the authority from other jurisdictions support Schmitt's position here.

For these additional reasons, the Supreme Court should decline to apply the voluntary payment rule to defeat statutory claims designed to protect Wisconsin customers.

D. <u>An Additional Exception to the Voluntary Payment Doctrine is Warranted</u>

Wisconsin common law currently recognizes three exceptions to the voluntary payment rule, including exceptions for fraud, duress and mistake of material fact. *Putnam*, 2002 WI 108, ¶ 25. Although the Supreme Court does not need to create an additional exception to the voluntary payment doctrine to rule in Schmitt's favor and reverse the decisions below, it may be appropriate to create a fourth exception to avoid confusion in future cases.

For the reasons set forth above, the common law voluntary payment rule does not apply to bar damage claims specifically authorized by the legislature when it enacted the three statutes at issue, § 100.207, § 100.18 and WOCCA. Each of these statutes was designed to protect the public interest and provide Wisconsin citizens with statutory damage claims against wrongdoers for certain claims involving misrepresentations, deceptive conduct and other wrongful activities specifically prohibited by the legislature. As discussed herein, the remedies provided by these statutes would be unduly limited if a protest requirement was written into the statutes. Accordingly, the Supreme Court may reverse the decision of the Circuit Court below without specifically creating an additional exception to the common law voluntary payment doctrine.

Nonetheless, creating an additional exception may be warranted and consistent with the Supreme Court's decision in *Putnam*. In that case, the Supreme Court declined to create an additional exception for some broad, undefined category of "wrongful conduct" that might be difficult for courts below to apply. *Putnam*, 2002 WI 108, ¶ 22 (declining to create new exception for unlawful liquidated damages or general "wrongful conduct" arising at common law). Here, however, the claims at issue do not involve some vague "wrongful conduct," but instead involve clear violations of statutes that plainly proscribe certain undesirable conduct and provide the victims of such conduct with specific remedies (none of which require a protest before such relief will be provided).

The present case, therefore, provides an opportunity for the Supreme Court to create an additional exception to the voluntary payment doctrine in Wisconsin – specifically, an exception making it clear that the voluntary payment rule does not apply to damage remedies authorized by statutes. The Court of Appeals tacitly acknowledged that such an exception was called for, noting that the Supreme Court, not the Court of Appeals, was the proper court to determine whether an additional exception was appropriate. Decision, ¶ 9, *citing Butcher v. Ameritech, Inc.*, 2007 WI App 5, ¶ 23, 298 Wis. 2d 468, 727 N.W.2d 546 ("The supreme court, not this court, is the proper court to decide if the services involved in this case, in themselves, warrant an exception to the voluntary payment doctrine.").

The creation of an additional exception for damage remedies authorized by the legislature in statutes also would be consistent with the current exceptions to the voluntary payment rule, including the exception for fraud, another type of wrongful conduct that courts should not encourage by allowing wrongdoers to assert voluntary payments as an affirmative defense. As with the fraud exception, the exception proposed here is important to discourage wrongdoers from engaging in conduct that is clearly illegal (as set forth by statutes containing damage remedies) and highly undesirable, only to avoid liability for statutory damages based on a common law rule that should not apply. *See Putnam*, 2002 WI 108, ¶¶ 25-27 (rejecting additional exception for unlawful liquidated damages claim because, in part, that claim was not similar to fraud).

Given the existence of statutes that clearly make cramming illegal in Wisconsin and require wrongdoers to pay statutory damages to those harmed by their illegal conduct, there is no need to create a broad exception for some vague type of "wrongful conduct" to be defined at common law. This case involves violations of statutes that clearly define the conduct at issue (cramming) as illegal. Public policy does not support allowing Defendants to escape liability for statutory damages based on the voluntary payment rule. An additional exception to the voluntary payment rule is warranted. For this additional reason, the Circuit Court's decision dismissing Schmitt's claims based on the voluntary payment doctrine should be reversed.

E. **<u>Requiring the Legislature to Amend or Reenact Statutes is Impractical and Contrary to Fundamental Legal Principles</u>**

In their decisions below, both the Circuit Court and Court of Appeals appeared to conclude that the Wisconsin legislature needed to take affirmative action to amend or reenact the relevant Wisconsin statutes to "abrogate" the voluntary payment doctrine. *See* Decision ¶ 15. Presumably, the Circuit Court and Court of Appeals believe that the legislature needs to amend or reenact not only § 100.207, § 100.18 and WOCCA, but also any number of other Wisconsin statutes that provide private rights of action for damages. *See*, *e.g.*, Wis. Stat. § 100.20(5), Wis. Admin. Code §§ ATCP 101.02 (home improvement practices), 111.03 (basement waterproofing practices), 123.06 (negative option billing), 125.09 (mobile home sales practices) and 134.09(9) (residential rental practices); *see also* Wis. Stat. §§ 100.174(7) (mail order sales); 100.30(5m) and (5r) (unfair sales practices); 425.302 - .304 (Wisconsin Consumer Act remedies). There are several fundamental flaws in such reasoning.

First, the approach ignores the Supreme Court's analysis in both *Stuart* and *Novell*, which recognize that the common law must bend to the statutes, and not the other way around. As discussed above, Wisconsin courts are not alone in this view, as shown by the many court decisions from other states finding that the common law voluntary payment doctrine does not bar statutory claims.

Second, to the extent the Circuit Court and Court of Appeals assume that the legislature tacitly agrees that the Supreme Court's 2002 decision in *Putnam* invalidates the private rights of action for damages created by numerous statutes, that assumption is baseless or, at best, misguided. As set forth above, the Supreme Court in *Putnam* did not analyze or address the specific questions presented by this appeal, and there are no published appellate decisions in Wisconsin holding that the voluntary payment rule may be used to bar statutory claims. Under such circumstances, the legislature would have no reason to revisit or take legislative action to amend or rewrite the relevant statutes. Accordingly, it cannot be assumed that the legislature believes that the voluntary payment rule bars numerous statutory claims created by the legislature over many years, and has somehow agreed to the judiciary gutting these statutes by legislative silence or inaction.

Third, suggesting that Wisconsin consumer protection statutes may be rewritten by courts to include a protest requirement would be a fundamental change in the nature of the relationship between the courts and legislature. Instead of the courts interpreting the language of statutes and discerning legislative intent, the legislature would be tasked with interpreting the effect of the decisions of the Wisconsin's appellate courts and reenacting statutes to respond to public policy decisions made by the judiciary.

To be clear, the Circuit Court and Court of Appeals did not interpret the three relevant statutes and conclude that they contained statutory language suggesting that the legislature intended a protest requirement. Rather, the lower courts ignored the statutory language and simply imposed a judicially created public policy *in spite of* the statutory language, thereby radically altering the statues themselves and, it can be argued, rendering them largely ineffective and meaningless. Obviously, it is not the role of the courts to legislate in this manner.

It is fundamental that the legislature enacts statutes, which reflect the public policy of Wisconsin. The courts interpret those statutes, to the extent they are ambiguous, and also consider whether the legislature has overstepped its constitutional authority. Courts are not supposed to ignore the language of statutes or, worse yet, rewrite or vitiate them by the application of judicially created public policy that would take away statutory remedies that that the legislature specifically created to protect Wisconsin citizens. For these additional reasons, the decision of the Circuit Court should be reversed.

VI. <u>CONCLUSION</u>

For the foregoing reasons, the decisions of the Circuit Court and Court of Appeals should be reversed, and this matter should be remanded to the Circuit Court for further proceedings consistent with the Supreme Court's direction.

Dated this 15th day of April, 2011

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By: ______________________________

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CERTIFICATION AS TO FORM & LENGTH

I, Douglas P. Dehler, certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 220 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,760 words.

Dated this 15th day of April, 2011

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the petition for review filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

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This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

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SUPREME COURT OF WISCONSIN

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THOMAS H. SCHMITT, CPA, d/b/a METROPOLITAN BUSINESS SERVICES, and MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

WISCONSIN BELL, INC. d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, AMERICATEL CORPORATION and LOCAL BIZ USA, INC.,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

APPENDIX TO
PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' BRIEF

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COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1830

Cir. Ct. No. 2006CV8092

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC
AND THOMAS H. SCHMITT, CPA,
D/B/A METROPOLITAN BUSINESS SERVICES,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

WISCONSIN BELL INC., D/B/A AT&T WISCONSIN,

DEFENDANT-RESPONDENT,

ILD TELECOMMUNICATIONS, INC.,
D/B/A ILD TELESERVICES,
AMERICATEL CORPORATION AND
LOCAL BIZ USA, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

US CONNECT, LLC,

DEFENDANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Lundsten, JJ.

¶1 CURLEY, P.J. MBS-Certified Public Accountants, LLC, and Thomas H. Schmitt, CPA, d/b/a Metropolitan Business Services (unless otherwise specified, collectively referred to as MBS, using the singular pronoun "it") appeal from orders dismissing their claims under WIS. STAT. §§ 100.207, 100.18, and the Wisconsin Organized Crime Control Act (WOCCA), *see* WIS. STAT. §§ 946.80–946.88 (2007-08).[1] MBS argues that the trial court erred when it dismissed MBS's damages claims based on its application of the voluntary payment doctrine. ILD Telecommunications, Inc., d/b/a ILD Teleservices (ILD) cross-appeals, arguing that the trial court erred when it concluded that MBS could state a claim against ILD for violating § 100.207(2). ILD further asserts that MBS cannot state a claim under § 100.207(3) because it is not a "consumer." Because we conclude that the voluntary payment doctrine precludes MBS from recovering damages for its payment of allegedly unlawful fees and affirm the trial court's order dismissing its lawsuit, we need not address ILD's cross-appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide nondispositive issues).

[1] The underlying lawsuit in this matter was filed in 2006. Because the current version of the statutory sections cited in this opinion are the same in all relevant respects, all references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

I. BACKGROUND.

¶2 MBS, on behalf of a putative class, brought an action to recover monetary damages from and injunctive relief against various telecommunications companies, based on allegations that the companies wrongfully billed unauthorized services (a practice known as "cramming") to Wisconsin consumers. In its complaint, MBS alleged that companies engaged in cramming "routinely insert relatively small, unauthorized charges into consumers' telephone bills, with the expectation that they will not notice the charges and, therefore, will unwittingly pay them."

¶3 MBS named three categories of defendants: (1) service providers (i.e., internet/web hosting; nationwide directory assistance; international calling plans), which start the cramming process by generating charges for unauthorized services; (2) billing aggregators or consolidators, such as ILD, which consolidate unauthorized charges and forward them on to local exchange carriers; and (3) local exchange carriers, such as Wisconsin Bell, Inc., d/b/a AT&T Wisconsin (Wisconsin Bell), which incorporate the unauthorized charges into consumers' telephone bills.[2] MBS alleged five causes of action: violation of WIS. STAT. § 100.207; violation of WIS. STAT. § 100.20(5); violation of WIS. STAT. § 100.18; violation of WOCCA; and unjust enrichment.[3] Initially, MBS sought both monetary and injunctive relief; however, MBS later voluntarily dismissed its claim for injunctive relief.

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[2] While this appeal was pending, two of the alleged service providers, AmericaTel Corp. and Local Biz, were dismissed.

[3] The trial court dismissed MBS's claims under WIS. STAT. § 100.20(5) and for unjust enrichment. MBS does not challenge the dismissal of these claims.

¶4 Wisconsin Bell and ILD moved to dismiss MBS's claims on multiple grounds, among them that MBS's claims were barred by the voluntary payment doctrine.[4] After entertaining argument, the trial court determined that the voluntary payment doctrine barred MBS's recovery and accordingly, granted the motion to dismiss for purposes relevant to this appeal. MBS now appeals and ILD cross-appeals.

II. ANALYSIS.

¶5 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint and presents a question of law that we review *de novo*.[5] ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). "The facts set forth in the complaint must be taken as true and the complaint dismissed *only if it appears certain that no relief can be granted under any set of facts that the plaintiff[] might prove in support of [the] allegations*." ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991) (emphasis added). Because the application of the voluntary

[4] MBS does not dispute that it paid the allegedly unauthorized charges for fourteen months without protest.

[5] The parties agreed that the telephone bills could be considered on the basis that they were specifically referenced and thereby incorporated into the complaint. The record is not clear regarding whether the motions to dismiss were converted to motions for summary judgment. Notwithstanding, the parties appear to agree that we should treat the motions as motions to dismiss. For purposes of this appeal, we need not resolve whether the trial court could have considered the telephone bills referenced in the complaint without converting the motion to dismiss into one for summary judgment. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide nondispositive issues).

payment doctrine precludes MBS from recovering monetary damages, we conclude that dismissal of MBS's complaint was warranted.[6]

¶6 "The voluntary payment doctrine places upon a party who wishes to challenge the validity or legality of a bill for payment the obligation to make the challenge either before voluntarily making payment, or at the time of voluntarily making payment." ***Putnam v. Time Warner Cable of Se. Wis.***, 2002 WI 108, ¶13, 255 Wis. 2d 447, 649 N.W.2d 626 (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 108 (2001) ("The rule is well settled that a person cannot recover money that he or she has voluntarily paid with full knowledge of all of the facts and without fraud, duress, or extortion in some form, and that no action will lie to recover the voluntary payment."). "'The doctrine has been applied in several diverse contexts to preclude actions to recover payments that parties paid voluntarily, with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment.'" ***Id.*** (citation omitted). In this context, voluntariness "goes to the willingness of a person to pay a bill *without protest as to its correctness or legality*." ***Id.***, ¶15. The three recognized exceptions to the doctrine's applicability are fraud, duress, and mistake of fact. ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶15, 298 Wis. 2d 468, 727 N.W.2d 546.

¶7 Two key reasons support Wisconsin's adoption of the voluntary payment doctrine: (1) it "allows entities that receive payment for services to rely upon these funds and to use them unfettered in future activities"; and (2) it "operates as a means to settle disputes without litigation by requiring the party

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[6] MBS stipulated to the dismissal of its claims for declaratory and injunctive relief against Wisconsin Bell and ILD, leaving only its claims seeking monetary damages.

contesting the payment to notify the payee of its concerns." ***Putnam***, 255 Wis. 2d 447, ¶16. Upon receiving "such notification, a payee who has acted wrongfully can react to rectify the situation." ***Id.***

¶8 MBS argues that the trial court erred when it applied the voluntary payment doctrine to dismiss all of its damages claims. First, MBS relies on the principle that the objective of statutory interpretation is to discern the intent of the legislature and advance the legislative purpose, *see* ***Estate of Capistrant v. Froedtert Mem'l Lutheran Hosp.***, 2003 WI App 213, ¶5, 267 Wis. 2d 455, 671 N.W.2d 400, which MBS asserts was to prohibit cramming, *see* WIS. STAT. § 100.207(3), and make it unlawful to include "false, misleading or deceptive" statements or representations in telephone bills, *see* § 100.207(2). MBS contends that applying the voluntary payment doctrine in this context would enable Wisconsin Bell and ILD to circumvent liability for conduct that the legislature sought to prohibit. It writes:

> Given the deceptive nature of the illegal billing schemes alleged here, it would be contrary to the express purpose of WIS. STAT. § 100.207 to allow [Wisconsin Bell and ILD] to engage in the very conduct that the legislature prohibited, only to avoid statutory liability for damages because their deceptive conduct has had the desired effect—namely, to cause customers unknowingly to pay unauthorized charges.

¶9 We note, however, that "[t]he [voluntary payment] doctrine presupposes mistaken or wrongful conduct by the payee." ***Putnam***, 255 Wis. 2d 447, ¶35. The ***Putnam*** court considered creating an additional exception to the voluntary payment doctrine to preclude a private entity engaging in wrongful conduct from "avail[ing] itself of the … doctrine to block claims derived from the wrongful conduct" and decided against doing so. ***Id.***, ¶¶22-23; *see* ***Butcher***, 298 Wis. 2d 468, ¶17 (discussing ***Putnam***). This court is bound by ***Putnam*** and its progeny. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify or withdraw language from a previously published decision). Therefore, we cannot create an additional exception to the voluntary payment doctrine that would preclude Wisconsin Bell and ILD from using the doctrine to block MBS's claims. *See* ***Putnam***, 255 Wis. 2d 447, ¶35 ("The legislature has the power to create additional exceptions to the voluntary payment doctrine in particular circumstances."); *see also* ***Butcher***, 298 Wis. 2d 468, ¶23 ("The supreme court, not this court, is the proper court to decide if the services involved in this case, in themselves, warrant an exception to the voluntary payment doctrine.").

¶10 Next, MBS submits that allowing Wisconsin Bell and ILD to avoid paying damages based on the voluntary payment doctrine would render the damages provision found at WIS. STAT. § 100.207(6)(a)1. meaningless insofar as "[o]nly those customers who were *not* deceived by the cramming (i.e., those who noticed the deceptive charges before paying their telephone bills, and either objected or refused to pay those charges) could bring claims for damages."[7] (Emphasis in brief.) MBS continues: "Indeed, if a customer noticed the charges and refused payment, what claim for damages would still exist?"

¶11 Contrary to MBS's assertions, the voluntary payment doctrine does not nullify WIS. STAT. § 100.207(6)(a)1. If a timely objection is made to an unauthorized charge and no relief ensues, the customer may pursue a claim for

[7] WISCONSIN STAT. § 100.207(6)(a)1. provides: "REMEDIES AND PENALTIES. (a) 1. If a person fails to comply with this section, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief, including damages, injunctive or declaratory relief, specific performance and rescission."

damages. Requiring that the customer object to unauthorized charges in order to pursue a claim was deemed acceptable in ***Putnam*** and ***Butcher*** in the context of late-payment fees on cable television bills and the collection of sales tax on services set forth in telephone bills, respectively. *See* ***Putnam***, 255 Wis. 2d 447, ¶3; *see also* ***Butcher***, 298 Wis. 2d 468, ¶¶1-2.

¶12 As its third argument, MBS relies on the principle that where a statute and common law conflict, the language of the statute controls. *See* ***Kensington Dev. Corp. v. Israel***, 139 Wis. 2d 159, 167, 407 N.W.2d 269 (Ct. App. 1987). Consequently, it asserts that "applying the voluntary payments doctrine to require [MBS] to discover and refuse payment of unauthorized charges, or to pay those charges 'under protest,' conflicts with WIS. STAT. § 100.207, as it effectively writes a 'protest' requirement into the statute where none exists." To support its argument, MBS relies on an erroneous reading of ***Butcher***. It submits: "In ***Butcher***, this Court stated that the voluntary payment[] doctrine would *not* preclude a claim under a statute, where that statute (like WIS. STAT. § 100.207) did not contain a protest requirement." (Emphasis in brief.) ***Butcher*** does not support MBS's position in this matter.

¶13 The plaintiffs in ***Butcher***, like MBS, argued that the statute at issue did not contain a protest requirement and based on the absence of such a requirement, asserted that the legislature did not intend the voluntary payment doctrine to apply. *See* ***id.***, 298 Wis. 2d 468, ¶31. The ***Butcher*** court disagreed and explained that the voluntary payment doctrine could still apply despite the lack of a statutory protest requirement:

> WISCONSIN STAT. § 77.59(4)(a) authorizes a taxpayer to file with DOR a claim for a refund for taxes paid to the seller if the claim is for at least fifty dollars. Plaintiffs point out that this section does not include a

> protest requirement and they argue that this shows the legislature intended that the voluntary payment doctrine not apply to actions such as this to recover from the seller. We do not agree. Section 77.59(4)(a) expresses the legislature's intent that a taxpayer need not protest the tax when paying it in order to recover a refund under the procedure established in § 77.59(4)(a). *The statute expresses no intent and no policy judgment on whether the common law voluntary payment doctrine should apply in a court action outside the statutory scheme.*

Butcher, 298 Wis. 2d 468, ¶31 (footnote omitted; emphasis added); *see also* ***id.***, ¶31 n.9. Indeed, the court went on to dismiss the plaintiffs' claims pursuant to the voluntary payment doctrine. ***Id.***, ¶32. Following ***Butcher***, we conclude that application of the voluntary payment doctrine does not conflict with WIS. STAT. § 100.207 despite the lack of a protest requirement.

¶14 MBS further contends that the trial court erred when it held that the legislature needed to abrogate the voluntary payment doctrine when it enacted the statutes at issue. This argument also fails.

¶15 In this regard, we, like the trial court, are persuaded by ***Fuchsgruber v. Custom Accessories, Inc.***, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. The ***Fuchsgruber*** court held that in the absence of an unequivocal statement to the contrary, a statute will not trump common law:

> It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent. Statutes in derogation of the common law are strictly construed. A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory.

Id., ¶25 (citations omitted). We agree with the trial court's conclusion that if the legislature had intended to "abrogate" the voluntary payment doctrine, it needed to do so expressly when it enacted the statutes at issue. MBS has not directed us to any language to this effect. We note that the legislature has not amended WIS. STAT. § 100.18, the statute at issue in ***Putnam***, to address the application of the voluntary payment doctrine. "Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act." ***Zimmerman v. Wisconsin Elec. Power Co.***, 38 Wis. 2d 626, 633-34, 157 N.W.2d 648 (1968).

¶16 MBS argues that a holding that the voluntary payment doctrine applies to preclude the claims at issue here would amount to a radical change in Wisconsin law that will effectively vitiate the remedial provisions of many Wisconsin statutes. [[Text omitted.]] However, as we have already demonstrated, we do not make new law here, but instead apply established law to the facts. Indeed, Justice Bablitch's dissent in ***Putnam*** makes essentially the same point that MBS does here, namely, that requiring customers to challenge improper charges imposes an unreasonable burden on them [text omitted]. *See* ***Putnam***, 255 Wis. 2d 447, ¶61 (Bablitch, J. concurring in part, dissenting in part).[8] But of course the ***Putnam*** majority rejected that view.

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[8] Justice Bablitch wrote:

> Why should a customer protest the payment of a fee if it has no reason at the time of payment to believe that it is unreasonable and/or unconscionable? If that is the law, and the majority says it is, then all payees of all late fees pursuant to prior agreements regarding late fee payments, whether to banks, credit cards, bills for services, and the like, must automatically protest at the time of payment or lose the right to contest it. That is, of course, absurd. Yet it is the requirement set out by the majority.

Putnam v. Time Warner Cable of Se. Wis., 2002 WI 108, ¶61, 255 Wis. 2d 447, 649 N.W.2d 626 (Bablitch, J. concurring in part, dissenting in part).

¶17 Having determined that the voluntary payment doctrine applies, we must now consider whether any of the exceptions—i.e., fraud, duress, and mistake of fact—come into play. *See* ***Butcher***, 298 Wis. 2d 468, ¶15. MBS does not allege that it paid its bills as a result of duress or mistake of fact. As a result, the trial court reviewed the bills to determine whether the fraud exception applied. The court concluded that no reasonable jury could find that the charges at issue were fraudulently concealed from MBS.[9] MBS argues that "whether the fraud exception applies is a question for the finder of fact to make" and submits that, regardless of whether Wisconsin Bell's and ILD's motions are treated as motions to dismiss or for summary judgment, it was improper for the trial court to decide a disputed question of fact—i.e., whether certain charges contained in the telephone bills were sufficiently deceptive as a matter of law to support a fraud claim. We disagree.

¶18 In ***Meyer v. The Laser Vision Institute***, 2006 WI App 70, 290 Wis. 2d 764, 714 N.W.2d 223, the court explained that the question of whether a document is deceptive or misleading "need only be sent to the trier of fact where there are facts alleged or reasonable inferences that can be drawn from those facts that could form the basis for a … claim." ***Id.***, ¶14. In addition, both ***Putnam*** and ***Butcher*** rejected, at the pleadings stage, conclusory allegations in support of exceptions to the voluntary payment doctrine. ***Putnam***, 255 Wis. 2d 447, ¶20 (holding plaintiffs' allegations of fraud did not support the fraud exception to the

[9] The trial court found that certain U.S. Connect "MONTHLY SVCS" charges were "vague enough and ambiguous enough … that even a reasonably attentive person looking at this might not understand exactly whether this was authorized or not," such that the fraud exception to the voluntary payment doctrine may have applied. Those charges are not at issue on appeal. MBS's claims relate only to ILD and Local Biz charges, which, the trial court found, could not form the basis for a fraud claim.

voluntary payment doctrine where the challenged fee clearly appeared on the bills); ***Butcher***, 298 Wis. 2d 468, ¶¶21, 29 (concluding that the amended complaint, including the attached bills, did not contain allegations of facts, including reasonable inferences from those facts, that the plaintiffs paid the unauthorized taxes because of duress or a mistake of fact).

¶19 To support a fraud claim, MBS needed to allege the following: (1) Wisconsin Bell and ILD made a factual representation; (2) which was untrue; (3) Wisconsin Bell and ILD either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) Wisconsin Bell and ILD made the representation with intent to defraud and to induce another to act upon it; and (5) MBS believed the statement to be true and relied on it to its detriment. *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 699 N.W.2d 205. As stated by the trial court, MBS's complaint implied that MBS "unwittingly relied on a statement implicit in the bills themselves, that is, that the charges had somehow been authorized by [MBS]." The court explained: "If [MBS was] unable to identify the unauthorized charges because of some deceptive manner in which they were included in the bills, and therefore they did not take notice and did not, in fact, notice the unauthorized charges, the plaintiffs may have justifiably relied on the bills in being accurate in making their payments."

¶20 Having independently reviewed MBS's claims and the charges involved, we agree with the trial court's assessment that the clarity of the statements on the bills calls into question MBS's ability to form the basis for a fraud claim.[10] As explained by the trial court:

> If [customers] don't read [their bills], I think they're out of luck. It's not that these bills are impossible to read. I don't think that they're presented to people who are incapable of reading, and therefore, I think they need to be read.
>
> If they were printed in such tiny font that they could not physically be read by the naked eye, that might be the problem, but even with my poor eyesight, I could read the bills....
>
> ....
>
> ... The only question is if you read them, can you understand whether or not you authorized those charges? Given the rather specific and explicit nature of the charge, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized those services.
>
> To the contrary the charges were stated with sufficient particularity that a reasonable customer would be startled to find such a charge on the bill.

The trial court further noted that "[customers] would know whether they had ordered a listing in [a national] directory or whether they had ordered internet services or ordered a calling plan for calling in a Spanish speaking country...." We see no error in the trial court's conclusion. *See* ***Kaloti Enters., Inc.***, 283 Wis. 2d 555, ¶12 (A necessary element to support a fraud claim is that "'the plaintiff believed the statement to be true and relied on it to his/her detriment.'") (citation omitted).

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[10] A sample bill reflecting the type of charge at issue is attached to this opinion.

¶21 Consequently, we conclude that MBS's claims were correctly dismissed by the trial court. Because our decision affirming the trial court's dismissal is dispositive, we need not address the issues ILD raises in its cross-appeal.[11] *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[11] Likewise, because we affirm the dismissal of MBS's claims based on the voluntary payment doctrine, we need not address the alternative grounds for affirmance argued by ILD and Wisconsin Bell. *See* ***Gross***, 227 Wis. at 300.

METROPOLITAN BUSINESS SER
VICE
10617 W OKLAHOMA AV
WEST ALLIS, WI 53227-4152

Account Number 414 328-4578 827 0
Billing Date Aug 28, 2004

Web Site www.sbc.com

Invoice Number 41432846578O8

Jul 29 - Aug 28, 2004

Previous Bill	139.79
Payment	.00
Adjustments	139.79CR
Past Due - Please Pay Immediately	.00
Current Charges	352.32
Total Amount Due	**$352.32**
Current Charges Due in Full By	Sep 20, 2004

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ILD Teleservices, Inc. 1-800-433-4518	37.76
SBC Long Distance 1-800-660-3000	39.62
Total of Current Charges	**352.32**

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See "News You Can Use" for additional information.

Item No.	Date	Description	Adjustments	Payments
1	8-13	Monthly Service	139.79CR	
2	8-24	Pages Plus(R) Advertising Adj.	.01	
3	8-25	Pages Plus(R) Advertising Adj.	.01CR	
Totals			139.79CR	.00

Monthly Service - Aug 28 thru Sep 27

Charges for 414 328-4578	
Monthly Charges	23.86
Federal Access Charge	5.06
Charges for 414 327-4829	
Monthly Charges	24.35
Federal Access Charge	5.06
Charges for 414 328-3871	
Monthly Charges	8.90
Federal Access Charge	5.06
Charges for 414 328-4232	
Monthly Charges	5.40
Federal Access Charge	5.06
Charges for 414 328-4679	
Monthly Charges	6.15
Federal Access Charge	5.06
Charges for 414 329-2798	
Monthly Charges	5.40
Federal Access Charge	5.06
Charges for 414 329-2805	
Monthly Charges	5.40
Federal Access Charge	5.06
Charges for 414 329-2816	
Monthly Charges	5.40
Federal Access Charge	5.06
Total Monthly Service	123.33

Local Calls

578 Call(s) were placed with your Measured Line
800 Call(s) were allowed

Extended Community Calling

No.	Date	Time	Place Called	Number	Code	Min	
1	8-04	824A	MCINE	WI 262 598-4114	B	1	.65

Local Services provided by SBC Illinois, SBC Indiana, SBC Michigan, SBC Ohio or SBC Wisconsin based upon the service address location.

CONFIDENTIAL
AT&T 000191

ILD
Teleservices Inc.

METROPOLITAN BUSINESS SERVICE
10617 W OKLAHOMA AV
WEST ALLIS, WI 53227-4152

Page 3 of 8
Account Number 414 328-4678 627 8
Billing Date Aug 28, 2004

Questions? 1-800-433-4518

Invoice Number 414328467808

This portion of your SBC bill is provided as a courtesy service to the above company. Please review all charges carefully - they may include those of a service provider not shown on a previous bill. In addition, nonpayment of toll charges may result in disconnection of local service, and other services may be restricted if not paid. Unpaid accounts also may be subject to collection action. If you have questions about any of the charges appearing on this page, please call the number shown above.

Miscellaneous Charges and Credits

This section of the bill reflects charges and/or credits applied to your account.

No.	Date	Description	
		Local Biz USA	
1	07-28	INTERNET SERVICES MONTHLY FEE	34.95

Taxes

Federal at 3%	1.05
State at 5%	1.75
Total Taxes	2.80

Total ILD Teleservices, Inc. Charges	37.75

CONFIDENTIAL
AT&T 000193

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MBS-CERTIFIED PUBLIC ACCOUNTANTS LLC, et al.,

Plaintiffs,

vs.

WISCONSIN BELL, INC., et al.,

Defendants.

FILED
CIVIL DIVISION
29 13 2007 29
JOHN BARRETT
Clerk of Circuit Court

ORDER
Case No. 07CV008092

This case came before the court for a hearing on the defendants' motions to dismiss. For the reasons stated on the record at the hearing, IT IS HEREBY ORDERED THAT:

1. The motions to dismiss are granted in part and denied in part.
2. All claims arising under WIS. STAT. §§ 100.18(1) and 100.20(5) are dismissed.
3. All claims for money damages are dismissed, except for claims for money damages against U.S. Connect, ILD and Wisconsin Bell arising out of billing statements in which a charge for U.S. Connect "MONTHLY SVCS" appears.
4. The motions to dismiss the remaining claims for injunctive relief are denied.
5. Leave is granted to the parties to bring dispositive motions on matters identified by the court during the hearing.
6. The court will conduct a scheduling conference on December 13, 2007 at 11:00 a.m.

7. The court will conduct the scheduling conference by telephone. Mr. Dehler's office will initiate the call.

Richard J. Sankovitz
Circuit Court Judge

Dated: 11-13-07

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MBS-CERTIFIED PUBLIC ACCOUNTANTS LLC, et al.,

Plaintiffs,

vs.

WISCONSIN BELL, INC., et al.,

Defendants.

FILED
CIVIL DIVISION
29 DEC 14 2007 29
JOHN BARRETT
Clerk of Circuit Court

ORDER

Case No. 06CV008092

This case came before the court yesterday for a hearing on the plaintiffs' motion for reconsideration and request for a suggestion on the propriety of interlocutory review.

For the reasons stated on the record yesterday, IT IS HEREBY ORDERED THAT:

1. The motion for reconsideration is denied.
2. The request for a suggestion on the propriety of interlocutory review is denied.
3. All proceedings are stayed pending a decision of the court of appeals whether to accept the plaintiffs' request for permissive review.
4. The court will conduct a status conference on March 18, 2007 at 8:45 a.m.
5. The court will conduct the scheduling conference by telephone. Mr. Dehler's office will initiate the call.

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

Richard J. Sankovitz

Richard J. Sankovitz
Circuit Court Judge

Dated: DEC 14 2007

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC,
10617 W. Oklahoma Avenue,
Milwaukee, Wisconsin 53227-4152,

THOMAS H. SCHMITT, CPA
d/b/a METROPOLITAN BUSINESS SERVICES,
10617 W. Oklahoma Avenue,
Milwaukee, Wisconsin 53227-4152,

Individually and On Behalf of All Others
Similarly Situated

Plaintiffs,

vs.

AT&T, INC.,
175 E. Houston Street,
San Antonio, Texas 77802,

ILD TELECOMMUNICATIONS, INC.,
d/b/a ILD TELESERVICES,
3230 West Commercial Blvd., Suite 360,
Oakland Park, Florida 33309,

LOCAL BIZ USA,
201 State Route 17,
Rutherford, New Jersey 07070

U.S. CONNECT, LLC,
1288 West Miner Road,
Mayfield Heights, Ohio 44124,

AMERICATEL CORPORATION,
4045 NW 97th Street,
Miami, Florida 33178

Defendants.

HON. JEAN W. DIMOTTO, BR. 7

Case No: CIVIL F

Case Classification Codes:
30301 (Money Judgment)
30704 (Other Injunction or Restraining Order)

CLASS ACTION COMPLAINT

Plaintiffs, MBS-Certified Public Accountants, LLC and Thomas H. Schmitt, CPA, d/b/a Metropolitan Business Services (hereinafter collectively "the Plaintiffs"), on behalf of themselves and all others similarly situated, hereby bring this class action against the above-named Defendants (hereinafter collectively "the Defendants"), and allege as follows:

INTRODUCTION

1. This class action is brought for the benefit of all Wisconsin consumers who have been wrongfully charged, by one or more of the Defendants, on their telephone bills for unauthorized telephone, internet and/or web hosting services through a deceptive billing scheme, commonly known as "cramming." Companies engaged in cramming, like the Defendants, routinely insert relatively small, unauthorized charges into consumers' telephone bills, with the expectation that they will not notice the charges and, therefore, will unwittingly pay them. For roughly a decade, cramming has plagued the telecommunications industry, primarily because it has proven over time to be a highly effective means of stealing money from consumers, who rarely understand all of the many charges on their telephone bills and trust that they will not be billed by the telephone utility for illegal charges.

2. Defendant, AT&T, Inc., as successor to SBC Communications, Inc. (hereinafter "AT&T"), has long known that cramming is a serious problem that needs to be addressed. Indeed, in 1998, AT&T and other leaders in the telecommunications industry adopted "Anti-Cramming Best Practices Guidelines" (hereinafter "Guidelines") at the request of the Federal Communications Commission ("FCC"). In those Guidelines, AT&T acknowledged that cramming is a serious problem, which it defined as follows: "[t]he submission or inclusion of unauthorized, misleading or deceptive charges for products or services on consumers' local telephone bills." A true and correct copy of the Guidelines is attached hereto as *Exhibit A*.

3. Despite the adoption of Guidelines eight years ago, the illegal practice of cramming remains highly prevalent in the telecommunications industry today. Indeed, over the

last several years, many thousands of AT&T customers in Wisconsin have been improperly billed for unauthorized charges. This lawsuit seeks relief, not only on behalf of the Plaintiffs, but also on behalf of all others in Wisconsin who have been harmed by the unlawful cramming schemes described herein.

THE PARTIES

4. Plaintiff, MBS-Certified Public Accountants, LLC (hereinafter "MBS"), is a limited liability company organized under the laws of Wisconsin, with it principal place of business located at 10617 W. Oklahoma Avenue, West Allis, Wisconsin. MBS is engaged in the business of providing accounting services to its customers, who are located primarily in southeastern Wisconsin.

5. Plaintiff, Thomas H. Schmitt, CPA d/b/a Metropolitan Business Services (hereinafter "Schmitt"), is an accountant who, at all relevant times, has owned and operated an accounting business with its principal place of business located at 10617 W. Oklahoma Avenue, West Allis, Wisconsin. In June 2005, Schmitt formed MBS, and he has worked as an accountant for MBS since that time.

6. Defendant, AT&T, is a publicly-held corporation organized under the laws of Delaware, with its principal place of business located at 175 E. Houston Street, San Antonio, Texas. On or about November 21, 2005, AT&T merged with SBC Communications, Inc. ("SBC"). Prior to the merger, SBC was a publicly-held corporation, also organized under the laws of Delaware, with its principal place of business located at 175 E. Houston Street, San Antonio, Texas. After merging with SBC, AT&T became the largest telecommunications company in the United States and one of the largest in the world.

7. Defendant, ILD Telecommunications, Inc. a/k/a ILD Teleservices ("ILD"), upon information and belief, is a privately-held corporation organized under the laws of Delaware, with its principal place of business located at 5000 Sawgrass Village Circle, Suite 30, Ponte Vedra, Florida. ILD is in the business of providing billing aggregation and clearinghouse services, whereby it contracts with various service providers (many times service providers known to engage in deceptive and unlawful marketing practices) to aggregate the service providers' charges and forward them on to local exchange carriers (hereinafter "LECs") such as AT&T, so that the charges can be incorporated into consumers' telephone bills.

8. Defendant, Local Biz USA, Inc. ("Local Biz USA"), upon information and belief, is a privately-held corporation organized under the laws of New Jersey, with its principal place of business located at 201 State Road 17, Rutherford, New Jersey. Local Biz USA is a service provider (one that is known to engage in deceptive and unlawful marketing practices) allegedly in the business of providing internet and web hosting services to thousands of AT&T customers, who are solicited through deceptive telemarketing practices.

9. Defendant, U.S. Connect, LLC ("U.S. Connect"), upon information and belief, is a limited liability company organized under the laws of Ohio, with its principal place of business located at 1228 West Miner Road, Mayfield Heights, Ohio. U.S. Connect is a service provider (one that is known to engage in deceptive and unlawful marketing practices) allegedly in the business of providing nationwide directory assistance service for thousands of AT&T customers, who are solicited through deceptive telemarketing practices.

10. Defendant, AmericaTel Corp. ("AmericaTel"), upon information and belief, is a privately-held corporation organized under the laws of Florida, with its principal place of business located at 4045 NW 97th Avenue, Miami, Florida. AmericaTel is a service provider

(one that is known to engage in deceptive and unlawful marketing practices) allegedly in the business of providing international calling plans, including a plan commonly known as "AmericaTel's Plan Uniendo America," to thousands of AT&T customers, who are solicited through deceptive telemarketing practices.

VENUE AND JURISDICTION

11. This Court has jurisdiction over the Plaintiffs' claims because, at all pertinent times, the Defendants have done business in Wisconsin and, therefore, have been subject to the requirements of Wisconsin law including, without limitation, Wis. Stat. §§100.207, 100.20(5), 100.18 and 946.80, which pertain to all business that the Defendants transact in Wisconsin.

12. This Court has jurisdiction over the Defendants, which are non-resident corporations, because they each conduct substantial business in Wisconsin. The Defendants intentionally avail themselves of consumer markets within Wisconsin, through the promotion, sale, marketing and distribution of their products and/or services in Wisconsin. The Defendants thereby render the exercise of jurisdiction by Wisconsin courts permissible under traditional notions of fair play and substantial justice.

13. Venue is proper in this Court, pursuant to Wis. Stat. §801.50, because the Plaintiffs' claims arise in this County, which is the location of the Plaintiffs' primary offices. Many of the witnesses having knowledge of facts giving rise to the Plaintiffs' claims are located in Milwaukee County. Furthermore, the Defendants do substantial business in Milwaukee County, and derive substantial compensation and profits from their operations in Milwaukee County.

14. This Court has jurisdiction over the subject matter of this action pursuant to

Wis. Stat. §801.04. Neither the Plaintiffs nor any individual resident or business for whose benefit this action is brought has suffered damages that exceed or approach $75,000. Furthermore, upon information and belief, the total amount in controversy in this case does not exceed $5 million.

FACTUAL BACKGROUND

15. The cramming at issue in this case involve three different service providers -- namely, Local Biz USA, U.S. Connect and AmericaTel (hereinafter collectively "the Service Provider Defendants"). The Service Provider Defendants, in concert with other Defendants, have deceptively billed thousands of AT&T customers for unauthorized services, with charges ranging from $2 to $40 per month.

16. To succeed in stealing money from consumers through cramming, the Service Provider Defendants need assistance from other Defendants. Because consumers would be more likely to question unauthorized charges if they were contained in bills sent to them directly by the Service Provider Defendants that are engaged in the deceptive marketing practices, those Service Provider Defendants enlist the aid of third-party billing companies, including AT&T and ILD, which agree to take part in the deceptive business practices in exchange for a fee.

17. For instance, Local Biz USA used ILD to assist in unlawfully billing AT&T telephone customers for unauthorized services. As a billing clearinghouse, ILD willingly performs the billing function for many disreputable service providers, including Local Biz USA, because it stands to profit from its relationships with these companies. When it consolidated the charges at issue in this case, ILD knew or should have known that there had been thousands of complaints from consumers about the deceptive business practices of Local Biz USA. Indeed, upon information and belief, ILD itself received hundreds, if not thousands, of complaints

directly from consumers, some of whom had their Local Biz USA charges reversed after explaining that this disreputable service provider was billing for unauthorized services.

18. In this case, ILD assisted Local Biz USA in its deceptive business practices by aggregating its charges and forwarding them on to AT&T, in a consolidated format, so that they could be deceptively incorporated into Schmitt's telephone bills. Upon receiving aggregated charges from ILD, AT&T incorporated those charges into Schmitt's telephone bills, along with the bills of thousands of other AT&T customers, using the vague heading of "Miscellaneous Charges and Credits." AT&T purposely inserted these unauthorized charges into the local telephone bills in a vague and confusing manner, using the same format and pagination style as the rest of the telephone bill. Accordingly, Schmitt and thousands of other unsuspecting AT&T customers did not notice the charges and unwittingly paid them.

19. Unlike Local Biz USA, the other two Service Provider Defendants, U.S. Connect and AmericaTel, did not use billing clearinghouses to aggregate their charges. Instead, they contracted directly with AT&T to have their unauthorized services billed on the monthly telephone bills of AT&T customers. Contrary to the Guidelines that it helped to develop in 1998, AT&T (in exchange for a fee) included these unauthorized charges on Plaintiffs' telephone bills, despite knowing or having reason to know that both U.S. Connect and Americatel were disreputable companies that routinely billed consumers for unauthorized charges.

20. AT&T knew, or should have known, that U.S. Connect was a disreputable company engaged in cramming. In 2003, U.S. Connect was sued by the State of Wisconsin, and ultimately agreed, in that case, that it had engaged in cramming. Indeed, U.S. Connect entered into a formal stipulation with the State of Wisconsin, which required it to reimburse consumers for unauthorized charges. The stipulation has been, at all relevant times, a matter of public

record. Nonetheless, upon information and belief, AT&T continues to do business with U.S. Connect in exchange for a fee.

21. Likewise, AT&T knew or should have known that AmericaTel was a disreputable company engaged in cramming. AmericaTel markets itself as a business that offers services to international callers. MBS is a local accounting firm that does not ordinarily place international calls, a fact that was known to AT&T as the company that, at all relevant times, has billed MBS's telephone services. AT&T knew or should have known that AmericaTel's charges to MBS, and many other Wisconsin consumers, were unauthorized. Nonetheless, upon information and belief, AT&T continues to do business with AmericaTel in exchange for a fee.

22. Despite the fact that U.S. Connect had been sanctioned publicly, and AmericaTel clearly offered services that were neither needed nor authorized by MBS, AT&T billed Plaintiffs for unauthorized charges of behalf of these Service Provider Defendants. Even after the Plaintiffs contacted AT&T and requested to have these unauthorized charges removed from their telephone bills, AT&T continued to include those charges on the Plaintiffs' bills, time and time again. Moreover, when the Plaintiffs understandably refused to pay the unauthorized charges, AT&T referred the Plaintiffs to collection and threatened to suspend their telephone services.

23. Each of the Defendants knowingly and intentionally participated in the cramming described above, and each derived substantial profits as a direct result of its participation. Indeed, upon information and belief, the Defendants have entered into contractual arrangements with one another, whereby they have agreed to share the revenue generated from these unlawful practices.

24. Even though AT&T has publicly acknowledged that cramming is a serious problem, which results in many thousands of consumers being wrongfully charged millions of dollars, it has not taken the reasonable steps necessary to address the problem. AT&T has failed to act because, upon information and belief, it derives millions of dollars in profits nationwide by billing unauthorized charges. Indeed, when the Federal Trade Commission ("FTC") considered taking action to protect consumers from these deceptive practices in the late 1990s, AT&T aggressively lobbied against its involvement. In addition, while opposing FCC regulations that would have addressed the cramming problem, AT&T asserted that cramming could be better handled through the development and implementation of voluntary guidelines within the telecommunications industry. Hence, AT&T drafted and supported various guidelines (including the Guidelines attached hereto as *Exhibit A*) as a means of avoiding federal regulation intended to remedy cramming.

25. As part of its efforts to avoid anti-cramming regulations, AT&T wrote a lengthy position statement to the FCC dated March 10, 1999, a true and correct copy of which is attached hereto as *Exhibit B*. In that statement, AT&T again acknowledged that cramming was a serious problem in the industry, but asserted that only industry guidelines were necessary. In support of its position, AT&T again pointed to and endorsed the Guidelines attached hereto as *Exhibit A*. Nonetheless, despite heartily endorsing those Guidelines, upon information and belief, AT&T consistently refuses to abide by them.

26. For example, contrary to the Guidelines, AT&T, upon information and belief: (a) undertakes no investigation of the legitimacy of the various service providers with which it does business; (b) makes no effort to sample or otherwise evaluate the legitimacy of the service charges being billed to its customers; and (c) does not obtain a sampling of written authorizations

or tape-recordings that would allow AT&T to determine whether its customers were actually authorizing the charges being billed. Instead, upon information and belief, AT&T relies solely on an unreliable method of determining "complaint volume" to assess whether there is a problem with a particular service provider. However, AT&T's approach to "complaint volume" is entirely off-base because AT&T specifically instructs disgruntled customers (in their telephone bills) to contact service providers and/or billing clearinghouses directly (*not* AT&T) if they have questions or concerns about unauthorized service charges on their AT&T bills. Given that consumers are told to contact the service providers and/or billing clearinghouses directly, AT&T's calculations of "complaint volume" (the number of complaints made *to AT&T*) are understated and relatively meaningless.

27. Upon information and belief, AT&T undertakes no meaningful steps to identify fraudulent charges on the telephone bills it sends to customers. It simply sends those bills out, and then collects substantial fees from disreputable service providers and billing clearinghouses month after month, regardless of whether the bills contain charges for unauthorized services. Moreover, on the pages of the AT&T bills that contain these unauthorized charges, AT&T threatens its own customers that "[u]npaid accounts may be subject to collection action." AT&T also warns that "[o]ther services may be restricted if not paid," suggesting that the customers' other telephone services (i.e. local and long distance) will be terminated if the unauthorized charges are not paid.

28. Like AT&T, upon information and belief, ILD fails to take reasonable steps to ensure that it does not bill unauthorized services, contrary to the Guidelines. ILD's failure to abide by the Guidelines is particularly distressing because ILD is part of an organization of billing clearinghouses known as the Coalition to Ensure Responsible Billing ("CERB"), which

adopted and endorsed the Guidelines. Despite belonging to CERB and endorsing the Guidelines, ILD, upon information and belief, bills hundreds of thousands of dollars annually for disreputable service providers, including Local Biz USA. Like AT&T, ILD billed these charges without investigating or taking action to address the service providers' highly suspect marketing and billing practices. Moreover, ILD knows or should know that Local Biz USA bills for unauthorized services because ILD, upon information and belief, receives hundreds or thousands of complaints about Local Biz USA annually. ILD is therefore responsible for perpetuating the deceptive billing practices that are the subject of this lawsuit.

29. If AT&T and ILD followed the Guidelines, which they have wholeheartedly endorsed in an effort to avoid effective regulation, they could prevent much of the cramming that currently plagues the industry, both in Wisconsin and throughout the country. However, upon information and belief, those Guidelines were developed primarily as a political tool for the purpose of avoiding federal regulation, and they are not taken seriously by either AT&T or ILD. When it comes to the day-to-day business operations of AT&T and ILD, upon information and belief, the Guidelines are largely ignored.

30. For example, the Guidelines explain that billing entities (like AT&T and ILD) should obtain "assurances" from service providers to make certain that they have adequate processes in place to ensure that end-users (in this case, the AT&T customers) have actually authorized the purchase of services. The Guidelines also state that each end-user's authorization should be documented in one of the following ways: (a) a voice recording of the entire and actual conversation with the end-user; (b) a written document signed by the customer; or (c) an independent third-party verification. Furthermore, the documentation related to customer authorizations is to include certain detailed information including, without limitation, specific

verification of the customer's age, telephone number and authority to enter into the transaction, as well as a specific acknowledgment that the customer understands that the service will be billed on his or her local telephone bill. All documentation of such authorizations is to be maintained for at least two years, and copies are to be provided to the customer in a timely manner. Upon information and belief, neither AT&T nor ILD has implemented processes to ensure that these "assurances" are obtained.

31. The failure and refusal of both AT&T and ILD to abide by the Guidelines is particularly problematic, because the FCC declined to intervene with more effective federal regulations because companies like AT&T and ILD promised to take the steps necessary to correct the problem. However, as history has shown, these companies are not sufficiently motivated to address the problems, as they stand to earn substantial profits by perpetuating the deceptive conduct.

32. As demonstrated by the facts of this case, it is apparent that Defendants do not follow the practices outlined in the Guidelines, and have not taken the steps necessary to prevent the theft attributable to cramming. Moreover, given the lack of effective regulatory enforcement, a class action lawsuit (like this one) may provide the only effective means of addressing the cramming problems plaguing the industry.

CLASS ACTION ALLEGATIONS

33. The Plaintiffs bring this lawsuit on their own behalf and on behalf of a class consisting of all others similarly situated, defined as follows:

> All current and former Wisconsin customers of AT&T (formerly SBC) who paid telephone bills, at any time between September 1, 2000 and present, where those bills included charges from one or more of the Service Provider Defendants and Defendants have no authorizations containing the information required by the Guidelines (hereinafter "Class").

Excluded from the Class are Defendants, their subsidiaries and affiliates, and any officers and directors thereof, Plaintiffs' attorneys and their immediate family, as well as any judge presiding over this action, the judge's spouse and immediate family.

34. This action is brought and may properly be maintained as a class action pursuant to Wis. Stat. §803.08. This action satisfies the requirements enumerated in Section 803.08 in that it presents questions of common interest on behalf of numerous parties, the joinder of whom is impracticable.

35. Numerosity of the Class: The proposed Class is so numerous that the individual joinder of all its members is impractical. While the exact number and identities of Class members are unknown at this time, and can only be ascertained through appropriate discovery, the Plaintiffs are informed and believe that there are thousands of members of the Class.

36. Existence and Predominance of Common Questions of Law and Fact: Questions of law and fact of common and general interest exist as to all members of the Class and predominate over any questions affecting only individual members of the Class.

37. Questions of fact common to the Class predominate, including the following:

a. Whether the Defendants implemented procedures to ensure that members of the Class actually authorized the services for which they were ultimately billed by AT&T;

b. The knowledge and information available to AT&T and ILD with regard to complaints and/or government enforcement proceedings brought against the Service Provider Defendants at the time they were doing business with those companies;

c. The monthly charges billed by the Service Provider Defendants on the Class members' monthly telephone bills; and

d. The damages to the Class.

38. Questions of law common to the Class predominate, and include the following:

a. Whether the cramming activities described herein constitute violations of Wis. Stat. §100.207;

b. Whether the cramming activities described herein constitute violations of Wis. Stat. §100.20(5), including the applicable Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") regulations;

c. Whether the cramming activities described herein constitute violations of Wis. Stat. §100.18;

d. Whether Defendants, by engaging in the cramming activities described herein, were associated in an unlawful enterprise that engaged in a "pattern of racketeering activity" for purposes of Wis. Stat. §946.80, *et seq.*; and,

e. Whether Defendants were unjustly enriched by reason of the cramming activities described herein, such that they should not be allowed to retain the benefits derived from those activities.

39. Typicality of Claims: The Plaintiffs' claims are typical of the claims of the other Class members, as all such claims arise out of the same set of practices and procedures engaged in by the Defendants, including the unauthorized billing of members of the Class for telephone, internet and/or web hosting services.

40. Adequate Representation: The Plaintiffs will fairly and adequately protect the interests of the members of the Class, and they have no interests antagonistic to those of the other Class members. The Plaintiffs have retained counsel experienced in the prosecution of class actions, including consumer class actions.

41. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impractical. The expense and burden of individual litigation by individual customers of AT&T would make such litigation difficult or impossible. Individual litigation would also impose a substantial burden on the court system and raise the risk of inconsistent or contradictory adjudications. In contrast, proceeding as a class action presents fewer management difficulties,

conserves the resources of the parties and the court system, and is the only means available to adequately protect the rights of all Class members.

COUNT I
(Violations of Wis. Stat. §100.207)

42. The Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

43. During 2004 and 2005, AT&T repeatedly billed the Plaintiffs for unauthorized telephone, internet and/or web hosting services, which were allegedly provided by the Service Provider Defendants. However, the Service Provider Defendants provided no such services to Plaintiffs, and they never obtained any authorizations from Plaintiffs to put charges for such services on their monthly telephone bills.

44. Between at least October 2004 and December 2005, AT&T billed Schmitt approximately $37.75 per month as an "Internet Services Monthly Fee," supposedly for some unknown internet service provided by Local Biz USA. Schmitt did not authorize this charge or request any such service. Moreover, Schmitt's AT&T bill does not clearly identify the basis for the charge, or the nature of the service provided. The billing clearinghouse for this unauthorized charge was ILD.

45. Between at least October 2004 and December 2005, AT&T billed MBS approximately $4.24 per month as a fee for "Nationwide Discount Directory Assistance," supposedly for some unknown service provided by U.S. Connect. MBS did not authorize the charge or request any such service. Moreover, MBS's AT&T bill does not clearly identify the basis for the charge, or what service was provided. Upon information and belief, AT&T entered

into an arrangement with U.S. Connect directly, whereby it agreed to include U.S. Connect's charges on MBS's monthly telephone bills in exchange for a fee.

46. Between at least July 2004 and December 2005, AT&T billed MBS approximately $2.11 per month as a fee for "AmericaTel's Plan Uniendo America," allegedly for some unknown service provided by AmericaTel. MBS did not authorize or request this service. Moreover, MBS's AT&T bill did not clearly identify the basis for the charge, or what service was provided. Upon information and belief, AT&T entered into an arrangement with AmericaTel directly, whereby it agreed to include AmericaTel's charges on MBS's monthly telephone bills in exchange for a fee.

47. The Wisconsin legislature has enacted statutes giving consumers the authority to bring claims in court against entities, such as the Defendants, that unlawfully and deceptively charge consumers for unauthorized services. *See* Wis. Stat. §§ 100.207(3) ("A person may not bill a customer for any telecommunications service that the customer did not affirmatively order unless that service is required to be provided by law, the federal communications commission or the public service commission") and 100.207(6)(a) (creating private right of action for violations of the statute). Furthermore, in enacting these statutory prohibitions against "cramming," the legislature made it clear that other statutory remedies are also available, including Wis. Stat. §§ 100.18 and 100.20. *See* Wis. Stat. § 100.207(6)(f).

48. By this action, the Plaintiffs seek relief not only on their own behalf, but also on behalf of a class of similarly situated consumers, and they seek to enjoin the Defendants from continuing to engage in illegal cramming in Wisconsin. The Plaintiffs also request that the Court grant all appropriate relief available under Wisconsin law to deter the Defendants from continuing to engage in unlawful cramming including, without limitation, an award of damages

designed to punish the Defendants, and to compensate those consumers that have sustained pecuniary losses as a result of these unlawful practices.

49. The Defendants were all involved in schemes to bill the Plaintiffs and other Class members for services that were never authorized. The Plaintiffs and other members of the Class did not agree to purchase any services from the Service Provider Defendants, yet the Defendants proceeded to prepare and aggregate charges that were included on the monthly AT&T telephone bills sent to the Plaintiffs and other Class members. The Defendants knew or should have known that such charges and services were neither authorized nor approved.

50. The Defendants violated Wis. Stat. §100.207(3)(a) by billing the Plaintiffs and other Class members for telephone, internet and/or web hosting services that they did not affirmatively order. Moreover, such telephone, internet and web hosting services were not required by federal law, the FCC, or any local utilities commission in Wisconsin.

51. The Defendants violated Wis. Stat. §100.207(3)(a) by engaging in negative option billing and/or negative enrollment of telecommunications services by, *inter alia*, billing the Plaintiffs and other Class members for services that they did not affirmatively authorize.

52. To the extent it is asserted that the Plaintiffs and other Class members authorized the services at issue during an oral solicitation, the Defendants violated Wis. Stat. §100.207(3)(c) by failing to provide the Plaintiffs with independent confirmation of their supposed purchase of telephone, internet and/or web hosting services within a reasonable time.

53. The Defendants violated Wis. Stat. §100.207(2) by billing the Plaintiffs and other Class members in a false, misleading or deceptive manner, and by omitting information necessary to ensure that statements contained in the AT&T bills sent to these consumers were not false, deceptive or misleading. Specifically, the Defendants failed to notify the Plaintiffs and

other Class members that their monthly AT&T bills contained charges for services that they had not authorized. In addition, the Defendants violated this statute by using deceptive and misleading headings, formatting, fonts and pagination when billing the Plaintiffs and other Class members. As prepared and submitted, the bills containing these unauthorized charges were false, deceptive and misleading.

54. The Plaintiffs and other Class members have been harmed and sustained pecuniary losses because of the above-referenced statutory violations. Pursuant to Wis. Stat. §100.207(6)(a), Defendants are each liable to the Plaintiffs and other Class members for all appropriate relief including, without limitation, an award of monetary damages, and all injunctive and declaratory relief necessary to remedy the harm caused by the Defendants and to prevent continuing violations of these statutes.

55. The Defendants have engaged in conduct that was malicious and outrageous, and they did so intentionally for the purpose of stealing money from the Plaintiffs and other members of the Class. Accordingly, punitive damages are appropriate in this case.

COUNT II
(Violation of Wis. Stat. §100.20(5))

56. The Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

57. Pursuant to Wis. Admin. Code §ATCP 123.06, the Defendants are prohibited from engaging in the practice of negative option billing. Specifically, this regulation prohibits the Defendants from billing for service offerings that the Plaintiffs and other Class members did not affirmatively order. The Defendants violated Wis. Admin. Code §ATCP 123.06 because they billed the Plaintiffs and other Class members for alleged service offerings that they did not affirmatively order or authorize.

58. If an authorization is made orally, the Defendants must provide the Plaintiffs and other Class members with certain disclosures, as required by Wis. Admin. Code §ATCP 123.02(1) and (2), by no later than fifteen (15) days after the oral authorization is made. No such disclosures were provided to the Plaintiffs. Moreover, upon information and belief, the Defendants have had no procedures in place to comply with this statute, and they routinely violate Wis. Admin. Code §ATCP 123.02(1) and (2).

59. The Plaintiffs and other members of the Class have suffered pecuniary losses because of the Defendants' violations of the above-referenced regulations. Such pecuniary losses include, but are not limited to, all amounts paid for unauthorized services (including alleged telephone, internet and/or web hosting services).

60. Pursuant to Wis. Stat. §100.20(5), Plaintiffs and other members of the Class are entitled to damages from the Defendants including, without limitation, twice the amount of their pecuniary losses, together with attorneys' fees, costs and any other recoverable expenses of litigation.

61. The Defendants have engaged in conduct that was malicious and outrageous, and they did so intentionally for the purpose of defrauding and stealing money from the Plaintiffs and other members of the Class. Accordingly, punitive damages are appropriate in this case.

COUNT III
(Violation of Wis. Stat. §100.18)

62. The Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

63. The Defendants made false, deceptive and misleading assertions when billing the Plaintiffs and other Class members for unauthorized services. Specifically, the Defendants falsely informed the Plaintiffs and other Class members that they were obligated to pay monthly

charges for telephone, internet and/or web hosting services, despite the fact that they had never ordered such services. In addition, the Defendants used deceptive and misleading headings, formatting, fonts and pagination when billing for these unauthorized services, in an effort to deceive the Plaintiffs and other Class members into believing that they were responsible for the unauthorized charges. The above-referenced assertions, representations and statements of fact were untrue, deceptive and misleading for purposes of Wis. Stat. §100.18(1).

64. The Plaintiffs and other Class members sustained pecuniary losses because of the Defendants' untrue, deceptive and misleading statements, including without limitation, the amounts they paid for unauthorized services.

65. Pursuant to Wis. Stat. §100.18(11)(b)2, the Plaintiffs and other members of the Class are entitled to recover their pecuniary losses from the Defendants, together with attorneys' fees, costs and any other recoverable expenses of litigation.

66. The Defendants have engaged in conduct that was malicious and outrageous, and they did so intentionally for the purpose of defrauding and stealing money from the Plaintiffs and other members of the Class. Accordingly, punitive damages are appropriate in this case.

COUNT IV
(Violation of Wisconsin Organized Crime Control Act)

67. The Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

68. Each of the Defendants played an integral role in an unlawful enterprise of illegally charging Plaintiffs and other members of the Class for unauthorized services through a common scheme (described in more detail above) known as "cramming."

69. The Service Provider Defendants purposely and intentionally billed the Plaintiffs and other Class members for telephone, internet and/or web hosting charges that the Service

Provider Defendants knew were not purchased or authorized. By doing so, the Service Provider Defendants made intentional misrepresentations of fact, knowing that these misrepresentations would be included in monthly AT&T bills sent to consumers through the United States mail.

70. The false billing information described in the preceding paragraph was created by the Service Provider Defendants with the full knowledge and intention that it would be sent to AT&T electronically and then ultimately mailed to Plaintiffs and other Class members through the United States mail. The Service Provider Defendants also created and presented the false billing information with the full knowledge that Plaintiffs and other Class members would be expected to make payment for these charges through the United States mail. Accordingly, the United States mail was used for the purpose of facilitating the fraud.

71. The Service Provider Defendants provided the fraudulent information described herein with the intention and for the purpose of stealing and unlawfully depriving the Plaintiffs and other members of the Class of money, the total amount which exceeds $2,500. The Service Provider Defendants stole and unlawfully deprived Plaintiffs and other members of the Class of money in excess of $2,500, pursuant to the fraudulent scheme described above.

72. The Service Provider Defendants engaged in a pattern of racketeering activity for purposes of the Wisconsin Organized Crime Control Act, Wis. Stat. §946.80, *et seq.* (hereinafter "WOCCA"). On at least three occasions, each of the Service Provider Defendants engaged in federal mail fraud and/or stole more than $2,500 from others while acting in concert with the same or similar accomplices, including AT&T and/or ILD. In each case, the purpose of the mail fraud or theft was to unlawfully take and deprive the Plaintiffs and other Class members of their money by charging them, in a deceptive and unlawful manner, for unauthorized services.

73. AT&T received and collected on behalf of the Service Provider Defendants substantial proceeds derived from the unlawful pattern of racketeering activity described above, while knowing that those proceeds were derived from such racketeering activity. Moreover, AT&T has used and invested such proceeds. Such proceeds and the returns on investments of such proceeds have been used by AT&T either to purchase interests in real property, or to establish and operate the business enterprises of AT&T. These enterprises include both the lawful and unlawful business activities of AT&T.

74. ILD received and collected on behalf of Local Biz USA substantial proceeds derived from the unlawful pattern of racketeering activity described above, while knowing that those proceeds were derived from such racketeering activity. Moreover, ILD has used and invested such proceeds. Such proceeds and the returns on investments of such proceeds have been used by ILD either to purchase interests in real property, or to establish and operate the business enterprises of ILD. These enterprises include both the lawful and unlawful business activities of ILD.

75. All of the Defendants in this action have associated with one or more of the other Defendants and participated in a common enterprise with regard to the deceptive and unlawful billing of unauthorized charges to customers of AT&T. The enterprise in which each of the Defendants participated was established and maintained by the Defendants for an unlawful purpose - - namely, for the purpose of engaging in illegal cramming, wire fraud and theft. Each of the Defendants played a critical role in the unlawful enterprise by engaging in a pattern of racketeering activity, in violation of WOCCA.

76. More specifically, Local Biz USA participated in an unlawful cramming enterprise by, on at least three occasions, engaging in the federal mail fraud described above and

by stealing more than $2,500 while acting in concert with the same or similar accomplices, including AT&T and ILD. In each case, the purpose of the mail fraud or theft was to unlawfully take and deprive the Plaintiffs and other Class members of their money by charging them in a deceptive and unlawful manner for unauthorized charges.

77. More specifically, U.S. Connect participated in an unlawful cramming enterprise by, on at least three occasions, engaging in the federal mail fraud described above and by stealing more than $2,500 while acting in concert with the same or similar accomplices including, without limitation, AT&T. In each case, the purpose of the mail fraud or theft was to unlawfully take and deprive Plaintiffs and other Class members of their money by charging them in a deceptive and unlawful manner for unauthorized charges.

78. More specifically, AmericaTel participated in an unlawful cramming enterprise by, on at least three occasions, engaging in the federal mail fraud described above and by stealing more than $2,500 while acting in concert with the same or similar accomplices including, without limitation, AT&T. In each case, the purpose of the mail fraud or theft was to unlawfully take and deprive the Plaintiffs and other Class members of their money by charging them in a deceptive and unlawful manner for unauthorized charges.

79. More specifically, ILD participated in an unlawful cramming enterprise by engaging in a pattern of racketeering activity for purposes of WOCCA. This pattern of racketeering activity consisted of receiving from U.S. Connect and forwarding to AT&T fraudulent billing information with the knowledge and intent that the fraudulent billing information would be sent to the Plaintiffs and other Class members by the United States mail, and that those consumers would make payment based on these fraudulent charges through the United States mail.

80. More specifically, AT&T participated in an unlawful cramming enterprise described above by engaging in a pattern of racketeering activity for purposes of WOCCA. This pattern of racketeering activity consisted of receiving from ILD and Service Provider Defendants fraudulent billing information, with the knowledge and intent that the fraudulent billing information would be sent to the Plaintiffs and other Class members through the United States mail, and that those consumers would make payment based on these fraudulent charges through the United States mail.

81. Moreover, AT&T participated in an unlawful cramming enterprise by, on at least three occasions, engaging in the federal mail fraud described above and by stealing more than $2,500 while acting in concert with the same or similar accomplices, including ILD and Service Provider Defendants. In each case, the purpose of the mail fraud or theft was to unlawfully take and deprive the Plaintiffs and other Class members of their money by charging them in a deceptive and unlawful manner for unauthorized charges.

82. The Plaintiffs and other members of the Class have been injured and sustained financial harm by reason of the unlawful racketeering activities and the violations of WOCCA described above. The Plaintiffs and other members of the Class are, therefore, entitled to twice the amount of the actual damages that they have sustained, attorneys' fees, costs and expenses of litigation recoverable under WOCCA.

83. The Defendants have engaged in conduct that was malicious and outrageous, and they did so intentionally for the purpose of defrauding and stealing money from the Plaintiffs and other members of the Class. Accordingly, punitive damages are appropriate in this case.

COUNT V
(Unjust Enrichment)

84. The Plaintiffs incorporate the allegations of each of the foregoing paragraphs as though fully set forth herein.

85. The Plaintiffs and members of the Class, by inadvertently paying false and deceptive charges for unauthorized services, conferred a substantial and unwarranted benefit upon each Defendant.

86. By continuing to accept these monies, which were obtained through deceptive and unlawful billing practices, each of the Defendants has had knowledge of, appreciated and wrongfully retained the benefits conferred upon them by the Plaintiffs and other members of the Class.

87. The circumstances surrounding the acceptance and retention of these benefits are inequitable because Defendants knowingly charged and collected fees for unauthorized services.

88. The Defendants' acceptance and retention of these benefits would be inequitable under all of the circumstances.

89. The Defendants have engaged in conduct that was malicious and outrageous, and they did so intentionally for the purpose of defrauding and stealing money from the Plaintiffs and other members of the Class. Accordingly, punitive damages are appropriate in this case.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, on their own behalf and on behalf of affected consumers and members of the general public, pray for judgment against the Defendants as follows:

A. For an order certifying that this action may be maintained as a class action, appointing the Plaintiffs and their counsel to represent the Class, and directing that reasonable notice of this action be given by the Defendants to Class members;

B. For a permanent injunction enjoining the Defendants, their officers, directors, employees, agents, partners or representatives, successors and any and all persons acting in concert, from directly or indirectly engaging in the wrongful acts and practices described above;

C. For an order directing disgorgement or restitution of all improperly collected charges and interest thereon;

D. For general damages to be proven at the time of trial;

E. For statutory damages;

F. For punitive damages;

G. For an award of allowable attorneys' fees, costs and other expenses of litigation incurred in this action, including but not limited to, all attorneys' fees, costs and expenses of litigation recoverable pursuant to Wis. Stat. §§100.107, 100.20(5), 100.18(11) and 946.87;

H. For pre-and post-judgment interest, as provided by law, in an appropriate amount and according to the proof at trial; and

I. For such other and further relief as the Court may deem necessary, proper and just under all of the circumstances.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all causes of action so triable.

Dated this 25th day of August, 2006

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ANTI-CRAMMING BEST PRACTICES GUIDELINES

Consumer Summary

Introduction

On April 22, 1998, William Kennard, Chairman of the Federal Communications Commission (FCC), invited a group of the largest local exchange carrier (LEC) providers of billing and collection services, along with representatives of USTA, ALTS, and CompTel, to participate in a workshop to develop a set of guidelines that represent best practices to combat the problem known as "cramming". Cramming refers to the submission or inclusion of unauthorized, misleading, or deceptive charges on consumers' local telephone bills. The billing relationship between the Service Providers and the LECs stems from the fact that many LECs bill their local telephone customers for some services provided by others such as long distance carriers and information service providers, pursuant to contracts and/or tariffs.

The cramming problem has increasingly been receiving a great deal of attention from federal and state legislators, regulatory agencies, and law enforcement agencies. In his April 22 letter to prospective workshop participants, Chairman Kennard expressed his strong concern over the rate at which consumers are experiencing cramming. In addition to the consumer harm caused by cramming, Chairman Kennard recognized the harm that cramming causes the LECs, both in the costs incurred by the LECs and the damage caused to the LECs reputations with consumers. Chairman Kennard expressed the willingness of the FCC staff to assist the workshop in its efforts, and to provide a neutral forum for the workshop's activities. In his opening remarks at the initial workshop meeting on May 20, 1998, Chairman Kennard described cramming as a serious problem that is likely to become even more serious in the near future. He urged the workshop participants to come up with a way to handle this growing problem. FCC Commissioner Susan Ness also spoke to the workshop participants about the cramming problem.

At the May 20 meeting, the workshop participants were also addressed by Congressman Bart Gordon of Tennessee, who echoed the concerns of Chairman Kennard about the serious consumer problem represented by cramming. Congressman Gordon characterized cramming as the fastest growing consumer fraud, and one that affects the most vulnerable consumers.

The workshop participants uniformly concur with the views of Chairman Kennard and Congressman Gordon concerning cramming. The workshop participants are committed to seeking ways to eliminate cramming and prevent the substantial harm that cramming is causing to consumers. In addition, as pointed out by Chairman Kennard, the workshop participants recognize that cramming results in substantial harm to the LEC providers of billing services. Cramming causes the LECs to incur significant cost and effort to investigate and resolve the numerous individual consumer complaints. In addition, because many consumers view the LECs (rather than the Service Providers) as imposing these improper charges, cramming damages the LEC's reputation and hurts consumer confidence in the LEC.

Various individual LECs have already developed and implemented a number of measures designed to remedy the cramming problem. Despite these efforts, however, the cramming problem has continued to grow. As recognized by the FCC in deciding to convene this workshop, a more elaborate, comprehensive effort that makes use of the collective experience and ideas of the participants is necessary in order to have a meaningful impact on cramming.

The guidelines set out below represent the culmination of the workshop's efforts to identify best practices designed to prevent, deter, and eliminate cramming. Although the guidelines were jointly developed by the workshop participants, the decision of whether, and to what extent, to implement any or all of these guidelines is an individual company decision to be made by each LEC unilaterally.

EXHIBIT
tabbies
A

The cramming problem that led to the convening of this workshop stems from the submission of charges by third parties to LECs for inclusion on consumers' local telephone bills, and does not involve billing for services provided by the LECs. Thus, the guidelines are intended to deal solely with cramming by third parties. While the scope of these guidelines is third party billing on the LEC bill, the LECs affirm their responsibility to ensure that consumers are afforded basic billing rights for all billing on the local telephone bill, including the LEC's own. These consumer rights include:

(1) a clear, concise description of services being billed,

(2) full disclosure of all terms and conditions,

(3) billing for authorized services only, and

(4) prompt and courteous treatment of all disputed charges.

In addition, effective regulatory mechanisms are in place today to deal with any problems caused by the billing of products or services provided by the LECs.

There is no single cure for the cramming problem. These guidelines offer various methods for combating cramming. It is not expected that any LEC would need to implement all these best practices, or any particular best practice. Rather, it is expected that the maximum consumer benefit will result from each LEC choosing from among these best practices those that best suit its individual circumstances. Further, it is not intended that the identification of the best practices set out below would preclude the implementation of other practices reasonably calculated to address cramming problems.

If a LEC chooses to implement a particular best practice, it is expected that such practice will be implemented in an objective, fair, and equitable manner.

Definitions of Commonly Used Terms

For purposes of these guidelines, the following definitions shall apply:

Billing and Collection Customer (B&C Customer): Any entity who submits billing information under contract to the LEC to be included on the End-user Customer's billing statement.

Clearinghouse: Billing and collection customers that aggregate billing for their Service Provider customers and submit that billing to the LEC.

Cramming: The submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on End-user Customers' local telephone bills.

End-user Customer: The party (i.e., the consumer) identified in the account records of a local exchange carrier issuing a telephone bill (or on whose behalf a telephone bill is issued), any other person identified in such records as authorized to change the services subscribed to or to charge services to the account, and any person contractually or otherwise lawfully authorized to represent such party.

End-user Customer Complaint: An oral or written communication between an End-user Customer and an authorized representative of a LEC where the customer identifies an unauthorized, deceptive or misleading charge, or charges.

Local Exchange Carrier (LEC): The local telephone company (this would include CLECs) that renders the bill to the End-user Customer.

Service Provider: The party that offers the product or service to the End-user Customer and directly or indirectly sends the billable charges/credits to the LEC, for billing to the End-user Customer.

SubCIC Entity (SubCIC): A Service Provider that is a customer of a Clearinghouse and has no direct (or contractual) relationship with the LEC.

Best Practices Guidelines

The following best practices guidelines present options that can be considered for Billing and Collections processes, procedures and contracts.

I. Contract Provisions

A. Screening - Products and Service Providers

1. Products to be Billed - An appropriate practice for charges that are placed on the local telephone bill would be to include those approved charges that are related to telecommunications and information services and other services approved by the LEC.

2. Each LEC should consider establishing criteria to help Service Providers identify problematic programs. Some programs that have a history of problems include the following:

   - Programs advertised via "box" or sweepstakes/contest entry forms

   - Programs initiated via "assumptive sale" or "negative option" plans

3. Product Screening - For the purposes of identifying programs that may be deceptive or misleading or otherwise not in compliance with applicable LEC policies, the LEC should consider requiring a comprehensive product screening and text phrase review/approval process. Material submitted to a LEC should be reviewed by the LEC in a timely manner. The LEC should require the Service Provider to furnish various data, including but not limited to the following:

   - Suggested text phrase language for bill presentation

   - The name, date and issue number for any publication(s) in which the product or service will be advertised

   - Advertisement placement plans

   - Copy of actual advertisement (print advertisement, tape of radio or television advertisement, etc.)

   - Internet web page address where product or service will be advertised or where the End-user Customer may subscribe to the product or service

   - Detailed description of how the product is ordered, including any telemarketing scripts (if telemarketing is used)

   - Detailed description of how the product can be canceled

   - Detailed description of how the End-user Customer can generate questions, request adjustments, etc., including a description of how such requests will be accommodated

- Copy of actual post sale fulfillment documentation

As part of the screening process, the LEC should consider determining that all promotional and marketing materials:

- clearly and accurately describe the services being purchased

- clearly and conspicuously disclose all material terms and conditions of the offer, including without limitation,

    - the amount of the charge which will be billed to the End-user Customer's telephone bill

    - if the charge is a recurring charge, the frequency of billing and any minimum time interval for which the End-user Customer will be billed

- clearly and conspicuously disclose that the charges will appear on the End-user Customer's telephone bill

- do not contain any information which is false, misleading or deceptive

4. The LEC should consider developing a process to ensure that only pre-approved text phrases are applied to the End-user Customer's telephone bill. For example, the LEC could develop a process whereby text codes and a text code table/mechanized process are used to control the application of charges on the End-user Customer's telephone bill.

5. Service Provider - The LEC should consider developing an approval process for the addition of subCICs. The types of data to be supplied by the Clearinghouse may include, but are not limited to, the following:

- SubCIC Company Name

- SubCIC Company Address

- SubCIC Company Officer Names

- State of Incorporation

- Public Utility/Service Commission certification, as required

- State registration for each state for which billing will be submitted

- Information regarding whether the company, its affiliates and its principals or any company that its principals have been associated with have been subject to prior conviction for billing related or other consumer fraud, had access to billing services terminated or been denied access to billing services

- Type of data to be billed

- Estimated number of customers to be billed

- Inquiry company name and address

- Inquiry procedures

- Names of other companies with whom they have a billing contract

- Number of complaints and adjustments associated with other billing companies

B. Sample General Contract Provisions

The LEC should consider implementing the following general contract provisions:

1. The LEC has and maintains discretion for charges that appear on its local telephone bill.

2. The B&C agreement is between the LEC and the B&C Customer. In those instances where the B&C Customer is a Clearinghouse, the Clearinghouse is directly responsible for the actions of its customers (i.e., the subCICs).

3. The B&C customer, by signing the B&C contract, agrees to abide by the terms and conditions of the contract and the LEC's billing policies. If the B&C Customer is a Clearinghouse, it shall hold its customers equally responsible for upholding the terms and conditions of the contract.

4. The LEC reserves the right to modify its billing policies based upon regulatory agency rules, End-user Customer complaint levels, as well as any negative impact to the LEC's image or reputation.

5. Should the LEC billing policies change, a minimum of 30 days written notice shall be proVided to each B&C Customer.

6. The LEC reserves the right to review and re-evaluate any previously approved product or service.

7. The Service Provider shall submit to the LEC billing records only for those products or services that have been approved by the LEC. If a request to bill for a product or service is rejected, the Service Provider may not send charges for said product or service to the LEC for billing (i.e., the rejected product or service must not be misrepresented as a different product or service).

8. The LEC reserves the right to terminate the B&C contract, either in its entirety or for an individual Service Provider's subCICs, if the Service Provider and/or the subCIC is found to be in breach of the contract.

9. The LEC reserves the right and authority to immediately suspend billing for Service Providers or programs whose billing generates customer complaints that indicate a pattern consistent with cramming.

C. Service Level Thresholds

1. The LEC should consider establishing a complaint threshold to be applied at the Service Provider or subCIC level.

2. The LEC should consider establishing an adjustment threshold to be applied at the Service Provider or subCIC level.

3. "Inquiry Service" is an optional B&C service offered by the LECs for a fee that enables the LEC customer service representatives to discuss and resolve questions from End-user Customers about the B&C customer's service. Most B&C customers do not purchase the LEC Inquiry Service, choosing instead to offer customer

service directly to their subscribers. For those B&C contracts that are without Inquiry Service, the LEC should consider establishing an End-user query threshold (based on an acceptable number of calls from End-user Customers into the LEC's customer contact centers regarding questions or issues on the specific Service Provider's charges).

4. In implementing the above mentioned thresholds, the LEC should consider including requirements for written notification to the billing and collection customer if a threshold is exceeded, a cure period (that could include suspension) for a specific period of time to allow the situation to be remedied, assessment of administrative charges and a contract termination provision.

   a. The notification letter should document the acceptable threshold and that the specific threshold has been exceeded, and that appropriate administrative charges are applicable and will be assessed.

   b. The notification letter should advise the billing and collOctions customer of the cure period length, start and end dates, and that the number of complaints, adjustments, or queries must be below the applicable threshold by the end date of the cure period.

   c. The notification letter should advise the B&C Customer that if the above mentioned results are not obtained by the end of the cure period, the contract, either in its entirety or for specific subCICs, will be terminated.

5. Administrative Charges

   The LEC should consider imposing appropriate compensatory administrative charges when the above described service level threshold(s) (for complaints, adjustments or queries) are exceeded. There are a number of appropriate methods for calculating the dollar amount of any such charges. One possible methodology is as follows:

   - The complaint, adjustment, or query threshold administrative charge could be calculated by the LEC on a P X Q (i.e., price multiplied by quantity) basis and could be assessed for each complaint, adjustment or query that exceeds the threshold.

   In addition, the LEC should consider assessing an administrative charge when a charge for a product or a service not approved by the LEC is placed on the End-user Customer's bill.

   In an effort to assist the Clearinghouses in their efforts to identify problematic subCICs, consideration should be given to computing and reporting these charges at the subCIC level.

6. . Settlement Process Modification

   The LEC should consider settlement process modifications, that could include the following:

   1. Higher billing charges when thresholds are exceeded (e.g., a sliding scale based on threshold level).

   2. A Purchase of Accounts Receivable (PAR) reserve account for post billing adjustments, based upon a percentage of billed revenue for each Service Provider who exceeds a predetermined level of adjustments.

   3. A longer settlement cycle for Service Providers who submit primarily pay per call traffic or miscellaneous (i.e., EMI 42) charges.

4. A process to recourse adjustments for any non-deniable charges that are unpaid after being on the End-user Customer's telephone bill for a period of 90 days.

7. Clear Criteria for Clearinghouse Function

As mentioned above, Clearinghouses are billing and collection customers that aggregate billing for their subCIC customers and submit that billing to the LEC, on behalf of the subCIC(s). Experience has shown that many of the cramming problems have occurred on charges originating at the subCIC level. Therefore, to have a meaningful effect on cramming, the LEC should consider establishing criteria for Clearinghouse responsibilities, as follows:

1. The Clearinghouse should be responsible for activities performed by their subCIC customers.

2. The Clearinghouse should ensure that the only charges that are submitted for each subCIC are those that have been approved for billing through the LEC's program approval process.

3. The Clearinghouse should provide adjustment reports for each of their subCICs to the LEC. The data to be provided on these reports should be, at a minimum, subCIC name and identification number, number of adjustments, adjusted revenue, number of accounts billed and revenue billed.

4. The Clearinghouse contract with their subCICs should ensure that the LEC has the right to audit the Service Provider and/or the subCIC data used to provide the above referenced reports. A copy of this contract provision should be provided to the LEC.

8. Confidentiality

The LEC should consider establishing procedures to preserve the confidentiality of proprietary information furnished to the LEC as part of the screening process. Such procedures should include limiting the use and disclosure of such information to the performance by the LEC of the product screening function and the provision of billing and collection services. In addition, the LECs should consider a contract provision to maintain the confidentiality of such proprietary information furnished to the LEC, to the extent consistent with legal or regulatory requirements. Information or data which is in the public domain or becomes available to the LEC from a source other than the service provider should not be considered proprietary or confidential.

9. Disclosure of End-user Customer Complaints and Aggregate Adjustment Data

The LEC should consider a contract provision that expressly permits the LEC to disclose the categories of data described in detail in item III below.

10. Other Contract Provisions

1. The LEC should consider a contract provision that requires each billing and collection customer to provide the LEC with requested information about their (or any Service Provider that is billing through that B&C customer) operating history related to cramming in other geographic areas.

2. The LEC should consider a contract provision that allows the LEC to reserve the right to impose additional controls, as deemed necessary, in order to address new forms of cramming.

3. The LEC should consider a contract provision to indicate that the LEC has sole discretion to determine

if due to cramming practices its reputation has been harmed. If the LEC determines its reputation has been harmed or may be harmed, the B&C contract may be terminated.

4. The LEC should consider a contract provision to allow the B&C contract to be terminated if it is determined that the Service Provider sold a product or service to the end-user while misrepresenting themselves as the LEC or an agent of the LEC.

II. Process for Authorization/Verification of End User Approval

It is recognized that both the LEC and the Service Provider have a direct relationship with the consumer, and therefore have a responsibility to ensure that no unauthorized non-message telephone service charges are assessed via the LEC bill. However, it is the Service Provider's responsibility to inform End-user Customers of rates, terms, and conditions of its services and to obtain and retain the necessary End-user Customer authorization and verification as set out below.

To ensure that End-user Customers are appropriately informed of Service Provider rates, terms and conditions, the LEC should consider obtaining assurance from the Service Provider that the following processes and conditions are met by the Service Provider for authorization and verification of a Service Provider non-message telephone service charge.

A. A Service Provider should submit for billing on the End-user Customer's telephone bill only charges for products or services that are authorized by the End-user Customer and charges that are required by regulatory or governmental authority (such as the subscriber line charge and taxes).

B. A Service Provider that is the End-user Customer's preselected provider of toll or local telephone service may submit other charges for customer-used or requested telecommunications-related products or services without additional documented authorization.

C. Where the End-user Customer's authorization is to be obtained, it should be documented through one of the following formats:

   1. A voice recording of the entire and actual conversation with the End-user Customer.

   2. A written and signed document.

   3. Independent third party verification.

D. The documented authorization should contain, at a minimum, the information set out below. Information contained in any communications with consumers should be provided in a clear and conspicuous manner.

   - Date

   - Name and telephone number of the End-user Customer

   - Question and answer to ensure that the End-user Customer is qualified to make the requested changes and to authorize billing

   - Question and answer regarding the End-user Customer's age, to ensure that authorization is provided by an of-age End-user Customer

- Explanation of the product/service being offered

- Explanation of all applicable charges

- Explicit End-user Customer acknowledgment that said charges will be assessed via the telephone bill

- Explanation of how a service or product can be canceled

- Description of how the charge will appear on the telephone bill

- Information related to whom to call (and the appropriate toll-free telephone number) for inquiries

E. The documented authorization should be retained for a period of not less than 2 years.

F. Upon request, the documented authorization should be made available by the Service Provider to the LEC, regulatory or government agency, or End-user Customer in a timely manner.

G. Failure to comply with the above provisions should be considered a breach of contract, for which the B&C contract may be terminated.

III. Disclosure of Information

A. Each LEC should consider providing various categories of information upon request to those federal and state public utility commissions and law enforcement agencies that request such information, as well as to other LECs. The LEC should consider providing this data at the subCIC level, if available. Examples of such information could include:

1. A description of the specific practices relating to cramming that the LEC has encountered, and the steps being taken by the LEC to deal with such practices. This is intended to be general information that does not identify the entities that have allegedly engaged in the described practices.

2. The identity of Service Providers either terminated or notified of a need to cure due to cramming related problems.

3. Aggregate escalated complaint data, by billing and collection customer, received by the LEC. Escalated complaints are those complaints issued by the End-user Customer to any regulatory or law enforcement agency (such as the FCC, FTC, a state Attorney General, or a public utility/service commission), or to a LEC executive officer or news organization.

Aside from the beneficial regulatory and law enforcement goals that the disclosure of such information would serve, the LECs have a significant interest in obtaining the information submitted by others that relates to the LECs' current billing and collection customers as well as prospective billing and collection customers. Among other things, such information would permit the LECs to do the following:

1. Develop more efficient, effective and less costly methods for detecting, preventing and eliminating cramming.

2. Reduce the costs to End-user Customers and the LECs associated with cramming.

3. Better evaluate the cramming risks posed by prospective billing and collection customers.

4. It should be emphasized, however, that the decision of what, if any, action to take based on the information obtained from this process is an individual company decision to be made by each LEC unilaterally.

B. The Clearinghouses and Service Providers should consider collecting and disclosing similar data to that described in Section III.A., above.

IV. End-User Customer Dispute Resolution Process

Each LEC should consider establishing an End-user Customer Dispute Resolution Process. For example:

A. With respect to charges for which failure to pay will not result in disconnection of local telephone service (e.g., non-deniable), the LEC should consider responding to End-user Customer complaints of having been crammed with an immediate recourse adjustment (i.e., the End-user Customer will not be requested to contact the Service Provider).

B. Once the charges have been removed from the End-user Customer's telephone bill, they may not be re-billed by the Service Provider via the local telephone bill.

C. If the End-user Customer contacts the Service Provider, rather than calling the LEC, with a complaint of having been crammed, the Service Provider must agree to provide a credit adjustment to the telephone bill. Any further collection attempts on the part of the Service Provider should not involve the telephone bill.

D. Credit adjustments (for any charges that were originally billed via the telephone bill) should be applied to the End-user Customer's phone bill. The adjustment should not be provided via a check paid directly to the End-user Customer, unless otherwise specified by a regulatory or government agency or unless the End-user Customer no longer has a billing account with the LEC.

E. The LEC reserves the right to adjust the End-user Customer's telephone account for any non-deniable charges that remain on the End-user Customer's account and are unpaid for greater than 90 days.

The LEC should also recognize the potential for abuse by End-user Customers in the dispute resolution process and should take this into account in developing appropriate dispute resolution mechanisms.

V. Enforcement of Compliance with Existing Laws by Government Agencies

Upon appropriate request from regulatory, government, and/or legislative bodies, the LEC should provide documentation regarding Service Provider billing and collection contract violations.

VI. Bill Format

An End-user Customer's rights will be upheld and the End-user Customer's telephone service will not be disconnected for failure to pay non-deniable charges. Prior to disconnection of service for other appropriate reasons, an End-user Customer rights/advisory message should be displayed on the bill or other notification upon which the non-deniable charges appear.

The LEC should consider modifications to the Bill Format that include:

A. Each Service Provider and any of their subCICs should be adequately identified on the End-user Customer's telephone bill.

B. The bill pages should adequately display the toll free number that the End-user Customer is to call with any questions, requests for credit, etc.

C. Non-deniable charges should be uniquely identified as such.

VII. Consumer Billing Controls

The workshop participants believe that consumers should have the ability to avoid the inclusion of unauthorized service or product charges on their local telephone bills. The LEC should consider retaining the right, at the request of an End-user Customer, to limit which End-user Customers may receive billing as a result of a B&C contract.

The workshop participants recognize that there are significant implementation issues associated with such controls. Needed mechanization presents significant technical challenges and costs and will require an extended period of time to implement. To avoid abuse by consumers, a method to notify Service Providers would have to be developed for use in conjunction with allowing consumers the ability to "block" billing on the LEC bill. Most importantly, to effectively block at a Service Provider level, there would have to be a universally assigned, nationwide subCIC designated for each Service Provider. This is an industry wide issue.

Despite these challenges, however, consumer-designated billing options can be an extremely powerful method of controlling third party cramming on the LEC bill and should be actively pursued.

Individual LECs may opt, in the short-term, to implement internal processes that would give consumers some limited control over miscellaneous charges and their appearances on a LEC bill.

VIII. End-user Customer Education

The workshop's participants recommend the following as potential End-user Customer education initiatives:

A. Bill Inserts - Develop a bill insert that reinforces knowledge and education on "how to read the LEC bill," defines cramming and advises the End-user Customer on what can be done to avoid being crammed, who to call if they do get crammed, what to expect, etc.

B. Page Left Intentionally Blank - Utilize the "this page left intentionally blank" pages of the End-user Customer's bill, in the same manner as described for bill inserts in section VIII.A, above.

C. Web Page - Modify the LEC's WWW page to include an End-user Customer advisory message regarding cramming, as described above.

D. Telephone Directories - Develop text for printing in the "useful information" portion of the LEC's telephone directories, to contain the same type of information described above.

Before the
FEDERAL TRADE COMMISSION
Washington, D. C. 20580

In the Matter of

Pay-Per-Call Rule Review-- Comment

FTC File No. R611016

COMMENTS OF SBC COMMUNICATIONS INC.

SBC COMMUNICATIONS INC.
ROBERT M. LYNCH
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Dallas, Texas 75202

March 10, 1999

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I. Introduction

SBC Communications Inc. ("SBC") on behalf of itself and its subsidiaries (1) files these Comments for the purpose of urging the Federal Trade Commission ("FTC") to move cautiously and not expand the current rules in such a manner that would unnecessarily burden the telephone billing process. SBC generally supports the efforts of the Federal Communications Commission ("FCC"), the various state Public Utility Commissions ("PUCs") and the Federal Trade Commission ("FTC") to protect consumers from unauthorized or even fraudulent charges. However, some of the proposed changes go too far and burden the entire industry, not just the wrongdoers that are causing the problems. SBC questions whether the complex and burdensome changes that some of the amendments to the rules would require in local exchange company ("LEC") billing practices will really have any substantial effect on cramming. SBC was an active participant in the industry group that formulated the "LEC anti-cramming Best Practices Guidelines" and believes that such industry forums produce the most practical solutions to the problems plaguing the industry today. SBC is also providing separate notice of its

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willingness to participate in any public workshop conducted by the FTC on the proposed Pay-Per-Call Rule.

II. Response to General Questions

(a) What is the effect (including any benefits and costs), if any, on consumers?

Response: To the extent that the amendments to the rules require changes in the manner in which telephone bills are issued today, then the ultimate effect on consumers will be an increase in the price of telephone billed purchases. Local exchange telephone company billing systems are highly automated, designed to bill multiple small charges on a monthly basis at minimal cost. Making changes to those mechanized systems is very costly.

For example, elimination of the "Annual Notification" alternative will increase costs for every telephone company that is required to include the notification on each bill. Compliance with this rule change will require changes in the billing systems of the SBC companies and, presumably, all other billing entities that had relied on the annual notification alternative. In addition to the annual notification, SBC companies print the notification in the general information pages of its White Pages directories. Customers are done a disservice when regulators attempt to require the inclusion of too much information in telephone bills, thereby defeating LEC efforts to respond to customer demand for a shorter, simpler bill. Consideration should be given to using such other channels of communication in order to avoid the necessity of making costly changes to a LEC billing system. A careful cost/benefit analysis should be made before any change is required in the LEC billing process and it would be more appropriate for the FCC to make such analysis than the FTC.

Ultimately, SBC companies will be required to recover that additional cost from the vendors who purchase billing services from SBC and those vendors will, in turn, increase their prices to their customers. While the cost of this one change may not be prohibitive, the cumulative effect of this and other expanded billing requirements is more bill pages, with commensurate increases in paper for printing the bills and postage for mailing the bills. Customers are already complaining that there are too many bill pages and that bills are too confusing. Changes to a LEC billing system, particularly changes that lengthen the bill, usually require considerable advance notice and are very costly. It is SBC's position that the result of a careful cost/benefit analysis would be the conclusion that the benefits from the elimination of the "Annual Notification" option do not outweigh the cost of implementing that change.

(b) What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

Response: Any changes to the rules that require a change in the billing systems of LECs is particularly burdensome at this time, when the LEC billing systems are undergoing changes to accommodate local competition and to solve the Y2K problem. The billing system is a computerized process and there are limited resources available for implementing changes in that process.

(c) What is the impact (including any benefits and costs), if any on industry?

> ***Response*:** There is both benefit and cost to the industry. Certainly, the elimination of fraudulent billing practices that give the whole industry a bad reputation is beneficial to those ethical companies who are providing a much needed service. However, if the cost of that benefit causes the billing service to become too expensive to use, then the benefit may not be worth the cost.

(d) What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?

> ***Response*:** SBC will recommend specific changes in the Response to Questions on Proposed Specific Changes below.

(e) How would those changes affect the benefits that might be provided by the proposed Rule to consumers or industry?

> ***Response*:** It is the position of SBC that the changes it recommends will not adversely impact the benefits that might be provided to consumers or industry and, in some cases, will enhance those benefits.

III. Response to Questions on Proposed Specific Changes

Question 1: ***Unauthorized charges.*** **Viewed together, do the new billing error and express authorization sections (proposed 308.2(b) and 308.17) of the proposed Rule adequately address the problem of consumers being charged for unauthorized telephone-billed purchases? Is the "knew or should have known" standard for vendors, service bureaus, and billing entities sufficient to address the deceptive practices that the Rule intends to prevent?**

> ***Response*:** For the most part, the new billing error and express authorization sections will adequately address the problem. However, in some instances the amendments go too far. Rule 308.17 requires the "express authorization of the person to be billed for the purchase." Telephone billing is often in the name of an individual, but is used by multiple responsible adults in the family. To restrict the ability to make any telephone billed purchase to the person whose name appears on the bill is unnecessarily restrictive, inconvenient for consumers and burdensome for vendors. Rule 308.17 should be amended to require only "the express authorization of the customer."
>
> The "knew or should have known" standard is inappropriate for application to billing entities. Such standard, while somewhat vague, may be appropriate for application to vendors because they have contact with the customer. Thus, there is a basis for assuming that they either know or should have known. To impose that standard on others, such as the LEC that only provides a billing service will impose a burden that far outweighs the benefit to be obtained from this particular rule change. In addition, it would impose liability on a party that cannot control the circumstances that drive that liability. To date, it does not appear that the problems are being caused by billing entities; the remedy, therefore, should be directed at the entities that are causing the problems, not the billing entities.

The LEC subsidiaries of SBC would come within the scope of the broad proposed definition of "billing entities." Those subsidiaries bill for individual carriers and for billing aggregators who resell the billing service to numerous smaller carriers. There is no way for the SBC LECs to know whether the end user customer authorized charges or not, short of verifying every charge over the telephone with each end user customer. Such extraordinary activity would dramatically increase the cost of the billing service, for each and every billing service customer, not just those who engage in the practice of cramming. In addition, this type of activity could be viewed as anticompetitive and would be very confusing to the customer. Thus, it is SBC's position that no billing entity should incur liability for unauthorized charges submitted for billing by a vendor in the absence of some strong evidence of complicity in the fraudulent scheme.

SBC's current policy is that it will not bill for non-telecommunications related items and that policy is reflected in the terms and conditions of its billing and collection contracts. However, the SBC companies cannot enforce that policy prospectively because of the automated nature of the billing process; it can only discontinue billing pursuant to the terms of its billing contracts, if it becomes apparent that charges for non-telecommunications related items are being billed. Otherwise, the SBC companies would have to examine every item sent through for billing to make sure that it was in fact a telecommunications-related charge. An additional layer of verification would cause unnecessary delay and inconvenience to customers. Even if customers would accept some system of individual verification, the cost of such examination alone would cause the fees for the billing service to be prohibitive. Such remedies, while they might cure the problem, are worse than the problem itself because it causes LEC billing services to become so expensive that those billing services are not an option for other carriers, even those carriers that only provide local or interexchange telecommunications services.

SBC has recently implemented new remedies based upon its billing contract provisions that prohibit submission of unauthorized charges. In those instances where the SBC companies have received an inordinate number of complaints, the carrier is placed on ninety days probation. If the carrier does not reduce the number of complaints received to an acceptable level within that ninety-day period, the billing service is subject to suspension altogether. A billing entity that has in place such a fraud-prevention program should not be liable for any fraud perpetrated by a carrier for whom it bills, unless there is very clear evidence that the billing entity is a party to the fraudulent scheme.

Question 2: ***PIN Number.*** **Does the requirement that a PIN, as defined in proposed 308.2(i), be used in connection with a presubscription agreement adequately address the problem of controlling access to audiotext services provided through toll-free numbers?**

Response: The requirement of a PIN to be used in connection with a presubscription agreement should help to control access to audiotext services provided through toll-free numbers. Some clarification may be needed, however. Would the PIN requirement apply to voicemail services that the customer reaches via toll-free numbers? If so, can the PIN assigned to the customer to allow the customer to access his/her messages also function as the pin for authorizing charges? It would be unreasonably burdensome to require the customer to have to remember two different codes to operate his/her voice-mailbox. Most PIN numbering systems allow the customer to select their own PIN, within certain limitations. Thus, if the PIN requirement is to apply to voicemail, then the actual assignment of PIN should be left to the carrier, so that the carrier could allow the customer to select its own PIN and use the network PIN for both purposes, if desired.

Question 3. *Presubscription agreement.* **Do the proposed changes to the definition of "presubscription agreement" (proposed 308.2(j)), together with the provision relating to prohibitions concerning toll-free numbers (proposed 308.13), adequately address the problem of consumers receiving charges on their telephone bills under presubscription agreements to which they were not a party?**

Response: SBC is assuming that either this requirement does not apply to telephone related services, such as voicemail or internet service, or if the rules do apply, the PIN used to activate the service can also serve as the billing pin. Based upon that assumption, SBC has no further comments on this Question.

Question 4. *Service bureau.* **The proposed definition of "service bureau" (proposed 308.2(n)) is designed to include billing aggregators, and to prevent an entity from escaping liability under the Rule by hiding behind "common carrier" status. Does the revised definition include the appropriate entities? Are there other entities that should be included?**

Response: SBC offers no comment on this issue.

Question 5: *Pay-per-call service.* **Does the proposed definition of "pay-per-call service"(proposed 308.2(g) rely on the appropriate criteria to identify a pay-per-call service? Are the exemptions to the proposed definition of pay-per-call service appropriate? Are there additional exemptions that should be included?**

Response: SBC supports the expansion of the definition of "pay-per-call" to apply to audiotext services that may use a dialing prefix other than, or in addition to, the charge for the transmission of the call. Such expansion would appear to be within the scope of the congressional definition and the FTC's jurisdiction. However, the expansion of the definition of "telephone billed purchase" to apply to any purchase that is charged to a customer's telephone bill goes beyond the scope for the FTC's jurisdiction and is not reasonable. Congress limited the jurisdiction of the FTC by specifically defining the term "telephone billed purchase" to mean "any purchase that is completed solely as a consequence of the completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller." The FTC cannot legally expand its own jurisdiction through a rule change, nor is such a change needed.

Question 6: *De minimis threshold for pay-per-call services.* **Does the proposed $.05 per minute or $.50 per call *de minimis* threshold strike the appropriate balance between services that should be considered pay-per-call and services that should not be considered pay-per-call? Should the proposed threshold be higher or lower? Will some vendors be required to undertake additional record keeping in order to demonstrate their exemption? Is there a more efficient alternative to the *de minimis***

approach?

***Response*:** It seems wrong to establish a safe harbor for fraud, even if it is for insignificant sums of money, but this very common sense exemption may free up scarce enforcement resources to pursue those wrongdoers who are imposing the most damage. It would appear, however, that a rule based upon the total amount paid by the consumer would provide better consumer protection, without imposing any greater burden on the vendors. A limit stated as a flat rate of even $2.00 or $3.00 charged to a single consumer would provide greater consumer protection than the rule as worded. Presumably, a vendor could escape liability for a charge of $900.00 to a single consumer under the proposed rules, if the vendor could prove that on average it came within the safe harbor based on the average amount collected from its customers as a group.

Question 7: ***Rebuttable presumption of payment to a vendor.*** **In the absence of direct evidence of payment, is a rebuttable presumption the best method of determining whether remuneration has been provided to a vendor? If so, has the Commission described the appropriate circumstances under which it should presume that payment has been made to a vendor? If not, what is a more appropriate method of determining whether remuneration has been provided to a vendor? Are there other circumstances under which payment should be presumed?**

***Response*:** No, the imposition of a rebuttable presumption of payment to a vendor places the vendor in the position of having to prove a negative. It is more appropriate to require the customer to prove payment to the vendor, as is the case in just about every other commercial transaction. A customer that has paid a telephone bill has or can get a copy of a returned check, a draft or a cash receipt evidencing such payment. What documentation can a vendor produce that will show non-payment of a bill? There are no circumstances under which payment should be presumed, without some evidence of payment first being presented by the customer.

Question 8: ***Misrepresentation of cost.*** **Does the proposed provision governing misrepresentation of cost (proposed 308.6) adequately address the problem of consumers being misled regarding the cost of services?**

***Response*:** Yes. The language is clear, yet broad enough to cover any misrepresentation of the price to be charged for the service.

Question 9: ***Beepers and pagers.*** **Is there any non-deceptive way in which beepers or pagers are used or could be used to solicit calls to a pay-per-call service? Is the restriction in proposed 308.7 appropriate? Is it possible to make adequate disclosures in beeper or pager solicitations? Would it be appropriate to prohibit these types of solicitations altogether?**

***Response*:** It does not appear to be possible to make adequate disclosures in beeper or pager solicitations at this point in time, unless the beeper or pager can receive voice or text messages. It might be appropriate to prohibit these types of solicitations in any situation where there would be a charge on the initial response call. Alternatively, the FTC could consider the prohibition of such solicitations to all beepers and pagers that are not capable of receiving voice or text messages long enough to accommodate the appropriate disclosures.

Question 10: ***Nominal cost calls.*** **Do the data suggest that $3.00 is an appropriate threshold for designation of "nominal cost calls" (proposed 308.9) for which no preamble is necessary? If not, what "nominal cost" threshold does the data support? Should the "nominal cost" figure be adjusted for inflation?**

Response: SBC has no comment on the appropriate level of nominal cost calls.

Question 11: ***Fractional minute billing.*** **Under what circumstances are telecommunications calls or services currently billed in increments of less than one minute? In what increments are these calls or services billed? What billing increments are technologically feasible? What costs, if any, would be associated with requiring pay-per-call services to bill in increments of less than one minute?**

Response: There should be no requirement for billing in increments of less than one minute. Long distance calls have traditionally been billed by the minute, often with an initial three minute charge and a set fee for each minute thereafter. However, if you went even just a little over the three minute initial period, you were billed for the next minute. It is very costly for companies to change their billing practices and there is no need for companies to do so. There is nothing deceptive about billing by the whole minute. The rules should focus on adequate disclosure to the customer of the charge to be billed and the manner in which the billing will occur. If adequate disclosure is made, the vendor should be free to bill for any desired increment of time because the customer can always decline to purchase the service, if the customer finds the billing practice that has been disclosed by the carrier to be non-satisfactory. There is no need for regulation of billing time increments because if there is sufficient customer demand for fractional minute billing, the market will drive at least one or more carriers to make that change in order to meet the market demand. If there is not sufficient demand to cause even a few carriers to implement that billing change in order to meet customer demand, then the cost of imposing that change on all carriers certainly cannot be justified.

Question 12: ***Toll charges.*** **Does the proposal to prohibit audiotext services from being billed as toll charges (proposed 308.12) adequately address the problem of consumers being charged for audiotext services in a manner that does not provide them with all of the TDDRA-mandated protections? Are there other, less restrictive, means to address the problem?**

Response: SBC has no comment on this issue.

Question 13: ***Express authorization.*** **What costs would be associated with obtaining express authorization from consumers for non-blockable telephone-billed purchases (proposed 308.17)? Are there methods of obtaining express authorization that would impose lower costs than those methods described in the Notice? Is the proposed Rule sufficiently flexible to accommodate technological developments that may make it easier to obtain express authorization?**

Response: While this rule may be very reasonable as applied to the vendor, application of the rule to the billing entity is not reasonable. The billing entity (and presumably the service bureau), has no way of knowing that a charge was not expressly authorized by the person from whom payment is being sought. The only way for the billing entity to come within the standard of "know or should have known" would be for the billing entity to verify each charge with the billed customer. The effect of such a rule will be to raise the billing charges to such an extent that no one will be able to bill non-local or long distance charges on a telephone bill, not to mention the inconvenience to the customer. While SWBT does not contract to bill such charges on its telephone bills, not all companies follow that practice. Imposition of this rule could cause such an increase in the billing rates that telephone bill billing will no longer be an option for pay-per-call vendors.

Question 14: ***Billing statement disclosures.*** **Do the modifications regarding the disclosures on billing statements (proposed 308.18) adequately address the problem of consumers being unable to reach the entity whose telephone number is listed on the phone bill for billing inquiries? Does the provision adequately address the problem that consumers often cannot reach the entity with the authority to provide refunds or credits?**

Response: No, the real problem is not just the identification of the billing carrier, there is also the issue of accessibility. Just requiring that a telephone number be printed on the bill is not sufficient, if the vendors then fail to have someone available to talk to customers. For identification purposes, SBC has proposed the use of a national identifier number for carriers in the Truth-in-Billing proceeding at the FCC and would make the same proposal here. Each vendor should be provided a national identifier number for billing purposes and that number would then be required to be printed on every bill sent to an end user customer. Further, the same basic billing identifier should be issued to an affiliated group of companies, with varied suffixes to denote multiple DBAs. Such a numbering system would allow customers to avoid changing vendors to escape the fraudulent practices of one vendor, only to discover that the "new" vendor is just the old vendor operating under a different trade name.

Question 15: ***Service bureau liability.*** **What effect will the additional direct liability of service bureaus pursuant to proposed 308.17 and 308.20 have on industry? Will it increase the level of industry's accountability to consumers? What effect will it have on cramming?**

Response: Liability should only be imposed on those entities that are responsible for the problem and service bureaus do not appear to be responsible for the problem, except where the service bureau has an equity or revenue-sharing interest in the vendor's business. However, in such situations, the service bureau is really functioning partly as a vendor and should have liability as a vendor, not as a service bureau. It is the vendor that deals with the customer and imposes the charges. The best way to stop fraudulent practices is to hold the vendor responsible for all damages and to impose harsh penalties on vendors with significant numbers of repeated offenses.

Question 16: ***Billing entity liability.*** **What effect will the additional liability of billing entities pursuant to proposed 308.17 and 308.20 have on industry? Will it increase the level of industry's accountability to consumers? What effect will it have on**

cramming?

Response: As previously stated, one possible result of the imposition of additional liability on billing entities is that such billing will not be available to the pay-per-call industry. The rates for billing services cannot support the additional cost of such potentially devastating liability. It is not reasonable, nor is it necessary, to impose liability on the billing entity because there has been no convincing evidence that the billing entities are causing the problems.

As previously stated, the rules should target the offending companies, not burden the whole industry because of the unfortunate practices of a few. Rule changes that drive up the cost of billing for everyone in order to attempt to restrain the fraudulent acts of a few will only serve to dampen competition, without serious impact to the subset of the market that is primarily responsible for the cramming problem. The imposition of liability on the billing entity is particularly troubling because of the vague "knew or should have known" standard.

Imposition of that standard will have practically no effect if enforced only when a customer can prove that the billing entity actually knew or really should have known that the customer did not authorize the charge. Alternatively, this proposed rule change could shut down the billing process if a broad interpretation of the standard is applied. No billing entity can verify even a reasonable sample of the charges routinely sent to the billing entity for billing. The only standard that makes sense is one that is based upon a presumption that the carrier "should have known" when certain factual patterns exist, i.e. the carrier has consistently had an extremely high level of complaints and has taken no action to remedy the situation. The more effective approach would be establishment of the principle that billing entities in such situations have a legal right to cease billing for vendors who display a pattern of billing charges without proper authorization, without thereby losing the ability to bill for its own affiliates. In many instances, the LECs have been able to identify the vendors or billing aggregators causing the problems, but are met with allegations of anti-competitive behavior whenever they try to remedy the situation. Carriers should not be held liable for problems caused by others without being accorded a level of control that allows them to avoid billing the problem makers.

Question 17: ***Information necessary to collect debts.*** **Does the proposed Rule adequately address in proposed 308.20(n)(4) the need of vendors and service bureaus to obtain sufficient information from the LECs to continue collection activities against customers who refuse to pay valid charges?**

Response: Rule 308.20(n)(4) would impose an unreasonable notification requirement on a LEC functioning as a billing entity. Under current practices and procedures, there is no way for a LEC functioning as a billing entity to know whether a customer intended to pay any specific charge when a customer makes a partial payment with no explanation. When a customer actually disputes a charge, the LEC functioning as a billing entity routinely provides prompt notice of the non-payment of that disputed charge as a part of the billing process. But where the customer makes a partial payment without explanation, a very common occurrence, the LEC has no way of knowing which charges the customer is intending to pay or the reason for the partial payment. The general industry practice is to credit the partial payment to the oldest balance due, without regard to the nature of the

charges that make up that balance.
To impose rules that require the LECs to change their entire billing system to accommodate Pay-per-Call vendor's need for more specific information than is currently provided by the LEC billing system is arbitrary and unreasonable. The LEC billing system meets the LEC's billing needs as it exists today; it bills numerous small charges at very low cost per charge. Any FTC billing requirement should be imposed only on the vendors. The vendors can then negotiate with the LECs or other billing entities of their choice to determine whether those billing entities can fulfill the vendor's billing requirements, including the vendor's legal obligations as to billing.
There is no need to impose this burden on the LECs, especially when the LECs have no way to fulfill the requirement in a partial payment situation. The vendors should be held responsible for securing all pertinent billing information necessary for their service, whether they secure that information directly from their customers or from other sources.

Question 18: *Reporting times.* If the period of time that LECs or other billing entities have to respond to a billing error notice is shortened from 90 to 60 days, what effect, if any, would this have on billing entities? Would this impose additional costs? Do the changes in the proposed 308.20 of the Rule that shorten the times by which the LEC must provide information to the vendor or service bureau sufficiently expedite the process so that vendors or service bureaus will be able to pursue collection of valid debts in a timely manner? Are these deadlines feasible?

Response: While the time frames may be generally workable and the procedures may be generally acceptable, the provisions relating to when a customer fails to pay are extremely burdensome. It is very common for customers to pay less than the full amount of their telephone bill, with no explanation of the reason for the partial payment. Thus, a customer could pay less than the full amount of each month's telephone bill for a period of several months, without giving any notice that any part of that bill was contested. Any requirement that places the burden upon the telephone billing entity to determine which items a partial payment is to be credited against would be extremely burdensome and costly to the industry. Further the notification requirement is unreasonable. Normally, the billing contract would cover how and when notification to the vendor of the customer's failure to pay is to be made. The imposition of rules governing the interactions between the billing entity and the vendor appears to be overreaching and unnecessary.

Question 19: *Chargebacks.* Are the proposed changes to the dispute resolution section the most cost effective and appropriate ways to deal with industry concerns regarding the chargeback process?

Response: No. Again, it seems unnecessary to try to regulate the interaction between the billing entity and the vendor. The industry has managed to operate with very little regulation of the relationship between the billing entities and the vendors for several years now. The most cost effective and appropriate way to deal with industry concerns about the chargeback process is to let competition among billing entities resolve the issue. The FTC's rules should focus on consumer protection, rather than attempt to interfere with carrier relationships in a competitive environment.

Question 20: ***Reasonable investigation.*** **Does the proposed Rule adequately address in proposed 308.20 the problem of consumers becoming the target for a collection action without ever receiving an explanation or evidence that the alleged debt is in fact valid?**

RESPONSE: The proposed rule is much more extensive than necessary to accomplish that purpose. SBC objects to the application of the rule to billing entities and also objects to the requirement for a written acknowledgement of every customer billing dispute. Implementation of such a requirement would require drastic changes in the way the billing process is handled today and would certainly increase cost.

Requirements as to how a customer billing complaint is to be handled should be imposed on the vendor, not the billing entity. While it may very well be the billing entity that ultimately fulfills the requirement, it should be doing so on behalf of the vendor pursuant to contract, not because the billing entity has any independent legal obligation to the customer.

Any legal obligations arising from a pay-per-call transaction should be the obligation of one of the two parties to the transaction: the customer or the vendor. Either of those parties may then subsequently fulfill those duties itself or contract to have another fulfill it duties arising from the obligation. For example, a customer could direct its bank to pay its telephone bill on a monthly basis, but that contractual arrangement would not impose any duties arising from a pay-per-call transaction on the bank. The bank would merely be fulfilling its contractual obligation to the customer when it pays the bill that includes billing for a pay-per-call service. Likewise, a billing entity is involved in a pay-per-call transaction only because it has entered into a contract with the vendor or billing aggregator to fulfill some or all of the vendor or billing aggregator's duties arising from the transaction. There is no more reason to attempt to impose duties on the billing entity than there would be to impose duties on the bank in the example set forth above. Rule 308.20 should be changed to impose whatever requirements are ultimately deemed necessary after a careful cost/benefit analysis on the vendor, not the billing entity.

The requirement for the method of providing a billing error notice on each bill and the requirement for a written acknowledgement of each notice of a billing error is extremely burdensome. It will dramatically increase the cost of the billing process and unnecessarily aggravate customers. The great majority of billing errors are today handled to satisfactory completion over the telephone, which is the most expeditious way to handle most billing complaints. For example, assume that a customer calls to indicate that a charge on this month's bill was already billed on last month's bill. That fact is verified while the customer is on the line, the charge is credited and the customer hangs up the telephone relieved that he/she has resolved the issue. Then two days later a letter shows up in the mail as to that issue that the customer thinks was all resolved. The customer is not going to be happy to have to read the letter and go back and check the bill to make sure it is the transaction that was already resolved and that the letter can be discarded. Further, the cost of the preparation of a letter and the cost of postage are totally wasted in those circumstances. Customers who choose to make purchases over the telephone, call in their complaints and conduct most of their personal business over the telephone should not be forced to return to a paper process in order to resolve a billing dispute.

Question 21: ***Evidence of debt.*** **What evidence (other than ANI information) is**

currently created or maintained that would show the delivery of telephone-billed purchases? If no such evidence is created or maintained, what would be the costs, if any, associated with creating and maintaining such evidence. What would be the benefits?

Response: For telephone-billed purchases that cannot be delivered over the telephone, there would normally be delivery or shipping records. However, those records may not be retained for any extended period of time and a longer retention period would necessarily increase costs.

Question 22: *TDDRA blocking.* **What records do LECs maintain with respect to 900-number blocking? Do these records indicate the date a consumer-requested block became effective? What measures do LECs take to ensure that blocks are not turned off by someone other than the subscriber? Do LECs make blocking information available to billing entities who are conducting "reasonable investigations" of disputed charges for telephone-billed purchases? Should LECs be required to do so? What would be the costs and benefits associated with such a requirement?**

Response: Currently SBC local exchange companies maintain the 900 number blocking information in the customer's service record. When a customer requests 900 number blocking, a service order is issued to initiate a block at the switch. The customer's record indicates the block and the date the block was initiated.

Customers can change the block in the same manner as the initial authorization of the block, through verbal authorization for the change. As in all customer contacts that result in service changes, customer service representatives ask questions to try to verify that they are speaking to the customer. Alternatively, customers have the option of having a passcode or assigned to their account to prevent unauthorized changes, if they choose to do so.

SBC would oppose the imposition of additional blocking requirements on LECs. Typically blocking mechanisms are extremely costly and require major systems changes. SBC's position is that these issues are better addressed for common carriers through industry forums at the FCC. There is a very real potential for conflicting regulatory requirements if the FTC begins specifying blocking requirements for common carriers.

SBC also wants to register its deep concern about the FTC "regulating LEC billing practices" through rules applying to "pay-per-call" or any other types of services. Billing services have been de-tariffed at the federal level for a number of years now, but the FCC retains oversight jurisdiction of the billing process. Competition has allowed the negotiation of the terms, conditions, and prices without any necessity for the FCC to exercise its oversight jurisdiction. It is the position of SBC that there is no need for any regulatory intervention in the common carrier billing process today. However, if any assessment is to be made regarding the necessity of rules applicable to the common carrier billing process, it should be the FCC making that assessment, not the FTC. In this new competitive era, it seems backward and unnecessary to impose regulatory rules on a service that was deemed competitive some years ago.

Question 23: *Applicability to third-party debt collectors.* **The proposed definition of "billing entity" does not include an exemption for third-party debt collectors attempting to collect debts for telephone-billed purchases. Should there be such an exemption? What, if any, costs or benefits would be associated with such an**

exemption?

Response: It would appear that the practices of third party debt collectors are adequately addressed by the Fair Debt Collection Act. Again, it is the position of SBC that the burden should be placed on the one entity that can avoid the problem of unauthorized charges: the vendor that negotiates the transaction with the customer and submits the charge to the billing entity for billing.

IV. Conclusion

SBC and other responsible companies care too much about their customers and their business reputations to engage in the shoddy practices that are the target of the proposed rule changes. Yet, so long as LECs are required to bill for all carriers in order to be able to bill for their own affiliates, SBC and others could incur liability under the "know or should have known" standard for fraudulent practices that they had no practical power to detect or prevent. Such liability becomes especially burdensome when the real perpetrator of the fraudulent practices has folded up its tent and disappeared into the night, a not infrequent occurrence. SBC strongly supports the imposition of liability on the wrongdoers, but opposes the imposition of broad rules that greatly increase the cost of billing service for everyone and impose liability on the billing entity for fraudulent practices that the billing entity has no practical way to avoid.

Respectfully Submitted,

SBC COMMUNICATIONS INC.

By:____________________________

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March 10, 1999

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1. SBC Communications Inc. is the parent company of various subsidiaries, including telecommunications carriers. These subsidiaries include Southwestern Bell Telephone Company ("SWBT"), Pacific Bell, Nevada Bell, and The Southern New England Telephone Company ("SNET"). The abbreviation "SBC" shall be used herein to include each of these subsidiaries as appropriate in the context.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH #29

MBS CERTIFIED PUBLIC ACCOUNTANTS LLC ET AL.,
Plaintiff,
-vs- Case No. 06CV008092

WISCONSIN BELL INC. ET AL.,
Defendant.

MOTION HEARING

NOVEMBER 12, 2007

Before the **HONORABLE RICHARD J. SANKOVITZ**
CIRCUIT COURT JUDGE PRESIDING

A P P E A R A N C E S

MR. DOUGLAS DEHLER, MR. JAMES SHAH
Attorneys at Law
On Behalf of the Plaintiffs.

MR. PAUL LINN, MR. TED WISNEFSKI
Attorneys at Law
On behalf of the Defendant AT&T.

COPY

MR. CHRISTOPHER MEULER, MR. GREG HARLEY
Attorneys at Law
On behalf of the Defendant ILD.

MR. DAVID MEANY
Attorney at Law
On behalf of the Defendant Local Biz.

MS. CAROL MORGAN
Attorney at Law
On behalf of US Connect XL Inc.

MR. PAUL HEATON, MR. RALPH WEBER
Attorneys at Law
On behalf of the Defendant Americatel.

LINDA KASPRZAK
Official Court Reporter

P R O C E E D I N G S

THE COURT: Let's call MBS-Certified Public Accounts LLC et al. v. AT&T Inc. et al. Appearance for the plaintiff, please.

MR. DEHLER: Good afternoon, Your Honor. Doug Dehler of Shepherd, Finkelman, Miller & Shah, for the plaintiffs. I'm here with partner Jim Shah.

MR. SHAH: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Appearance for AT&T.

MR. LINN: Paul Linn. With me here is Ted Wisnefski my colleague, and Mark Lewis from AT&T.

THE COURT: And in the briefs AT&T is also using the name Wisconsin Bell.

MR. LINN: The parties have agreed AT&T Inc. was a misidentified party, and Wisconsin Bell is the proper party.

THE COURT: Okay.

And an appearance for ILD.

MR. MEULER: Good afternoon, Your Honor. Christopher Meuler from Friebert, Finerty & St. John along with Greg Harley from Burr & Forman.

THE COURT: And appearance for Local Biz.

MR. MEANY: Good afternoon, Your Honor. David Meany from DeWitt, Ross & Stevens for Local Biz

USA.

THE COURT: Thank you.

And for US Connect.

MS. MORGAN: Your Honor, my name is Carol Morgan. I am actually here for US Connect XL, Inc. which is not US Connect LLC which is named as a party in the action.

THE COURT: But you guys filed a brief, right?

MS. MORGAN: I did not.

MR. DEHLER: US Connect LLC is the subject of a motion for default judgement.

THE COURT: Oh, okay. Good to know. Thank you for.

MR. HEATON: Paul Heaton from Gas Weber Mullins. I'm here with Ralph Weber and also my client is here today, Aurora Ares.

THE COURT: What was that name?

MS. ARES: Aurora Ares.

THE COURT: Can you spell that, please.

MS. ARES: Aurora is A-u-r-o-r-a and the last name Ares, A-r-e-s, Your Honor.

THE COURT: Okay. Well, you guys finally get your day in court after, I don't know, was this motion filed about eight months ago. I have to apologize on behalf of my colleagues that it took this much time, of course, part of the fault is your guys because you had your opportunity to be in front of one of my colleagues and decided to take a pass.

I had an opportunity to see you sooner than this, and I have to apologize that I couldn't. In fact, the tables you're sitting at are still skewed, not to throw off your balance or anything like that, but because we had a very long trial in here.

We turned all the tables to face the jury because the 30 or 55 captives we had in here for six weeks all had much more to say to the jury than they had to say to me. I got the box, and I had to add it to my other boxes over there.

And I have to be quite honest with everybody, I started looking for an excuse as to why I could recuse myself off the case. I have a telephone at home. I thought maybe that would give me a reason to recuse myself, but I decided to pass on that.

Paul Linn and I were in Cub Scouts together, but I didn't think that gave me grounds to recuse myself. Brian Smigelski and I were associates in a law firm together, but I didn't think that gave me enough of an excuse, so you're stuck with me.

What I want to do is this. I have a

couple of initial questions, and then I want to give you my thoughts depending on how the questions go on how this motion might be decided, but those are my tentative conclusions.

And after hearing my tentative conclusions, I'll give you an opportunity to comment or tell me anything else I need to know. First question I have for you is this. The impression I get is that there are three specific types of cramming allegations, in other words, three specific types of cramming that occurred in the plaintiffs' bills.

There are instances in which a charge was included for "nationwide discount direct assistance." There are instances in which a charge appeared for "Plan Uniendo America" and instances in which there's charge for "internet services monthly fee" appeared. Are there any other charges that appear in the plaintiffs' bills that are alleged to.

MR. DEHLER: There was also a more general charge for monthly service fee.

THE COURT: Can I see a copy of what that looks like?

MR. DEHLER: I can provide you one in a moment.

THE COURT: I did get 300 some pages from

Wisconsin Bell. I didn't look at all 384 pages because no particular bill was called out for me to look at. Which one of these so-called independent service providers issued something called a monthly service fee?

MR. DEHLER: I believe it was US Connect LLC, which is the company alleged to be in default.

THE COURT: Now, US Connect was the one with the nationwide discount directory assistance; is that right?

MR. DEHLER: Correct. There was a couple different names for that charge, depending on the month is was billed.

THE COURT: Okay. How about the Wisconsin Bell people. Can you point me to one of these pages you had in your filing that has this fee in?

MR. LINN: The specific one you mentioned, Your Honor, we'll look for it while we're sitting here. I don't have it in front of me now.

THE COURT: Okay. I would like to take a look at that if I can, that would be great.

If I were to treat the motion to dismiss as a motion for summary judgment, are there any other billing statements or any other factual statements I would need to consider to decide whether, in fact, the plaintiff was deceived by these by these statements in their bills, Mr. Dehler.

MR. DEHLER: I don't think there would be anything beyond that. I think that the plaintiff, the owner of the business would testify that he saw some other charges on occasion, did object to some of the charges on occasion, didn't notice all of the charges, didn't understand the charges.

THE COURT: Would you say that globally or would you say there's something about these particular ones we've listed that he didn't understand?

MR. DEHLER: I believe he would say that there were some of the particular charges that he objected to that he didn't understand why they were on the bill and that he tried to get an explanation as to why they were on the bill and he couldn't.

THE COURT: When you say he didn't understand them, he did understand that he didn't authorize them, he didn't understand why they were on there without his authorization?

MR. DEHLER: As to some of them. There were certainly some that he didn't even notice. I think we made it clear that there were some he did in fact object to, there were others that he never noticed.

THE COURT: And what that implies to me is that for whatever reason he didn't see the words, and so he couldn't have gone through any equation in his head, any calculus in his head that is about whether he had authorized them or not?

MR. DEHLER: Correct.

THE COURT: Okay. Okay, any luck finding that one charge?

MR. LINN: Your Honor, document number AT&T 79.

THE COURT: Are you looking at the production number at the lower right-hand corner.

MR. LINN: Yes. Would have ILD, US Connect. Document number 81--

THE COURT: Before we get to 81, let's just take a quick look at 79, and see if that serves as a good example. So 79 is the first page of the bill--

MR. LINN: Yes.

THE COURT: --and then on page 80 -- oh, page 83, I'm sorry document number 83 is where the--

MR. LINN: ILD would be.

THE COURT: And I see at the top left-hand part of the page ILD Teleservices, Inc., and then what I see National Online Internet monthly fee.

MR. LINN: Correct.

THE COURT: Is that what you were referring to, Mr. Dehler?

MR. DEHLER: No, I was not.

THE COURT: Well, that's another one for us to throw in there then. That's a fourth category we have now.

MR. LINN: And the document 84 would have US Connect Nationwide Discount Directory assistance, which was one of the categories.

THE COURT: Okay.

MR. LINN: And we're still trying to pull the other two examples out, Your Honor.

THE COURT: Why don't you keep looking through those. Let me tell you what my tentative conclusions are, and then you can tell me what you think. I do want to stress my conclusions are tentative, but I have read your briefs, I think I understand your argument.

I hope I've read them correctly, but they could be like telephone bills, they can get buried in footnotes or in parentheticals or in long-winded sentences and sometimes even a dedicated reader might miss the point.

So feel free to tell me that I've missed something after I tell you what my conclusions are, and please be patient, it may take me a few minutes to run through my analysis.

I think that a proper analysis of this motion proceeds in three parts. First, you have to analyze whether absent the voluntary payment doctrine, the complaint states a claim for relief against each of the defendants.

Second, you have to analyze whether the voluntary payment doctrine applies in this case. And third, you have to analyze whether the plaintiffs have demonstrated any of the exceptions to the voluntary doctrine, if it does -- the voluntary payment doctrine that is, if it does apply.

My tentative conclusion is that but for certain allegations that I'm going to address in a moment, the claim does state a cause of action for damages and injunctive relief, at least for a violation of subsections (2) and (3)(a) of Wisconsin Statute Section 100.207.

The pertinent portion of section 100.207(2) prohibits "making in any manner any statement or representation with regard to the provision of telecommunications service including the rates for telecommunications service which is false or which omits to state material information with respect to the provision of telecommunications services that is necessary to make the statement not false."

Stating on a phone bill that a customer owes money for services the customer did not authorize is false. Taking the allegations of the complaint as true, each of the defendants made false statements "with regard to the provision of telecommunications service."

And that seems to be the only element that must be shown to demonstrate a violation of Wisconsin Statute Section 100.207(2). Subsection (2) does not specify to whom the statement must be made, and because it states no limits, it does not appear limited in any way to telecommunications providers who deal directly with customers, and it may be construed to mean that if such a statement is made to anyone on the planet, it is unlawful.

That is a pretty broad sweep, but courts don't get to limit statutes based on how far courts think the statutes should reach. That's a policy consideration which is left to the Legislature.

Our job is to take the statutes as written and apply them. If the Legislature botched the drafting of the statute, then the Legislature needs to fix it.

Whatever potential ambiguity might

exist in a statute which doesn't identify the victim of the conduct the statute purports to outlaw is clarified in the remedies section of the statute which authorizes -- and this is subsection (6)(e) I'm talking about, it authorizes "any person or class of persons adversely affected by the failure to comply" are authorized to bring a suit.

Consequently, my tentative conclusion is that any statement made to any person that adversely affects any other person about telecommunications service is unlawful.

Therefore, even though ILD-- I'll have to make that change in my notes, I wrote IDL all the way through my notes. Even though ILD may not have made any statements to the plaintiffs directly, the complaint makes allegations which suggests that ILD statements to Wisconsin Bell were false and it adversely affects the plaintiffs, and I must conclude that ILD's conduct is subject to the dictates of subsection (2).

I understand the defendants' contention that the complaint fails to state a claim under subsection (2) because telephone bills are not "advertisements" or "sales representations." The heading of subsection (2) suggests that it relates only to advertising and sales representations.

However, the text of the statute is what counts, and the heading comes into play only if the Legislature's intent is not expressed clearly enough in the text. The text is clear and straightforward and not limited by any language about advertising or sales, and I don't see any need to refer to the title to understand its meaning.

By all outward appearances, it seems that the Legislature intended a statute that reaches very broadly to the extent that the title and not the text reflects the limits of the Legislature's intended reach, then it is incumbent on the the Legislature to make the right fix.

It is also my tentative conclusion that but for certain allegations which I shall address in moment, the complaint states a cause of action for damages and injunctive relief for a violation of subsection (3)(a) of Wisconsin Statute Section 100.207.

The pertinent portion of section 100.207(3)(a) forbids "billing a customer for any telecommunications service that the customer did not affirmatively order unless that service is required to be provided by law, the federal communications commission or the public service commission."

The defendants offer a variety of reasons why this statute does not apply to them, but I am not persuaded with the exception of ILD. I am satisfied that ILD did not bill the plaintiffs. ILD collected, packaged, and communicated billing information to Wisconsin Bell, but that conduct cannot fairly be described as "billing" as in billing the plaintiffs, not any more than the post office or an internet service provider bills a homeowner by virtue of delivering a bill to the homeowner's attention.

ILD might have played some aider or abettor role in this case, but the claim does not assert aider or abettor liability against ILD.

Wisconsin Bell argues that it's in the same boat with ILD. It contents that it cannot be held liable because it did not enroll customers or generate the unauthorized service charges, it just passed them along from other defendants to the customers.

But the bill suggests otherwise. Drawing all inferences in favor of the plaintiffs, as I must in this stage of the proceedings, I do not believe it would be unreasonable for a finder of fact to conclude that Wisconsin Bell was billing customers, because the bills themselves suggest that if they are not paid, even the passed-along charges of the defendants are not paid, Wisconsin Bell might cut off all services.

In the introductory portion of the extensively independent portion of the bill, that last page, the bill delivers a not too subtle threat from Wisconsin Bell to its customers. It reads "in addition, nonpayment of toll charges may result in disconnection of local service and other services may be restricted if not paid."

The bill does appear to define "toll charges" so it might not be fair to a customer whether a failure to pay these "current charges," that appear directly below the threatening language, are the "toll charges" to which the threat refers.

Given that threat, it would not be fair to say that all parts of the bill may be attributed at least in part to Wisconsin Bell, and therefore, Wisconsin Bell can be said to have been billing its customers.

The defendants also contend that section (3)(a) does not apply in this case because the plaintiffs are business customers, but the reference to "customers" in this subsection, is a reference only to consumers -- I should say to consumers who purchase a telephone service for use in their homes.

The defendants reason that the word "customers" cannot be understood without reference to related statutes and regulation and the related statute and regulations apply only to consumers.

However, I see no need to resort to the other statutes and regulations to understand the meaning of section 100.207 (3)(a) because the meaning of the word customer in the statute is plain, and its plain meaning does not distinguish between customers who buy telecommunications service for their homes as opposed to their businesses.

The defendants urge me to consult the regulations issued under the authority granted by the statutes of the Department of Agriculture and Trade and Consumer Protection. Americatel goes so far in its brief as to argue that the court has no choice but to consider those regulations.

Americatel uses the weighty word "must" when it argues in footnote 2 of the reply brief that the court "must look to the definitions contained in administrative code enabling regulations to interpret undefined terms in enabling the statutes."

I think there are three flaws in the

defendants' arguments. First, it is not mandatory for a court to consult related regulations in order to discern the meaning of the statute. A court is permitted to do so if it needs to do so, to ferret out legislative intent, but when the Legislature uses plain language, there may not be a reason to do so.

Furthermore, I think you should look carefully at the language of the cases Americatel cites. I think that language is instructive for all of us.

State v. Brulport, a 1996 decision of Court of Appeals is first of the cases, and it states "we may -- and I emphasize the word 'may' -- look to the Wisconsin Administrative Code for guidance in defining terms used in the statutes where the terms used in the statute and code are sufficiently similar."

The Brulport court quoted the Sullivan Brothers v. State Bank case that Americatel also cites, and then there's Cox v. Wisconsin Department of Health and Social Services, a third case cited by Americatel, that's a 1994 decision of the Court of Appeals.

In footnote 3 of the decision, the court writes "the definition of 'applicant' in the

Administrative Code can be -- and I emphasize the words 'can be' -- adopted as the definition applicable in the statute because it is consistent with how that term is used in the statutes."

I think those cases teach a judge sitting in my position that if I need to, I can go look at those regulations, but I'm not required to. The second flaw in the defendants' argument is the assumption that section 100.207 has no force apart from the regulations. In other words, if the regulations do not apply to business customers, the defendants suggest that statute cannot be so applied.

I have to disagree. The language of subsection 6(e) directs the Department to promulgate rules, but the statute does not state that the rules are the exclusive means of enforcing the statute.

To the contrary, that statute explicitly provides for class action relief for a failure to comply with the statute. And that portion of the statute makes no precondition of a rule violation for liability under the statute.

The third flaw under the argument is that even if I was persuaded that I needed to consult the regulation to better understand the meaning of the term customer, the regulations are of limited help.

Wisconsin Administrative Code ATCP 123.01 does not define the term customer.

Having concluded that the complaint might state a claim for a violation for one or either, let's say one or both of these two subsections of section 100.207, I believe the complaint also establishes a possible defense to the damage claim, because the complaint implies that the plaintiffs voluntarily paid the unlawful charges. I draw that fact from paragraph 18 of the complaint.

If the plaintiffs voluntarily paid the charges, then, under the voluntary payment doctrine, they cannot recover in damages what they had paid.

I understand the plaintiffs' argument. The plaintiffs argue that the doctrine is trumped by the statute, but the statute implies that the Legislature outlawed the practice of cramming without regard to whether a given customer has voluntarily paid the crammer's charge or not.

The plaintiffs state that a common law doctrine like the voluntary payment doctrine must yield when the Legislature outlaws a particular practice, and conduct that violates the statute is not permitted regardless of whether customers voluntarily paid.

Whether or not that argument might make good policy sense, and it might make a good argument to the Legislature, I don't believe the argument finds enough support in the law.

I reach this juncture in my reasoning by following the maxim that a court cannot read a statute to override the common law unless the legislative purpose to do so is clearly expressed in the language of the statute.

A good example of this principle at work is Fuchsgruber v. Custom Accessories, Inc., which is a 2001 decision of the Supreme Court. The court wrote in paragraph 25 of the decision, and I'm going to omit the citations that the court uses.

"It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the Legislature's intent. Statutes in derogation of the common law are strictly construed.

"A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. To accomplish a change in the common law, the language of the statute must be clear, unambiguous and peremptory.

In Fuchsgruber, the court was called on

to decide whether new provisions of our comparative negligence statute applied only to comparative negligence claims or whether they applied also to strict liability claims.

The court looked at the words the Legislature chose and found it clearly expressed legislative purpose to partially eliminate joint and several liability in negligence actions, but the court found no indication of such a purpose with regard to strict product liability claims.

Accordingly, the court held that the new provisions of the comparative negligence statute did not apply to strict product liability claims rising under a strict liability theory.

Likewise, in the case before me, I find a lack of any explicit reference to voluntary payment in section 100.207, and that lack of any explicit reference to the possibility of voluntary payment leads me to conclude that the Legislature did not intend for this statute to override this common law doctrine.

I simply do not find any words suggesting that you can claim damages under the statute even if you voluntarily paid. I think this conclusion is buttressed by the language of paragraph

35 of the Supreme Court decision of Putnam v. Time Warner.

In that paragraph, the court makes it clear that even if the payees conduct is assumed to be wrongful, translate that to this case and say even if a court were to find cramming, then the Putnam court would say that the voluntary payment doctrine still applies.

I read Putnam to mean that even if the court were presented squarely with the question -- and by the court I mean the Supreme Court-- were presented squarely with the question that is presented in this case, it would find in favor of the voluntary payment doctrine instead of finding that the Legislature's declaration that cramming is illegal somehow defuses or overrides or abrogates the voluntarily payment doctrine.

In fact, the Putnam court suggested the essence of the rationale that persuades me here when it wrote, at the end of paragraph 35 "The Legislature has the power to create additional exceptions to the voluntary payment doctrine in particular circumstances."

Turn the clock back to whenever they wrote this statute and all the people here really thought hard about this, we're in front of that legislative drafting committee, I'm sure some of you would be saying, hey, in subsection (2) if you're only talking about sales and advertising, say something about sales and advertising and not just in the title otherwise the court's going to get it wrong.

And others of you would say, hey, it would be absurd to have a statute like this, let all these people get hoodwinked and pay the charges, and not be able to collect the charges because they voluntarily paid them, so put something in there about voluntary payment.

Without anything in there about sales and advertising, I have to find the statute is broad enough to apply to all defendants, because they all made false statements, at least taking the allegations of the complaint is true they made false statements.

Likewise, there's nothing in this legislation that says that it overrides this very well understood, long staying in common law doctrine about voluntary payment.

I will say I'm also influenced by the fact that the <u>Putnam</u> court upheld the application of the common law voluntary payment doctrine against not only common law damage claims, but also a statutory claim. The claim that arose under the Trade Practices Act. That's referenced in footnote 2 of the Putnam decision and mentioned as I stated that subject is also addressed in language at the tail end of footnote 12 of the decision.

Then I reach the third step of my analysis. Finding that the voluntary payment doctrine applies is not necessarily the last word in this case. There are exceptions to the voluntary payment doctrine in the cases of fraud, duress, or mistake of fact. Putnam says that at paragraph 36 of the decision.

I believe that the amended complaint implies that the plaintiffs paid the unauthorized charges as a consequence of fraud. I don't believe the complaint makes any allegation which state or imply any duress or any mistake of fact.

In particular the complaint implies that the plaintiffs unwittingly relied on a statement implicit in the bills themselves, that is, that the charges had somehow been authorized by the plaintiffs.

Indeed, drawing such an inference is mandatory in ruling on a motion to dismiss. If the plaintiffs were unable to identify the unauthorized charges because of some deceptive manner in which they were included in the bills, and therefore they did not take notice and did not, in fact, notice the unauthorized charges, the plaintiffs may have justifiably relied on the bills in being accurate in making their payments.

At this point I'm going to address the defendants frequent reminder that allegations of fraud must satisfy the particularity requirements of section 802.03(2), however, once the telephone bills are identified and supplied to the court as they have been in this case, it seems to me that we have all the particularity we would need to determine the transaction and the statements and the omissions the plaintiffs allege to have been made and allege to have been fraudulent.

So I don't think this process needs to be sent back to first base for more particularity. So the next step in the tentative analysis is to determine whether the bills themselves -- I should say at least to consider if the bill themselves and then determine whether to compare the allegations of the complaint to the actual bills.

I do this only to satisfy the very narrow objective that I just identified. For the plaintiffs to claim that the voluntary payment doctrine does not apply on account of fraud, they must satisfy the court of three elements:

First that there was a knowingly false representation of fact;

Second, that it was made with intent to defraud and for the purpose of inducing another to act upon it; and

Third, the recipient must have relied on the representation and must have been induced to rely on it which act caused the claimed damage.

The clarity of the statements on the bills puts into play that third element, that question whether in fact the plaintiff relied on the statement in the bills, that is, whether they understood the bills to be saying that the internet and directory service and international calling plans had been authorized.

If the plaintiffs can't prove, in other words, that in fact the plaintiffs were fooled by the bills, they cannot establish an exception to the voluntary payment doctrine.

I'm not dead-set on proceeding to summary judgment at this point in the proceedings, but Wisconsin Statute section 802.06(2)(b) permits me to convert the motion at this point to a motion for summary judgment.

I have been presented with matters outside the pleadings and my question to Mr. Dehler satisfies me that I don't have anything more at this point -- I should say I won't have anything more at some point down the line in response to summary judgment motion than I have now.

I think we know everything we're going to know about this subject now. I think we should go ahead and decide it. That thinking is also influenced by the wisdom of Meyer v. The Laser Vision Institute, a 2006 Court of Appeals decision in which the court explained the question about whether a written communication is misleading "need only be sent to the trier of fact where there are facts alleged or reasonable inferences that can be drawn from those facts that could form the basis" for a claim that the communication is misleading.

And I should say Peterson v. Volkswagen of America, a 2005 Supreme Court decision goes along the same lines as I'm referring to, particularly to paragraph 15 and footnote 8.

So I think that the question that Meyer tees up and that this case reluctantly leads to is could a reasonable customer look at these bills and be mislead?

They have some customers, as Mr. Dehler referred to, who don't look at their bills. If they don't read them, I think they're out of luck. It's not that these bills are impossible to read. I don't think that they're presented to people who are incapable of reading, and therefore, I think they need to be read.

If they were printed in such tiny font that they could not physically be read by the naked eye, that might be the problem, but even with my poor eyesight, I could read the bills. I don't think you need to blow them up as much as Mr. Meany had them so that somebody could see them--

MR. MEANY: Your Honor, I can't take credit for that.

THE COURT: Thank you. The only question is if you read them, can you understand whether or not you authorized those charges? Given the rather specific and explicit nature of the charges, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized those services.

To the contrary the charges were stated with sufficient particularity that a reasonable customer would be startled to find such a charge on the bill. Now, the degree to which they're startled might be somewhat limited by the amount of the charge.

Life's too short to be quibbling over $2 on one bill one time. But I think if a person saw even a $2 bill month in and month out for something they obviously didn't authorize like internet services or their listing in a national directory or something that had something to do with Spanish, unless they're Spanish speaking themselves, I thin that they would be startled.

They would know whether they had ordered a listing in such a directory or whether they had ordered internet services or ordered a calling plan for calling in a Spanish speaking country or some Spanish speaking element in our own country.

At the very least, I think a reasonable customer would have been put on notice that something was fishy, and it would be unreasonable to pay the bill on the assumption that such services had been authorized.

Thus, my tentative conclusion is that insofar as the damage claims go, the motion to dismiss should be granted. And I want to stop here for a moment and take one look again at these words monthly service fee. Has anybody come up with a copy of that so I could see what a reasonable customer would have seen? Did you find something there?

MR. HEATON: Judge, are you looking just for the specific company charge that Mr. Dehler referenced or any of the charges?

THE COURT: No, just the one that says monthly service fee that Mr. Dehler had mentioned?

MR. WEBER: It's not in the materials that I'm aware of, Your Honor. With respect to the Plan Uniendo, we have examples of that.

THE COURT: Well, I've seen the Plan Uniendo ones.

MR. LINN: We found the all the ones you mentioned, Your Honor, we haven't found the one Mr. Dehler added to the list.

THE COURT: Any luck, Mr. Dehler? Do you have a copy of--

MR. DEHLER: I do not. If I could have the bills--

THE COURT: I have a copy here. What I'm going to do is I'm just going to bookmark this one. To the extent there's evidence of this or to the extent we've misanalyzed this one because this is just a bit cloudier, and just on its face this might seem a little cloudy.

The words, "monthly service fee" are generic and ambiguous enough that even a dedicated bean counter might look at that and say, okay I can see why I have to pay a monthly fee, and would be easily hoodwinked, but I want to see some evidence that this plaintiff got charged something using words like that.

Assuming that they did not, just assuming they did not for the moment, then what I'm going to conclude at least tentatively before hearing from you is that the motion to dismiss should be granted, at least to the damage claims.

Such a ruling would call for the dismissal of all the other claims that seek monetary relief only.

Mr. Wisnefski?

MR. WISNEFSKI: With respect to monthly service, I'm aware of a US Connect bill. It's AT&T 00058. It's dated February 28th, 2002, and it includes a reference to monthly services.

THE COURT: Oh, okay,

MR. WISNEFSKI: I'm not sure if that's the reference. This one does not have my handwriting on.

MR. DEHLER: Yes, that is the reference.

THE COURT: Okay, well, there we go. Thank you for finding that.

I am looking at it now. I have the bill that starts with production number 000057, it's the bill for -- I'm sorry, starts with 56. This is the bill for January 29th through February 28th, 2002, and the critical page has the production number 58 on it.

With regard to this charge, I think this one might raise a dispute of fact as to this charge. This one is vague enough and ambiguous enough that even a reasonable person, I don't mean to imply that your clients are not reasonable, Mr. Dehler. Let me rephrase that.

I would say that even a reasonably attentive person looking at this might not understand exactly whether this was authorized or not. I mean the word US Connect appears, but it appears in the same font as much as the rest of the bill.

It's not like these other bills where you get a logo up there that looks different. And although it says in the paragraph above it that this is provided as service to Ameritech to the above company, it just doesn't stand out enough for me to be certain that I would take this issue away from a jury.

So at least as to the damage claims arising out of this particular charge, monthly services for US Connect, I would deny the motion to dismiss, and in fact, the motion for summary judgment insofar as I'm treating it as such.

As to the other damage claims based on the other items that are included, I would grant the motion. And such a ruling, I was about to say before, would call for the dismissal of all the other claims that seek monetary relief only, including the unjust enrichment claims and the WOCCA claims.

The voluntary payment doctrine is not a defense to the injunction claims, so I believe that those claims would survive the motion.

I'm also persuaded that the claims alleged under Wisconsin Statute Section 100.18 should be dismissed because the complaint fails to allege the receipt of any untrue, deceptive, or misleading advertising and sales promotions from the defendants.

The telephone bills themselves do not constitute advertisements or sales promotions, it's just a demand for payment, and therefore, I don't believe they fit within 100.18.

Furthermore, the plaintiffs seem to concede that the claims under Wisconsin Statute

Section 100.20(5) may be dismissed. Those are tentative conclusions. I want to hear what you have to say before I finalize those.

Mr. Dehler?

MR. DEHLER: Yes, Your Honor, I would like to focus on two areas of the very thoughtful analysis which you provided us. First of all, on the issue of voluntary payments, if the Court has before it the Butcher decision, Butcher v. Ameritech.

THE COURT: I read that. Let's get a spelling on that. Is that B-u-t-c-h-e-r or just--

MR. DEHLER: Correct, B-u-t-c-h-e-r, Butcher v. Ameritech. In paragraph 31 of that decision, there's a discussion of a statute, Wisconsin statute that relates to--

THE COURT: This is the tax statute, right?

MR. DEHLER: Correct, the tax statute that authorizes, specifically authorizes a taxpayer to file a claim with the Department of Revenue, and there's a sentence in that paragraph that I think is helpful in providing additional guidance, since this is the latest statement admittedly from the Court of Appeals rather than the Supreme Court, related statement on the subject.

It says section 77.59(4)(a) expresses

the Legislature's intent that a taxpayer need not protest the tax when paying it in order to recover a refund under the procedure established by the statute.

There is nothing in that statute that says the voluntary placement doctrine does not apply. Nonetheless, because this statute provides procedure by which a taxpayer can assert a claim against the Department of Revenue and is silent on the issue of whether they must or must not protest.

The court held here that the statute does not require the taxpayer to protest, again analyzing the voluntary payments doctrine before pursuing that claim. Now, what it does say is that it doesn't help the plaintiff in this particular case because weren't trying to assert a claim against the State, they were trying to assert a claim against Ameritech.

Then it goes on to say that nothing in that statute says that the voluntary payments doctrine would not apply to a private entity. The reason I point this out is because it goes directly to what the argument was with respect to 100.207 and some of the other statutes.

Those statutes although do not specifically say the voluntary payments doctrine does not apply with respect to claims, this statute it is just like the statute that I referenced here in that it doesn't say one way or the other. In fact, the implication, I think the necessary implication is that the Legislature intended to allow such a claim to proceed regardless of whether somebody protests.

In fact, I think to rule otherwise would truly undermine the statute itself because it would effectively write into the statute a requirement that you cannot bring a claim for relief under 100.207(6) unless you first make an objection. The Legislature--

THE COURT: At least a claim for damages.

MR. DEHLER: Excuse me, a claim for damages, yes, unless you first make an objection and it doesn't say that. You mention that the statute does not abrogate the voluntary payments doctrine.

When I was briefing this issue, you know, I looked at the definition of abrogate in Black's Law Dictionary and it says to vitiate. We're not arguing that this statute does away with the entire voluntary payments doctrine, that it abolishes it. We're just saying that it conflicts, this statute and common law voluntary payments doctrine conflict on this issue, and when there's a conflict, because we're not saying it's abrogated, the Legislature's intention control over the judicial doctrine.

So we're arguing that it's more of a conflict analysis as opposed to an abrogation analysis.

THE COURT: How did that compare to the court's analysis in all in _Fuchsgruber_?

MR. DEHLER: Your Honor, I'll be frank, I'm not as versed in that decision. However, I will say that in the _Putnam_ decision, there was no analysis of what the nature of that statutory cause of action was there.

There's a reference to it, not even by statute number, if I recall correctly. It just talks about it in terms of the Wisconsin Trade Practices Act -- presumably 100.20(5), maybe it's 100.18, it's probably 100.20, but there's no analysis.

So I'm not sure that that should be particularly persuasive to this Court. The other thing I point out is that 100.207 unlike 100.20 even if we assume that in _Putnam_ 100.20 was subject to the voluntary payments doctrine, 100.207 is different because it's a statute that specifically addresses billing situations.

It's not a broad, unfair competition

practices claim that we're asserting here. I mean, we're asserting a violation of a specific statute that specifically says how you have to go about billing, and so it is something that is in direct conflict we believe with the voluntary payments doctrine as opposed to some of the other statutes that aren't necessary specific to billing.

That's our argument with respect to voluntary payments. We appreciate the court's very thoughtful analysis, we just would respectfully request that before you finalize the decision that perhaps you may want to -- we request that you consider what I've just said about this paragraph 31 of Butcher.

THE COURT: Okay. Well, let me give you my reaction to that. My feeling is that that Butcher didn't help me one way or the other.

MR. DEHLER: Okay.

THE COURT: It wasn't analogues enough in terms of the kind of statute, and this whole protest issue, I think, creates an idiom of stream of thought on that that really carries us away from where we need to go.

What I think you're saying is is that if you look at the statute in Butcher and you look at the affect of the voluntary payment doctrine on that statute you could have a rule that says something along the lines of tie goes to the runner.

If it could go either way, if you would look at statute and you could either abrogate or not, you should consider that the voluntary payment doctrine has not been abrogated, and you should permit the claim to coexist with the statutory structure.

Butcher might stand for that proposition, I'm not going to venture a guess. I think that it's better to look back at Fuchsgruber. Fuchsgruber gives us a real good solid example of the doctrine at work.

And contrary to what you said, when we talk about a statute abrogating a doctrine, the statute doesn't have to kill the thing altogether. I mean when we say vitiate it or when we say that it abrogates it, we're not saying that it reduces it or eliminates it in all cases, it just eliminates it in whatever subject area or topic area covered by the statute.

So for example in Fuchsgruber the changes to the comparative negligence law changed the law of negligence, the common law that would otherwise apply but for the statute, but did not change the common law of strict product liability.

And it's not to say that it destroyed the law of negligence in it's of it's various aspects, it just changed how you compare products in negli-- or I should say in fact that the conduct of a product manufacturer is the conduct of somebody who's hurt by the product.

So I don't think I have to find that the Legislature, I guess, I don't have to consider whether or not the Legislature intended to eliminate the doctrine altogether. I just have to figure out whether the Legislature decided to prevent the application of that doctrine in this particular narrow field covered by the statute of telecommunications services.

And in fact, I guess I have to say I remain convinced that because we presume the Legislature knew about the doctrine and knew this would be raised as a defense, if they didn't want it raised as a defense, they would have said so.

MR. DEHLER: Very good, Your Honor. The other point I would like to discuss is with regard to ILD. Your tentative rulings with that 100.207(3) in particular (3)(a) does not apply to ILD because essentially they're the middleman, and I would contend, Your Honor, that the statute by its clear language intended to be broader than that.

That the statute talks in terms of all the negative enrollment of services, sort of the beginning of the process, the person is negatively is enrolled in a service without their permission or authorization as well as negative option billing.

And it talks about, I think you have to view that on a spectrum. That the entire billing process includes the generation of the unlawful charge, the passing of that through billing aggregators and then the ultimate billing on the individual's bill.

Otherwise a company could simply get around this statute by hiring some college students to sit on plastic chairs and call people up and to manufacture false bills and then have a company on the 33rd floor of some building and everybody sitting in leather chairs and abrogating those charges and in passing them on they would never had have liability regardless of what they knew.

I think that the statute is written so broadly that it contemplates billing as an entire process from beginning to end, and all people who participate in that billing process particularly in this case where we allege that they knowingly did so for purposed of generating profits for themselves, that the statute should apply to ILD.

THE COURT: I have section 38 in front of me at this point. There's three sentences in it, and I could see how you might plot those three sentences on a spectrum that you discussed, and I can see the point you're trying to make, but I think if they intended to include people who aren't involved in the actual billing of the customer, they would have said as much and in fact I think they might have even included specific language about aiders and abettors.

I don't know whether there is separate liability in a case like this for an aider or abettor, but I don't see that language here.

In fact, I don't see language even including the other two sentences which would apply to ILD. They weren't engaged in negative option billing because they didn't send out the bill to the customer. And they weren't involved in negative enrollment because weren't enrolling anybody.

Furthermore, they weren't refusing a proposal to provide a telecommunications services because they didn't have any contact with any customer who would have articulated such a refusal. So I don't see ILD with the language that I have before me.

If in fact, that was the Legislature's intent, I think they could have drafted the statute more broadly to cover the conduct of people who are packaging and retransmitting the charges to the ultimate billing entity.

MR. DEHLER: Your Honor, my final area of argument would be with respect to 100.18. The statute has been interpreted quite broadly by the Wisconsin courts to include any sort of misstatement, false misleading statements that can lead to the public and then turn to the public if the prognosis has been interpreted quite broadly.

There is an exception in some of the cases discussing the fact that a statement not made to the public where the parties are already in a contractual relationship.

What we would contend is that there was no agreement, there was no contractual agreement to pay for any of these charges. They were unauthorized charges. There was no contact to pay for those charges.

In fact, the way that the charges -- the way the product, so to speak, is sold is by just inserting it on your telephone bill, and that is the sales presentation. And presumably by failing to notice it, the party agrees that it's to be paid.

But in the first case, there is no there is no agreement between, for example, the plaintiff in this case and the service provider defendants to make contracts such that it would take it outside the scope of a representation to the public for purposes of 100.18.

We say there's similarly no contract or agreement with any of the defendants including AT&T and ILD to pay for unauthorized charges. There may be some sort of -- there's certainly, I suppose, is a contractual relationship of some sort between the plaintiffs and AT&T.

However, that contractual relationship didn't contemplate that there would be unauthorized charges that simply could be put on the bill. That's not part of what the parties agreed to. Therefore, I would contend that the statements which were false regarding the fact that you were obligated to pay for a particular charge when you haven't authorized it, those are actionable under 100.18.

THE COURT: You seem to say two things there. You were starting off to say was that 100.18 has been construed to cover any kind of statement made to the public regardless of whether it can be characterized as a sales or advertising statement, and then you seem to be saying that when these statements are included in these bills, that's some kind of sales presentation.

MR. DEHLER: Your Honor, what I'm saying is that the statute is very broad in terms of any kind of representation or statement made for the purpose of facilitating a sale or to generate revenue--

THE COURT: Those are two big differences.

MR. DEHLER: Well, the statute's language is quite broad.

THE COURT: If you can say there's some law that says if you make a statement in any context where you're trying to make a profit--

MR. DEHLER: To increase your revenue, yes, I believe that would be the interest of--

THE COURT: Do you want to give me a statute--

MR. DEHLER: I just like to the statute itself of 100.18.

THE COURT: Well, if there was some appellate decision that said that the words of the statute mean something other than what they seem to convey on their face, which is sales and advertising, then I would be inclined to agree with you, although it might not make a difference to the ultimate outcome of the motion given the voluntary payment doctrine applying to that statute as well as it does to the others, but at least it would cause me to amend my statements about that.

If you get back to the office and find a case that would give me some better direction on that, that's something I would be willing to listen to.

Let me check with the defendants. Wisconsin Bell, any comments or suggestions before I finalize my conclusions.

MR. LINN: Well, Your Honor, the one item that was, I guess, left open was this US Connect issue which was exemplified at least in documents AT&T number 56 and 58, and I understand Your Honor's remarks that I would submit there's a clarification in the language of page 58, that this portion of the bill is provided as the service of Ameritech to a different company.

But I would also like to make reference document 58 includes a charge for monthly services of $2.92 with a tax et cetera totaling $3.17. The plaintiffs in their complaint at paragraph 22 allege that they complained about the US Connect charge.

And document number AT&T 00090 which is dated from a time period subsequent by a number of months to document 56 and 58 includes a credit for US Connect. Also including a credit is document number 95. The next invoice also includes a credit for US Connect, but that one is $29.72 credit.

Now, I know we can't connect every single dot here, and my eyesight is perhaps not as good as your, Your Honor, I'm having trouble even reading these things in this light, but it seems consistent with the allegations in the complaint that refer to these invoices and consistent with the allegation in the complaint that says that the plaintiffs complained about the US Connect charge, it appears the US Connect was then credited in aggregate of $29 off of apparently a series of $3.17 a month as collected in the documents that we've submitted as part of this motion.

And we've also submitted law that says, you know, this doesn't necessarily turn this into a summary judgment motion even though there's a lot of detail in these statements of account. And so I would submit that consistent with allegations in complaint that the complaint was made about US Connect, the charge was adjusted and eliminated, and therefore that claim too should be dismissed for failure to state a claim be granted, alternatively on the summary judgment basis.

THE COURT: I know it's going to sound like hurry up and slowdown kind of stuff because you guys have been waiting forever for this and then we move right to summary judgment. Because I'm looking at this language for the first time, and because we're suggesting maybe a credit was given, but I don't know how many of these charges under this particular verbiage monthly "srvs" using the abbreviation, how many of these actually occurred, I want to go just a little bit slower and make sure that that credit thing as a matter of law eliminates any dispute of fact.

So I'm going to grant leave to Wisconsin Bell if not US Connect, if there's ever an entity that shows up wanting to stand up for them, I'm going to let them move for summary judgment again on that. You can lay it out. It will be all nice and neat in the record in case somebody else needs to review it, and we'll give a chance for Mr. Shah and Dehler to take a look at that and see if they agree or disagree and why.

So as I finalize my conclusions here,

I'm going to continue to deny the motion for summary judgment insofar as it relates only to this kind of charge for US Connect on bills that were sent by Wisconsin Bell.

Other comments, who wants to go next?

MR. HARLEY: Your Honor, Greg Harley for ILD. I want to briefly address your conclusion in regard to 100.207(2). Obviously, we agree with you on the application of voluntary payment doctrine, you know, probably saying if weren't for the injunctive relief aspects of it. But you that you believe ILD could be helping make this misrepresentation under provision, I think if you read the allegations the in the complaint, Your Honor, what they're saying is that ILD aggregates the data of the service provider and then sends it to AT&T,

Your Honor, that is not a representation to the plaintiff or anyone else that a particular charge is valid. It's simply we're sending you these charges from whatever particular service provider the defendant oddly is working with.

Much like when Visa sends a bill, they're not representing that the particular charge from the merchant was authorized or unauthorized. They're representing that we have received this charge from the merchant and we're forwarding it onto you.

And so as to what is at issue in this case, I don't believe from the complaint there is any allegations that ILD misrepresented that a particular charge was authorized or unauthorized.

THE COURT: Mr. Dehler, you want to respond to that?

MR. DEHLER: Your Honor, our position is first of all, ILD is part of the co-- as we've alleged in the complaint part of coalition to ensure responsible billing, and they put forth a series of guidelines acknowledging that cramming is a serious problem in the industry, and stating that they have undertaken a responsibility to deal with that situation, that they can put steps in place to identify fraudulent charges.

We believe that the Court's analysis was correct on this issue when you said that the statute is quite broad in its application, and that a person may not make in any manner any statement or representation with regards to provision of telecommunication services which is false, misleading, and deceptive.

And when a party bills for a service that they knew or should have known was not an authorized charge based on their own admission and our allegations they knew these were unauthorized charges and that they should have discovered that based on their guidelines they put in place, we believe that this statute, as you said in your preliminary rulings broad implications should apply.

THE COURT: Mr. Harley, you want to reply?

MR. HARLEY: We would-- ILD has complied with cerb guidelines. That's something we couldn't get into in this phase of the proceedings. All I can really do is repeat that there's no representation or allegations of representation by ILD that a particular charge was authorized or unauthorized.

Rather, I think the best case scenario is the representation from ILD was we are sending you this charge from Local Biz, and the representation was to AT&T not the plan.

THE COURT: Just so we have a clear record that term you used is cerb, c-e-r-b acronym for something having to do with cramming?

MR. HARLEY. I believe it's the Coalition to Ensure Responsible Billing.

THE COURT: Okay, thank you. I'm going to stand by my previous analysis. This has to do with the standards that apply at a motion to dismiss or on motion for summary judgment.

When a trier of fact looks at the evidence or when the court looks at the complaint, any inferences that can be drawn in favor of the party opposing the motion have to be drawn.

It's true that the complaint doesn't come out and say flat out that ILD represented to Wisconsin Bell that Local Biz's customers had authorized the charges that were being forwarded.

On the other hand, neither does it say that ILD represented to Wisconsin Bell that the following charges are being sent to you, but we make no representation about whether these charges were authorized or not.

In fact, if ILD would said such a thing at the time of transfer, maybe that would have put Wisconsin Bell on notice about whether it should include such charges in its bill.

When nothing is said either way, then the question is whether a reasonable trier of fact, could infer, based on what's saying here that ILD was representing to Wisconsin Bell that the charges that had been collected and were being transferred were, in fact, authorized.

And I don't think that's an unfair

inference, certainly not inference from these allegations in the complaint. I don't have much more besides the complaint to decide this is a matter of summary judgment, but to the extent that this is being construed as a motion for summary plus, given the entire record, the bill plus the allegations of the complaint, I don't think it would be unreasonable for a trier of fact to say if you pass these along and you wanted Wisconsin Bell to include it in their bill, and if you knew and that Wisconsin Bell knew that those were being sent to customers who were about ready to get out their checkbooks, that was a representation that these bills or these charges, I should say were legitimate and were authorized.

That may not prevail in front of a jury, but I think it's enough to get us past the pleading stage. So I'm going to stand by my previous rulings.

Anything from Americatel?

MR. HEATON: Your Honor, unless you have any specific questions for Americatel, no.

THE COURT: Okay.

And anything from Local Biz?

MR. MEANY: Your Honor, Local Biz is in the same position. We agree with the court's central holding and that the rest to be addressed at a certain time. However, we raise the same arguments we've raised in our briefs.

THE COURT: Okay. If we had a little bit more time in the calendar today, what I would do now is just adjourn to chambers and we would have a scheduling conference and talk about where we would go next. I have other parties who are ready for another motion, so I want to take that up.

What we'll do is schedule a scheduling conference because we have people from out of town who I'm sure will want to have say in what goes on, we'll do it by telephone.

Mr. Dehler?

MR. DEHLER: One last thing, Your Honor. There is a motion for default judgment that we don't need to address today I don't believe, but I like to take that up at the time we address scheduling issues. There has been no appearance on behalf of US Connect LLC. They have not answered. There's no basis for them to argue that default--

THE COURT: Well, is this US Connect cousin going to say anything?

MS. MORGAN: US Connect XL, Inc. takes no formal position. We're not in any way related to US

Connect LLC.

THE COURT: Okay. Well, not to treat you like anybody else that comes in, but let me just do this. Submit a proposed order under the five-day rule, and give us a copy of the affidavit of service so we can see that they've been served and give us a copy of notification.

MR. DEHLER: Very good.

THE COURT: Let's go off the record and set a date for a telephone conference.

(Discussion held off the record.)

THE COURT: Let's go back on the record. Off the record we had a scheduling conference about when we would gather next. It will December 13th at 11:00 o'clock. Mr. Dehler's office will place the call.

What I intend to do today is issue a brief order that capsulizes the tentative conclusions which I will now make final by saying that I'm going to grant the motion to dismiss insofar as it relates to the damage claims except for damage claims arising out of the inclusion in the Wisconsin Bell billings reportedly initialed by US Connect in relating to this so-called monthly service charge that appears on production number AT&T 58.

I'm going to deny the motion to dismiss insofar as it relates to the request for injunctive relief. I'm going to deny altogether or I should say grant the motion to dismiss all together as to 100.18 and 100.20(5) claims.

I'm going grant leave to Mr. Dehler to supply me with additional authority on the question of whether 100.18(1) is broad enough to include communications that do not -- that are not part of a sales or advertising effort, and I'll allow you to do that by filing a motion for reconsideration on that point.

I want to do one other minor matter in terms of putting the a caption on the order. Can I replace AT&T, Inc., with Wisconsin Bell, Inc.?

MR. LINN: Yes, Your Honor.

MR. WISNEFSKI: Yes.

THE COURT: Anything else that I need to include in that order today? Very good. Thanks for coming in.

MR. LINN: Thank you, judge

(Whereupon, the proceedings were concluded at 3:35 in the afternoon.)

* * * * *

STATE OF WISCONSIN)
)
MILWAUKEE COUNTY)

I, LINDA K. KASPRZAK, do hereby certify that I am an Official Court Reporter in the State of Wisconsin, Milwaukee County, that as such I reported the proceedings, later transcribed same, and that it is true and correct to the best of my knowledge and ability.

Dated this 13th day of December, 2007, at Milwaukee, Wisconsin.

Linda K. Kasprzak
LINDA K. KASPRZAK
OFFICIAL COURT REPORTER

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH #29

MBS CERTIFIED PUBLIC ACCOUNTANTS LLC ET AL.,
Plaintiff,

-vs-

Case No. 06CV008092

WISCONSIN BELL INC. ET AL.,
Defendant.

MOTION HEARING

DECEMBER 13, 2007

Before the HONORABLE RICHARD J. SANKOVITZ
CIRCUIT COURT JUDGE PRESIDING

A P P E A R A N C E S

MR. DOUGLAS DEHLER, MR. JAMES SHAH
Attorneys at Law
On Behalf of the Plaintiffs.

MR. TED WISNEFSKI, MS. JOAN HUFFMAN
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On behalf of the Defendant AT&T.

MR. CHRISTOPHER MEULER, MR. GREG HARLEY
Attorneys at Law
On behalf of the Defendant ILD.

COPY

MR. DAVID MEANY
Attorney at Law
On behalf of the Defendant Local Biz.

MR. FRANK TERSCHAN
Attorney at Law
On behalf of US Connect XL, Inc.

MR. PAUL HEATON
Attorneys at Law
On behalf of the Defendant Americatel.

LINDA KASPRZAK
Official Court Reporter

T E L E P H O N I C P R O C E E D I N G S

THE COURT: Let's go on the record on 06CV8092 MBS Certified Public Accounts LLC et al. v. AT&T et al. Appearances for the plaintiff, please.

MR. DEHLER: For the plaintiffs Doug Dehler and Jim Shah of Shepherd, Finkelman, Miller & Shah.

THE COURT: For AT&T.

MR. WISNEFSKI: Ted Wisnefski and Joan Huffman appear in person on behalf of Wisconsin Bell, Inc. doing business as AT&T Wisconsin.

THE COURT: Anybody else on the line for AT&T?

(No response.)

THE COURT: Appearances for ILD.

MEULER: Christopher Meuler from Friebert, Finerty & St. John, and Greg Harley, pro hac vice.

THE COURT: Appearance for Local Biz.

MR. MEANY: David Meany of DeWitt, Ross & Stevens, Your Honor.

THE COURT: Mr. Terschan, I understand that you're kind of in and out of this case. You're kind of out for US Connect, but you're here protecting some other US Connect, right?

MR. TERSCHAN: Yes, yes. I'm representing US Connect XL, Inc. which is at this point in time at least a non-party, but an interested spectator. I'm requesting the court's indulgence kind of as a friend of the Court to attend these conferences.

THE COURT: I'm not necessarily going to elevate you to friend of the court's status, but I will indulge your spectatorship--

MR. TERSCHAN: Friend of the attorneys, will that do?

THE COURT: And appearance for Americatel.

MR. HEATON: Morning, judge, it's Paul Heaton for Americatel.

THE COURT: Any other appearances that anybody else needs to make?

(No response.)

THE COURT: Okay. Let me give you my decision on the motion for reconsideration. The motion invites me to expand on my previous conclusions regarding the plaintiffs' claims under Wisconsin Statute Section 100.18(1).

My overall conclusion is that I must stand by my previous decision. With regard to the prospect of an interlocutory appeal, I am indifferent, and happy to let the court of appeals decide whether this is a case that satisfies the statutory standards for a permissive appeal.

First, I'll give you my thoughts about the viability of a claim for damages under Wisconsin Statute Section 100.18(1).

Previously I ruled that these claims should be dismissed because the complaint fails to allege the receipt of any untrue, deceptive, or misleading advertising or sales promotions from the defendants.

I concluded that the telephone bills themselves do not constitute advertisements or sales promotions. I reasoned that a telephone bill is a demand for payment for services rendered, and therefore it does not constitute a sales promotion.

I have considered the additional points set forth in the motion filed on November 21st, 2007, but they do no persuade me to reverse my previous decision, for the following three reasons:

First, even if the complaint states a claim for damages for a violation of section 100.18(1), I believe that a claim for damages would be defeated in this case by the voluntary payment doctrine.

One of the claims that was rejected by the <u>Putnam</u> court was a claim under the Deceptive Trade Practices Act, which is the d/b/a of section

100.18(1). For more on that I refer you to footnote 2 of the Putnam decision.

Let me add parenthetically that my conclusion that a section 100.18(1) claim is barred by the voluntarily payment doctrine applies only to a claim for damages and not to a claim for injunctive relief.

My second reason for denying the motion to reconsider is that I do not believe that the complaint states a claim against AT&T for a violation of 100.18(1).

As the plaintiffs acknowledge, the only statements or representations that are actionable under the statute are those that are made to the public. However, if a defendant has a "particular relationship" with a plaintiff, that plaintiff is not a member of the public for purposes of applying the statute to that defendant.

AT&T had a particular relationship with each of the plaintiffs, a contractual relationship that might also be termed a customer relationship.

The plaintiffs argue that the contract between AT&T and its customers did not permit it to bill them for unauthorized services that were neither requested nor provided. I agree with this proposition, but the proposition is immaterial to the question at hand, for two reasons.

First, section 100.18(1) liability does not turn on contractual authority, but upon deception regardless of authority. Whether the speaker lacked the authority to bill a customer is irrelevant to whether the speaker's statements and representations were deceptive.

Second, that AT&T might have abused its relationship with its customers does not transform its customers into strangers. Whether the recipients of its allegedly deceptive statements are deemed customers or alternatively members of the general public is to be determined by looking at their relationship as a whole, not on a transaction by transaction basis.

If the latter were so, the results might be anomalous. A customer with a longstanding, close, even intimate business relationship with a supplier might be deemed a member of the general public only as a result of an isolated instance of deception.

Likewise, a member of the general public who engages in a course of communication with a deceptive merchant that never arises to a particular relationship, such as a contractual relationship or a customer relationship, might be deemed not a member of the general public only as the result of an isolated transaction that is not reflective of any general relationship.

The third reason for my decision to deny the motion for reconsideration is that I do not believe that the statements made in the telephone bills constitutes statements or representations that are forbidden by the statute.

Section 100.18(1) bars deceptive statements and representations, true, but not every kind of deceptive statement or representation.

As the plaintiffs candidly acknowledge, to make a speaker liable under the statute, the statement or representation must be made "with intent to sell, distribute, increase the consumption of, or in any wise dispose of any -- and I'm going to skip over a few words -- service, or anything offered to the public for sale -- I'm skipping over some more words -- or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use, or lease of any service."

In this case, the complaint neither

states nor implies such an intent. The statements in the bills, to the extent that a customer was deceived by them, refer to past telephone services, not prospective telephone services, but the statute plainly refers to prospective, not past services.

The plaintiffs argue that the statute applies specifically to telephone bills, and they refer me to the 143rd word in the statute, that is the word "bill." The word "bill" has many meanings, including a piece of currency and a draft of a proposed law. But I do not believe that the statute was referring to the kind of bill that is in dispute in this case, as in an invoice.

One of the staples of statutory construction is that the meaning of words can be judged by the company they keep, and the company in which the word bill appears in section 100.18(1) makes it plain that it is referring to an advertisement, not an invoice.

The neighboring words are "book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, and label."

For all these reasons, therefore, I will deny the motion for reconsideration.

Then I turn to the plaintiff's request

that I recommend to the court of appeals that the court grant permission to the plaintiffs to pursue an interlocutory appeal on the question whether the voluntary payment doctrine applies in this case.

As I said before, I am indifferent. I am indifferent because the reasons to permit such an appeal seem to balance evenly with the reasons not to permit such an appeal.

On the one hand, there is no precedent that nails the question whether the voluntary payment doctrine applies to a statute like Wisconsin Statute Section 100.207.

The precedent on which I relied is strong, I believe, but may not be as specific as an authoritative decision from the court of appeals in this case. A specific decision from the court, whether it favored the plaintiffs or the defendants, would add clarity to this matter and clarity tends to materially advance the termination of litigation.

By saying these things, I do not mean to imply that the law is unclear. I am reasonably confident of my decision, and I do not believe that I need more clarity from the appellate courts to administer justice in this case.

Here is the factor that balances

against an interlocutory appeal. If cramming is a real concern for the plaintiffs and the members of the proposed class, then it seems to me that the plaintiffs' request for injunctive relief, which is not barred by the voluntarily payment doctrine, is just as urgent as, if not more urgent than, their claim for damages, and can be litigated without the year-long delay that might attend an interlocutory appeal.

Because these factors balance in my mind, I am indifferent to whether the court of appeals permits an interlocutory appeal.

Furthermore, I believe the court, given its experience and its vantage point, is in a much better position to wisely and sensitively apply the three statutory factors set forth in Wisconsin Statute Section 808.03(2) that govern whether permission should be granted.

Accordingly, I will deny the plaintiffs' request for a letter of recommendation supporting an interlocutory appeal, but neither will I oppose a request by the plaintiffs to the court of appeals for interlocutory appeal -- I should say for interlocutory review.

Mr. Dehler, anything else you need to

put on the record about your request and your motion at this point before we do some scheduling?

MR. DEHLER: No, Your Honor.

THE COURT: Anything that any other party feels the need to put on the record; anything from Wisconsin Bell d/b/a AT&T?

MR. WISNEFSKI: Yes. It does not -- it's not germane to the court's ruling with respect to the motion for reconsideration, but rather as a point of clarification that I think will be important for purposes of scheduling and also the court's understanding of the parties in this case.

Previously, when we were before different judges, US Connect XL, Inc., who is appearing today by Mr. Terschan, had forwarded correspondence with the previous trial judge informing him that it is true they are not US Connect, the company that was allegedly served in this case, but nevertheless, recognized that they, US Connect XL, Inc. are the party that issued the charges about which Mr. Dehler complains.

So there should be no confusion that US Connect XL, Inc. is, in fact, the right party, is the party that Mr. Dehler was looking for. However, US Connect XL, Inc. disputes that they were ever served in this case.

I guess if Mr. Terschan disagrees with that, I would ask him to comment. But I just wanted the Court to be aware that it's not as if US Connect XL, Inc. is just here protecting some, you know, vague interest. They're actually here because they are the real party about which Mr. Dehler complains.

THE COURT: Mr. Terschan, you want to add anything to that?

MR. TERSCHAN: No, Your Honor. We did, in fact, write a letter that expressed saying we're the correct party, we would-- In fact, I offered to accept service through my office so that they wouldn't even have to go track these people down, and that was never done, you know, declined I would guess because it was never done.

And so, yes, we are the party who did it, but we've never been served, and therefore not involved in the case.

MR. DEHLER: If this is on the record, Your Honor, I would like the opportunity to respond briefly. This is Doug Dehler.

THE COURT: Just so it's clear, it's really not going to effect my decision about scheduling--

MR. DEHLER: I understand, but I just don't want there to be any misunderstanding on the record. You know, the fact that a company that is not in default is willing to come in and stand in the shoes of a company that is in default, and then require service of process all over again, thereby effectively getting out from underneath a default is what we've been concerned about all along.

I asked AT&T and Mr. Terschan many times for documentations for what they just told the Court, and it's been additionally told to me that it would be provided, but then in follow-up discussions, it never is.

So you know, I'm not sure why they're making this particular record, but we have strong reason to believe that US Connect LLC is the proper party given that they stipulated with the State of Wisconsin that they were engaged in cramming at about the time that the events occurred here, so.

That's all I have on that, Your Honor.

THE COURT: Okay. Well, looks like we have an issue that's flagged that we may have to take up at some point then.

Anything else for the record before we go off the record to do some scheduling?

(No response.)

THE COURT: Hearing none, then let's go off the record.

(Whereupon, the proceedings were concluded at 11:24 in the forenoon.)

* * * * *

STATE OF WISCONSIN)
)
MILWAUKEE COUNTY)

I, LINDA K. KASPRZAK, do hereby certify that I am an Official Court Reporter in the State of Wisconsin, Milwaukee County, that as such I reported the proceedings, later transcribed same, and that it is true and correct to the best of my knowledge and ability.

Dated this 18th day of December, 2007, at Milwaukee, Wisconsin.

LINDA K. KASPRZAK
OFFICIAL COURT REPORTER

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(12). I further certify that:

This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix with the court and served on all opposing parties.

Dated this 9th day of September, 2010

____

Douglas P. Dehler
State Bar No. 1000732

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THE RECORD ON APPEAL NO. 08AP1830 CONSISTS OF THE FOLLOWING:

1	- 55	Summons and complaint with attached affidavit of process server
2	- 2	Notice of appearance
3	- 7	Stipulation to extend time to respond to summons and complaint with attached transmittal letter
4	- 2	Signed order extending time to respond to summons and complaint dated November 6, 2006
5	- 3	Defendant AT&T's request for judicial substitution with attached transmittal letter
6	- 1	Signed reassignment and exchange dated November 13, 2006
7	- 1	Notice that the case has been transferred to Judge Hansher dated November 14, 2006
8	- 7	Stipulation to extend time to respond to summons and complaint with attached transmittal letter
9	- 2	Signed order extending time to respond to summons and complaint dated December 121, 2006
10	- 3	Defendant Americatel's notice of motion and motion to dismiss all claims with attached transmittal letter
11	- 52	Defendant Americatel's memorandum in support of motion to dismiss
12	- 5	Defendant ILD Telecommunications, Inc.'s notice of motion and motion to dismiss with attached certificate of service and transmittal letter
13	- 20	Defendant ILD Telecommunications, Inc.'s memorandum in support of its motion to dismiss
14	- 5	Defendant AT&T's (Wisconsin Bell) notice of motion and motion to dismiss complaint against Wisconsin Bell, Inc. with attached certificate of service and transmittal letter
15	- 26	Defendant Wisconsin Bell, Inc.'s brief in support of its motion to dismiss complaint
16	- 184	Table of Non-Wisconsin Authorities
17	- 4	Defendant Local Biz USA's motion to dismiss with attached transmittal letter
18	- 25	Defendant Local Biz USA's brief in support of motion to dismiss
19	- 10	Affidavit of Attorney David V. Meany
20	- 2	Letter dated January 2, 2007 to Judge Hansher from Attorney Heaton following up on prior discussion and confirming letter of December 18, 2006
21	- 6	Stipulation to extend time to respond to summons and complaint with attached transmittal letter
22	- 2	Signed order extending time to respond to defendants' motions to dismiss dated January 8, 2007
23	- 4	Plaintiffs MBS Certified Public Accountants and Thomas Schmitt's notice of motion and plaintiffs' motion for default judgment against defendant, U.S. Connect, LLC with attached transmittal letter
24	- 3	Affidavit of Attorney Douglas P. Dehler
25	- 8	Letter dated January 22, 2007 to Milwaukee County Circuit Court from Process Specialist Melanie McGrath returning attached documents served/received
26	- 1	Letter dated January 24, 2007 to Judge Hansher from Ann Gelhaus – Assistant to Attorney Linn a copy of the motion to dismiss and brief of Wisconsin Bell with supporting document filed December 18, 2006 – not attached

27	- 8	Stipulation and proposed order to dismiss AT&T, Inc. and to substitute Wisconsin Bell, Inc. d/b/a AT&T Wisconsin for defendant AT&T, Inc. with attached certificate of service and transmittal letter
28	- 2	Signed order dismissing defendant AT&T, Inc. and substituting Wisconsin Bell, Inc. d/b/a AT&T Wisconsin as a defendant in place of AT&T, Inc. dated January 30, 2007
29	- 44	Plaintiffs' consolidated brief opposing motions to dismiss filed by defendants, AT&T, Inc. ILD Telecommunications, Inc., Local Biz, USA, Inc. and Americatel Corporation with attached transmittal letter
30	- 402	Letter dated February 2, 2007 to Judge Hansher from Attorney Dehler transmitting attached Appendix of Non-Wisconsin Authorities
31	- 3	Defendant ILD Telecommunications' motion to admit counsel pro hac vice with attached transmittal letter
32	- 2	Affidavit of Attorney Brian R. Smigelski
33	- 2	Affidavit of Attorney Gregory F. Harley in support of motion to appear pro hac vice as counsel for defendant, ILD Telecommunications, Inc.
34	- 2	Signed order admitting counsel pro hac vice dated February 22, 2007
35	- 19	Defendant Americatel's reply brief in support of motion to dismiss with attached transmittal letter
36	- 10	Defendant ILD Telecommunications, Inc.'s reply brief in support of its motion to dismiss with attached transmittal letter
37	- 399	Defendant Wisconsin Bell, Inc.'s reply brief in support of motion to dismiss with attached certificate of service and transmittal letter
38	- 11	Defendant Local Biz USA's reply brief in support of motion to dismiss with attached transmittal letter
39	- 10	Plaintiffs' brief in support of motion for default judgment against defendant, U.S. Connect, LLC with attached transmittal letter
40	- 23	Affidavit of Attorney Douglas P. Dehler
41	- 5	Plaintiff's notice of motion and motion to admit counsel pro hac vice with attached transmittal letter
42	- 2	Signed order admitting counsel pro hac vice
43	- 2	Signed reassignment and exchange dated March 20, 2007
44	- 1	Notice that case has been transferred to Judge Lamelas dated March 20, 2007
45	- 3	Signed reassignment and exchange dated March 28, 2007
46	- 1	Notice that case has been transferred to Judge Franke dated March 28, 2007
47	- 2	Letter dated April 10, 2007 to Judge Franke from Attorney Terschan informing that his client U.S. Connect XL is not a party to the action
48	- 54	Letter dated April 13, 2007 to Milwaukee County Circuit Court from A. Coleman, SOP Support returning attached documents served/received
49	- 30	Letter dated April 26, 2007 to Judge Franke from Attorney responding to Attorney Terschan's letter dated April 10, 2007 with attachments
50	- 1	Letter dated May 17, 2007 to Judge Franke from Attorney Turek confirming scheduling of two events on the court's calendar
51	- 5	Defendant Americatel's supplemental authority in support of its motion to dismiss with attached transmittal letter

52	- 2	Letter dated June 20, 2007 to Judge Franke from Attorney Linn requesting judge's disqualification
53	- 2	Letter dated July 6, 2007 to all counsel of record from Judge Franke responding to the judicial disqualification with attached seal letter dated July 6, 2007
54	- 1	Signed reassignment and exchange dated July 9, 2007
55	- 1	Notice that case has been transferred to Judge McMahon dated July 9, 2007
56	- 3	Defendant Local Biz USA's request for substitution with attached transmittal letter
57	- 2	Signed reassignment and exchange dated August 2, 2007
58	- 1	Notice that case has been transferred to Judge Sankovitz dated August 2, 2007
59	- 2	Letter dated August 17, 2007 to Judge Sankovitz from Attorney Heaton confirming hearing on October 1, 2007
60	- 2	Signed order dated November 13, 2007
61	- 1	Letter dated November 14, 2007 to Judge Sankovitz from Attorney Terschan affirming that he does not represent US Connect LLC
62	- 13	Plaintiffs' motion for reconsideration of a portion of the court's decision and order dated November 13, 2007, and for a suggestion on the propriety on interlocutory review with attached transmittal letter
63	- 1	Signed order dated December 14, 2007
64	- 2	Wisconsin Court of Appeals transcript of judgment was ordered that the petition for leave to appeal is denied
65	- 1	Signed order that the (1) court will conduct another status conference on April 8, 2008 and (2) that the court will conduct the scheduling conference by telephone dated March 18, 2008
66	- 10	Stipulation and order for dismissal of equitable claims with prejudice with attached signed order dated April 25, 2008 and transmittal letter
67	- 2	Letter dated June 17, 2008 to Judge Sankovitz from Attorney Dehler stating that he is attempting to coordinate a return phone with Wisconsin Bell's counsel
68	- 4	Stipulation for dismissal of certain claims with prejudice with attached transmittal letter
69	- 2	Signed order dismissing certain claims with prejudice dated June 19, 2008
70	- 4	Signed order for entry of default against defendant, U.S. Connect, LLC and for stay of proceedings pending appeal dated July 29, 2008 with attached transmittal letter
71	- 1	Gold envelope containing unidentified/unattached documents
72	- 4	Notice of appeal
73	- 3	Notice of cross-appeal
74	- 12	Americatel Corporation's notice of cross-appeal
75	- 4	Defendant-respondent-cross appellant local Biz USA's notice of cross-appeal
76	- 4	Notice of appeal
77	- 4	Statement on transcript
78	- 2	Statement on transcript
79	- 3	Americatel Corporation's statement on transcript for cross-appeal
80	- 57	Transcript of reporter's notes dated November 12, 2007
81	- 15	Transcript of reporter's notes dated December 13, 2007
82	- 4	Certificate of the clerk

APPELLANTS' BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the decision and opinion of the court of appeals;

(3) the findings or opinion of the circuit court;

(4) a copy of the unpublished opinion cited under Wis. Stat § 809.23(30)(a) or (b);

(5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of April, 2011

____

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MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC, and THOMAS H. SCHMITT, CPA d/b/a METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

Appeal No. 2008AP001830
(Cir. Ct. Case. No. 06-CV-008092)

WISCONSIN BELL, INC. d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, LOCAL BIZ USA, INC., and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT WISCONSIN BELL, INC. D/B/A AT&T WISCONSIN

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OTHER AUTHORITIES

This case is on review from the decision of the Court of Appeals, District I, affirming Milwaukee County Circuit Court Judge Richard J. Sankovitz's order dismissing the complaint for failing to state a claim upon which relief may be granted. Defendant-Respondent Wisconsin Bell, Inc. d/b/a AT&T Wisconsin ("Wisconsin Bell") files this brief in support of its position that this Court should affirm Judge Sankovitz's order of dismissal, at least with respect to Wisconsin Bell, which, in contrast to the other named defendants, had a separate contractual relationship with plaintiffs and distinct legal defenses to their claims.

INTRODUCTION

Plaintiffs-Appellants-Cross Respondents-Petitioners, MBS Certified Public Accountants, LLC and Thomas H. Schmitt, CPA d/b/a Metropolitan Business Services (collectively, "Accountants") are accounting businesses. Wisconsin Bell is their local telephone exchange carrier. Wisconsin Bell provided telecommunication services to Accountants. On a monthly basis, Wisconsin Bell sent Accountants itemized statements of account. This is a typical commercial practice. The statement displayed in detail the status of the account, the previous balance, and all charges, credits, and adjustments for the monthly period. Both Judge Sankovitz and the Court of Appeals found that Wisconsin Bell's monthly statements were clear and unambiguous. This finding is not on review.

As a convenience to customers, Wisconsin Bell's statements included charges of independent businesses that provided their own separate services. These independent businesses have access to the telephone lines and are known as ISPs (Independent Service Providers). If Wisconsin Bell did not include ISPs' charges on its monthly statements, the customer would have received multiple statements—from the various ISPs—and would have had to write and mail multiple checks to settle their multiple accounts.

Fundamentally, Accountants allege that they did not authorize certain charges of the ISPs, and that those charges violate three statutes. Accountants seek to pursue a class action. Significantly, Accountants do not allege that Wisconsin Bell's own charges were unauthorized. Accountants also concede that they were aware of the ISPs' charges, that they paid the charges without protest for fourteen months, and that they knew how to correct an erroneous charges by calling the toll free number for billing inquiries prominently displayed on the monthly statements.

In light of those concessions and the clear presentation of the charges on Wisconsin Bell's statements, Judge Sankovitz dismissed Accountants' claims pursuant to *Putnam v. Time Warner Cable of S.E. Wis., Ltd. P'ship*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626 (2002), and the voluntary payment doctrine. The Court of Appeals affirmed. *MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc.*, No. 2008AP1830 (Wis. Ct. App. Aug. 10, 2010) (hereinafter "Decision").

Putnam is squarely on point and controls here. It involved a monthly telecommunications statement, questioned charges, a statutory claim, and the application of the voluntary payment doctrine. *Putnam* makes sense and is consistent with common commercial expectations and long-standing Wisconsin law regarding statements of account. Try as they might, Accountants have not and cannot distinguish *Putnam*.

Accountants assert that in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762 and *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544, this Court silently overturned *Putnam* and implicitly held that common law defenses no longer apply to statutory claims. But *Stuart* and *Novell* did not make such a radical change in the law. Indeed, it is difficult to see how *Stuart* or *Novell* have any application here, especially in the face of *Putnam*. Unlike *Putnam*, neither *Stuart* nor *Novell* involved telecommunication services, statements of account, or the voluntary payment doctrine. *Stuart* involved the Home Improvement Practices Act and the economic loss doctrine. *Novell* addressed whether the

Court should imply new elements the legislature did not include in drafting the applicable statute.

Accountants argue policy reasons dictate that the voluntary payment doctrine should not be a defense to the statutory claims. In *Putnam*, however, this Court foreclosed this very argument when it applied the voluntary payment doctrine to a claim under section 100.18. *See Putnam*, 255 Wis. 2d 447, ¶¶ 2–3, ¶ 4 n.2. Indeed, Justice Bablitch in his dissent argued, as Accountants argue here, that requiring a customer of telecommunication services to read his or her itemized statement of account and to challenge any allegedly improper charge before making payment was unreasonable. But *Putnam* rejected that argument, consistent with common commercial and legal rules regarding accounts stated.

Accountants argue that Wisconsin Bell must somehow independently verify whether the ISPs' charges were authorized. The language of the statutes at issue does not compel this. But even if it were

Wisconsin Bell's burden to undertake its own independent verification of the ISPs' charges, such verification would ultimately require communication with the customer about each charge. And this is precisely what Wisconsin Bell's monthly itemized statements accomplish. To require separate monthly "verification only" statements is clearly not required by the statutes and would be confusing to customers, expensive, redundant, and unreasonable.

Putnam rests on basic and well-established rules of statutory construction: "[t]o accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833; *see also Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 74, 307 N.W.2d 256 (1981) (legislature must express intent to change common law "beyond any reasonable doubt."). Here, there is no "clear, unambiguous, and preemptory" language in the statutes at issue to demonstrate "beyond any reasonable doubt" that the legislature intended to abrogate the voluntary payment doctrine.

Respect for precedent also precludes the reversal of *Putnam* and *Fuchsgruber* and the underlying deep-rooted principles of commercial law and policy reaffirmed therein. *See State v. Ferron*, 219 Wis. 2d 481, 504, 579 N.W.2d 654 (1998) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (respect for precedent "promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.")).

STATEMENT OF ISSUES PRESENTED

Accountants properly recite the three issues this Court has accepted for review.

All the issues on review are resolved by the application of *Putnam* and *Fuchsgruber*, which Judge Sankovitz and the Court of Appeals followed. On review, the Court should also note that review of the itemized statements of account at issue demonstrates that Accountants have not and cannot show that Wisconsin Bell engaged in any false, deceptive, or misleading conduct.

With respect to the second issue for review ("Must individuals pay illegal charges or fees 'under protest' to preserve the right to bring a statutory claim for damages under Wis. Stat. §§ 100.18, 100.207, and WOCCA, even though the legislature did not include a protest requirement in the statutes?"), Judge Sankovitz did not directly decide this issue because Accountants did not present it to him. "The general rule is that a party waives a claim that is neither pleaded nor argued to the trial court, and such a claim will not be considered on appeal." *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶ 16, 284 Wis. 2d 264, 700 N.W.2d (quotations omitted).

Finally, in reviewing the certified issues, it is important for this Court to note that Wisconsin Bell raised additional defenses to Accountants' claims beyond the voluntary payment doctrine. Although

Judge Sankovitz's decision addressed at least one of these additional defenses, the Court of Appeals did not. Irrespective of this Court's ultimate decision on the voluntary payment doctrine, dismissal of Accountants' damages claims should be affirmed for the independent reasons discussed in section I. *State v. Alles,* 106 Wis.2d 368, 391–92, 316 N.W.2d 378 (1982) (holding judgment will not be reversed where record demonstrates trial court decision was correct, although for a wrong reason).

<u>**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**</u>

While this review involves the application of well-settled principles of Wisconsin law to a familiar set of facts (*see Putnam*, 255 Wis. 2d 447, ¶¶ 4–6, 20), Wisconsin Bell nevertheless welcomes oral argument and a published decision.

STATEMENT OF THE CASE

I. ALLEGATIONS OF THE COMPLAINT

Accountants chose Wisconsin Bell as their local telephone exchange carrier. (*See* A. 15–16, 21–23, 75–76; R.1 at 2–4; R.15 at 8–9; R.81 at 5–6.)[1] This created a contractual relationship whereby Wisconsin Bell agreed to provide telephone services to Accountants. (*See* A. 15–16; R.15 at 8–9.) On a monthly basis, Wisconsin Bell would then render to Accountants an itemized statement of their account, which clearly displayed their previous balance, any adjustments, credits, and new charges. (*See id*.)

Other businesses also provided telecommunication services to Accountants using the telephone lines, such as internet and web hosting services, nationwide directory assistance, and international calling plans. (*See* A. 39–40; R.1 at 20–21.) These ISPs independently enroll customers and

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[1] "A. ___" refers to the page number of Appendix to Accountants' Brief. "R.__ at __" refers to the document number and page number of the record on appeal.

generate their own stand-alone charges. (*See* A.39–40, 34–35; R.1 at 15–16, 20–21.) Wisconsin Bell includes the ISPs' charges on its monthly statements. (*E.g.*, A. 15; R.15 at 8.) Wisconsin Bell plainly itemized each ISP's charges in a separate section of Accountants' monthly statement, and provided a number to call with billing questions. (*Id.*). The name of the ISP appeared with the amount of the charge. (*Id.*) The statement provided in bold: "**Questions? Call**." (*Id.*) It also listed below the name of each ISP a toll-free number to call. (*Id.*)

The statement also itemized each ISP's charges in detail on a wholly separate page. (*See, e.g.*, A. 16; R.15 at 9). The name of the ISP appeared at the top of the page in capital and bold letters. (*See, e.g.*, *id.*) The itemization for each ISP included the following disclaimer under the heading "Important Information":

> This portion of your bill is provided as a service of Ameritech [Wisconsin Bell's former business name] to the above company. Please review all charges carefully – they may include those of a service provider not shown on a previous bill. . . . If you have any questions about any of the charges appearing on this page, please call the number shown above.

(*See, e.g.*, *id*.) The number to call with questions or objections was again listed in two different places on the separate page containing the itemization of ISP charges. (*See, e.g.*, *id*.)

The purpose of the unambiguous itemized statement of account and the inclusion of the directions for customer inquiries was to put Accountants on notice of Wisconsin Bell's and the ISPs' respective charges and ensure that, if there was any problem, Accountants could address the problem by asking questions or objecting to a charge. (*See* A. 16; R.15 at 9.) The record shows that when Accountants advised that an ISP's charge was erroneous, they got a credit. (*See* A. 117; R.1 at 46–47.)[2] Accountants understood the process for correcting any mistake on their monthly itemized statement of account. (*Id*.)

[2] For example, one of Accountants' billing statements includes a credit of $29.72 for charges from U.S. Connect that appeared on previous bills. (A. 117; R.80 at 46–47). In order to obtain such credits, Accountants seemingly contacted AT&T to dispute the charges. (*See* A. 27; R.1 at 8; R.80 at 46–47.)

ILD, the only other remaining defendant, is not affiliated with Wisconsin Bell. ILD is not an ISP. ILD is a clearinghouse. n(A. 23; R.1 at 4.) ILD compiled and sorted certain ISP charges and then electronically forwarded them to Wisconsin Bell in a consolidated format so that the ISP charges could be printed on separate and distinct pages within Accountants' monthly itemized statement of account. (*See id*.)

Accountants allege they did not authorize certain charges that the ISPs generated and sent to Wisconsin Bell for printing on the monthly statements. (*See* A. 34–35; R.1 at 15–16.) Accountants also allege that the ISPs included the unauthorized charges with the expectation that Accountants would pay them. (*See id*.)[3]

Significantly, Accountants do not allege that Wisconsin Bell's own charges were unauthorized or inappropriate. (*See generally* A.20–46; R.1 at 1–27.) Accountants admit, as they must, that Wisconsin Bell's

[3]Accountants settled their claims against Americatel Corporation. (R.66 at 1-3.) U.S. Connect, LLC never appeared and a default judgment was entered against it. (R.70 at 1-2.) Accountants also voluntarily dismissed their claims against Local Biz USA, Inc., because it declared bankruptcy. (R.66 at 1-3.)

statements of account accurately and truly set forth what the ISPs were charging Accountants. (*See* A. 39–40; R.1 at 20–21.) Accountants also admit that they were aware of the ISPs' charges and that they paid the charges for fourteen months without protest. (*See* A. 34–35; R.1 at 15–16.) Accountants do not allege that they paid as a result of fraud, duress, or mistake of fact. (*See generally* A.20–46; R.1 at 1–27.)

II. PROCEDURAL HISTORY

In granting Wisconsin Bell's motion to dismiss, Judge Sankovitz followed *Putnam*, and ruled that the voluntary payment doctrine barred Accountants' claims for damages because Accountants voluntarily paid their monthly statements with knowledge of the ISPs' allegedly unauthorized charges. (A. 89–90; R.80 at 19–20) ("If the plaintiffs voluntarily paid the charges, then, under the voluntary payment doctrine, they cannot recover in damages what they had paid."). Judge Sankovitz held that the voluntary payment doctrine's fraud exception did not apply because Wisconsin Bell's statements of account were clear, and plainly itemized the ISPs' charges. (A. 99; R.80 at 29.)

Judge Sankovitz and the Court of Appeals both reviewed and carefully analyzed Accountants' statements of account to determine whether a reasonable customer was likely to be deceived by them (*see* A. 95–99; R.80 at 25–29; Decision, ¶ 20), since, under prevailing case law, neither court was required to accept Accountants' conclusory (and unsupported) assertions that the statements of account were misleading.[4] *See Meyer v. Laser Vision Inst., LLC,* 2006

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[4] Plaintiffs concede that Judge Sankovitz properly considered the itemized telephone bills in analyzing the motions to dismiss. *See* A.76-79, 97; R.80 at 6-9, 27.) Wisconsin Statutes section 802.06(2), governing motions to dismiss, is similar to Federal Rule of Civil Procedure 12(b)(6). *Morgan v. Penn. Gen. Ins. Co.,* 87 Wis. 2d 723, 731–32, 275 N.W.2d 660 (1979). "[W]here a Wisconsin Rule of Civil Procedure is based on a Federal Rule of Civil Procedure, decisions of the federal courts, to the extent they show a pattern of construction, are considered persuasive authority." *Neylan v. Vorwald*, 124 Wis. 2d 85, 99, 368 N.W.2d 648 (1985). "A plaintiff is under no obligation to attach to her complaint documents upon which her action is based, but a defendant may introduce certain pertinent documents if the plaintiff failed to do so." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Id.* On this point, it would benefit the interests of justice and judicial economy if this Court would make this principle clear in a published decision.

WI App 70, ¶ 14, 290 Wis. 2d 764, 714 N.W.2d 223 (whether a written communication is misleading need only be sent to the trier of fact where there are facts alleged or reasonable inferences that can be drawn from those facts that could form the basis for a claim that the communication is misleading).

Judge Sankovitz framed the issue: "if you read [the statements of account], can you understand whether or not you authorized those charges?" (A. 98; R.80 at 28.) He concluded that "[g]iven the rather specific and explicit nature of the charges, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized those services." (*Id.*) "To the contrary the charges were stated with sufficient particularity that a reasonable customer would be startled to find such a charge on the bill." (A. 9; R.80 at 29.) "At the very least, I think a reasonable customer would have been put on notice that something was fishy, and it would be unreasonable to pay the bill on the assumption that such services had been authorized."[5] (*Id.*) The Court of Appeals agreed. (Decision, ¶ 20.) This finding was not certified (and is law of the case).

Judge Sankovitz also rejected Accountants' argument that: "a common law doctrine like the voluntary payment doctrine must yield when the Legislature outlaws a particular practice, and conduct that violates the statute is not permitted regardless of whether customers voluntarily paid," and "that the doctrine is trumped by the statute." (A. 89; R.80 at 19.) Significantly, Accountants did not argue that the voluntary payment doctrine and *Putnam* created an additional so-called "protest requirement" in the statutes at issue. (*See generally* A. 71–126; R.80 at 1–56.). Relying on this Court's decision in *Fuchsgruber*, that a statute does not abrogate a rule of Wisconsin common law unless the legislature expresses that abrogation so

[5] By contrast, with respect to a few charges that U.S. Connect, who had yet to appear in the case, had issued for "Monthly Svcs," Judge Sankovitz concluded that "even a reasonably attentive person looking at this might not understand exactly whether this was authorized or not." (A. 102; R.80 at 32.)

clearly as to leave no doubt as to its intent, Judge Sankovitz held that the lack of any reference in section 100.207 to the voluntary payment doctrine, in particular, or payments and common law defenses in general, compels the conclusion that the Legislature did not intend for section 100.207 to override Wisconsin's common law voluntary payment doctrine. (A. 91; R.80 at 21.); *Fuchsgruber*, 244 Wis. 2d 758, ¶ 25. Judge Sankovitz further explained that "I'm also influenced by the fact that the *Putnam* court upheld the application of the common law voluntary payment doctrine against not only common law damage claims, but also a statutory claim . . . under the Trade Practices Act [Wisconsin Statutes section 100.18]." (A. 93–94; R.80 at 23–24.)

As an alternative basis for dismissal, Judge Sankovitz concluded that the complaint failed to allege the receipt of any untrue, deceptive, or misleading advertising and sales promotions, as required by section 100.18. (A. 103; R.80 at 33.) Judge Sankovitz explained that "[t]he telephone bills themselves do not constitute advertisements or sales promotions, it's just a demand for payment, and therefore, I don't believe they fit within 100.18." (*Id*.)

Following *Putnam*'s and *Fuchsgruber*'s well-established rules of statutory construction, the Court of Appeals affirmed dismissal.[6] (Decision, ¶ 21.)

<u>LEGAL STANDARDS AND STANDARD OF REVIEW</u>

The Court reviews *de novo* a motion to dismiss. *Peterson v. Volkswagen of America*, 2005 WI 61, ¶ 14, 281 Wis. 2d 39, 697 N.W.2d 61. However, this Court follows its own precedent. *Rose Manor Realty Co. v. City of Milwaukee,* 272 Wis. 339, 346, 75 N.W.2d 274 (1956). Following precedent "promotes evenhanded,

[6] With respect to Accountants' claims under Wisconsin Statutes Section 100.20(5) for alleged violations of Wisconsin Administrative Code Sections ATCP 123.06(1) and 123.02(1) and (2), Judge Sankovitz accepted Accountants' concession that the court should dismiss these claims, (A. 37–38, 103–104; R.1 at 18–19; R.80 at 33–34), presumably because Accountants failed to meet the regulatory definition of "consumer." Accountants also dismissed their equitable claims, and all claims that arise from or otherwise relate to any charges generated, issued, or prepared by U.S. Connect, LLC, 'U.S. Connect,' and/or U.S. Connect XL, Inc. and titled 'MONTHLY SVCS' or 'MONTHLY SERVICES.'" (R.68). Judge Sankovitz entered an order to this effect. (R.69).

predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Ferron*, 219 Wis. 2d at 504. Particularly relevant here is the well-established rule that the legislative intent to change the common law must be expressed "beyond any reasonable doubt." *Kranzush,* 103 Wis. 2d at 74.

ARGUMENT

I. ACCOUNTANTS DO NOT STATE A CLAIM AGAINST WISCONSIN BELL UNDER THE THREE STATUTES AT ISSUE.

The gravamen of Accountants' complaint against Wisconsin Bell involves the itemized statements of account that Wisconsin Bell sent to Accountants every month. The lower courts found these itemized statements of account to be clear. Wisconsin Bell truthfully and accurately set forth its own charges which are not alleged to have been inaccurate. And, the lower courts found that Wisconsin Bell truthfully and separately presented the charges the ISPs had generated and issued to Accountants.[7]

Given the clarity of Wisconsin Bell's itemized statements of account, Accountants have not and cannot show that Wisconsin Bell (as distinct from the alleged conduct of any other defendant) engaged in any false, deceptive or misleading conduct. Consequently, Accountants cannot state a claim against Wisconsin Bell under Wisconsin Statutes sections 100.207, 100.18, or WOCCA.

A. WISCONSIN BELL HAS NOT ENGAGED IN FALSE, DECEPTIVE, OR MISLEADING CONDUCT.

1. WISCONSIN BELL IS NOT LIABLE UNDER SECTION 100.207 FOR THE INDEPENDENT SERVICE PROVIDERS' ALLEGEDLY UNAUTHORIZED CHARGES.

Accountants allege that Wisconsin Bell violated 100.207(2) and 100.207(3)(a). (A.34–37; R.1 at 15–18.) Section 100.207 provides in pertinent part:

> (1) Definition. In this section, "telecommunications service" has the meaning given in s. 196.01 (9m).

[7] This finding is not on review here.

> (2) Advertising and sales representations. A person may not make in any manner any statement or representation with regard to the provision of telecommunications service, including the rates, terms or conditions for telecommunications service, which is false, misleading or deceptive, or which omits to state material information with respect to the provision of telecommunications service that is necessary to make the statement not false, misleading or deceptive.
>
> (3) Sales practices.
>
> (a) A person may not engage in negative option billing or negative enrollment of telecommunications services, including unbundled telecommunications services. A person may not bill a customer for any telecommunications service that the customer did not affirmatively order unless that service is required to be provided by law, the federal communications commission or the public service commission. A customer's failure to refuse a person's proposal to provide a telecommunications service is not an affirmative request for that telecommunications service.
>
> (b) A person may not charge a customer for telecommunications service provided after the customer has canceled that telecommunications service.
>
> (c) A person shall provide a customer who has ordered a telecommunications service through an oral solicitation with independent confirmation of the order within a reasonable time.

The plain language of subsection (2) requires Accountants to allege that Wisconsin Bell made a false, misleading, or deceptive statement. Accountants have not and cannot allege that Wisconsin Bell made any such false or misleading statement. (*See generally* A.20–46; R.1 at 1–27.). As lower courts found, Wisconsin Bell's statements of account accurately, clearly, and truly itemized the charges that Wisconsin Bell and the ISPs, respectively, were actually charging Accountants. (*See* A. 99; R.80 at 29; Decision, ¶ 20.) This finding is not on review here. Without a false, deceptive, or misleading statement, Accountants' claim against Wisconsin Bell under subsection 2 fails as a matter of law and was therefore properly dismissed.[8]

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[8] There is yet another basis on which Accountants' claims under subsection 100.207(2) fails. The title to Wisconsin Statute 100.207(2) is "Advertising and Sales Representations." Wisconsin Bell's telephone statements of account fall well outside the scope of this section because they are not public "advertisements" or "sales representations." An "advertisement" is a "*public* notice or announcement, usually offering goods or services *for sale*." New Webster's Dictionary and Thesaurus of the English Language 12 (1993) (emphases added). Wisconsin Bell sent the statements only to Accountants, not to *the public*. As a matter of law, Accountants' statements were treated as private and confidential and were not publicly disclosed. *See, e.g.*, 47 U.S.C. § 222(c).

The purpose of an "advertisement" is to entice someone to buy a product or service in the future. In contrast, Wisconsin Bell's statements of account merely recapped and sought payment for Accountants' prior transactions and usage, a purpose distinct from that of an advertisement. *Cf. Kailin v. Armstrong*, 2002 WI App 70, ¶ 44, 252 Wis. 2d 676, 643 N.W.2d 132 ("Statements made

Accountants claim Wisconsin Bell violated the second sentence of 100.207(3)(a). This sentence creates liability for a person who seeks to be paid for services not ordered by the customer.[9] *See* Wis. Stat. § 100.207(3). Here, it was the ISPs who provided and charged for the allegedly unauthorized services. (*See* A. 39–40; R.1 at 20–21.) Wisconsin Bell should not be held liable under 100.207(3)(a) because Wisconsin Bell did not enroll Accountants as the ISPs' customers, did not provide the services that allegedly were unauthorized, and did not generate the charges at issue. (*See id*.) Wisconsin Bell is not the billing clearinghouse for the

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by the seller after a person has made a purchase or entered into a contract to purchase logically do not cause the person to make the purchase or enter into the contract."). In the end, Accountants' statements are not "advertisements" within the scope of section 100.207(2).

For the same reasons, Accountants' false advertising claim under section 100.18 fails. As Judge Sankovitz correctly held, "the telephone bills do not constitute advertisements or sales promotions, it's just a demand for payment." (A. 103; R. 80 at 33); *see also State v. Automatic Merchandisers of Am., Inc.*, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974) (100.18 applies to misrepresentations "made to promote ***the sale of a product***") (emphasis added).

[9] Wisconsin Statutes section 100.207(3) simply reflects that the equitable claim of rescission is available when there has been no meeting of the minds. *See* 1 Williston on Contracts § 4.1 (2007).

ISPs. (*See* A. 23–26, 29–30, 34–35, 39–43; R.1 at 4–7, 10–11, 15–16, 20–24). Rather, each ISP enrolls its own customers, secures its own authorizations, and determines the charges to assess to its customers. (*See id*.) With respect to the ISP charges at issue, Wisconsin Bell's role was this: Wisconsin Bell merely received the itemization of credits and charges from the ISPs and clearly presented those credits and charges on its monthly statements of account, so that customers could receive just one, rather than a multitude of statements for telecommunication services. (*See id*.)

In providing this service, Wisconsin Bell relies on the ISPs to be accurate. If an ISP's charge was allegedly unauthorized, then that charge arguably would violate 100.207(3). Accountants would have a claim under 100.207(3) against the ISP, but not against Wisconsin Bell merely for truthfully telling Accountants on its statement of account exactly what the ISP was charging. For example, U.S. Connect electronically forwarded to Wisconsin Bell a charge of $3.92 generated on June 1, 2002, for "Nationwide Discount Directory Assistance." (*See* R.15 at 8.) Wisconsin Bell, in turn, presented this charge on the separate page of its monthly statement devoted to U.S. Connect. (*See* R.15 at 9.) Nothing about Wisconsin Bell's representation that U.S. Connect was charging Accountants $3.92 for "Nationwide Discount Directory Assistance" services used on June 1, 2002, (*see id*.), was "false, deceptive, or misleading" as this truthfully represented exactly what U.S. Connect was actually charging Accountants. *See, e.g., Zekman v. Direct Amer. Marketers, Inc.,* 695 N.E.2d 853, 855, 861-62 (1998) (consumer fraud claim dismissed because telephone bills clearly listed charges). If something was wrong with U.S. Connect's charge, Accountants' claim is against U.S. Connect, not Wisconsin Bell.

Both the language of the statute and common sense support the conclusion that a claim under 100.207 does not lie against Wisconsin Bell under the circumstances alleged in the complaint. The reference to billing for unordered services appears in the section of the statute that establishes standards for "Sales Practices." Accountants do not and cannot allege that Wisconsin Bell engaged in any "sales practice" with respect to the charges at issue, as the services were sold by the ISPs. Under the statute, the party *making the sale* must obtain customer authorization. The statute accords with common sense, as the party *making the sale* and providing the service is best situated (indeed, the only party situated) to obtain the necessary authorization or receive the necessary order for the service being sold. The alternative, where multiple parties must each independently undertake to determine if a customer has ordered a service from a different telecommunication service provider before a statement of account is issued, is simply not required by the language of the statute. But frankly, even if it were Wisconsin Bell's statutory burden to undertake its own independent verification of the propriety of ISP charges, this would ultimately require written communication with the customer with respect to each ISP charge. And that is precisely what a statement of account accomplishes. To require a second monthly "verification statement" in addition to Wisconsin Bell's clear statement of account would be confusing to customers, expensive, redundant, and unreasonable. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (explaining that statutes must be interpreted reasonably, to avoid absurd or unreasonable results). If the Legislature wanted a second "verification only" statement, it would be in the statute. *Lang v. Lang*, 161 Wis. 2d 210, 227, 467 N.W.2d 772 (1991) ("We will not read extra words into a statute to achieve a specific result.").

The common commercial practice of issuing statements of account to customers is exemplified by a credit card company's statement to an account holder. Credit card companies include merchants' charges on the customers' credit card statements. If a credit card statement clearly presents an unauthorized charge from a retailer, *e.g.,* a charge for two shirts when the customer purchased just one, reflecting that charge on the customer's credit card statement of account does not mean that the credit card company has engaged in "false, deceptive, or misleading" billing. On the contrary, by plainly presenting the retailer's charges, even if erroneous or unauthorized, the credit card statement allows the account holder to identify and correct the erroneous charge. Courts have routinely rejected attempts to hold intermediaries liable for erroneous charges of a disclosed provider of goods or services. *See, e.g., Bill Buck Chevrolet, Inc. v. GTE Fla., Inc.,* 54 F. Supp. 2d 1127, 1133 (M.D. Fla. 1999) (noting that "[i]f courts were to adopt the proposition Plaintiff urges . . . credit card companies could be sued . . . for billing customers for purchases that an unauthorized user made on the card."), *aff'd*, 216 F.3d 1092 (11th Cir. 2000).

In sum, Wisconsin Bell's activity—truthfully telling Accountants what the ISPs' charges were—is not conduct captured by the plain terms of subsections (2) or (3) of 100.207. The complaint was properly dismissed as to those allegations.

2. WISCONSIN BELL IS NOT LIABLE UNDER SECTION 100.18 FOR THE ISPS' ALLEGEDLY UNAUTHORIZED CHARGES.

Wisconsin Statute section 100.18, titled "Fraudulent representations," prohibits a person from distributing to the public any "advertisement, announcement, statement or representation [which] contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."[10] To

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[10] In full, Wisconsin Statute § 100.18 states: (1) No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease

properly allege a claim against Wisconsin Bell under section 100.18, Accountants must allege and prove three elements: (1) Wisconsin Bell made a representation to the public with the intent to induce an obligation; (2) that the representation was untrue, deceptive or misleading; and (3) that the representation caused the plaintiff a pecuniary loss. *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792 (citation omitted).

Wisconsin Bell cannot be liable under section 100.18 for the same reason that it is not liable under section 100.207(2): Accountants have not and cannot allege that Wisconsin Bell made any representation to them that was untrue, deceptive, or misleading. (*See generally* A.20–46; R.1 at 1–27.) Wisconsin Bell's itemized statements of account accurately and

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of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

truthfully itemized the charges that the other providers were actually charging Accountants.[11]

3. Accountants Do Not State a Claim Against Wisconsin Bell Under WOCCA.

WOCCA prohibits "racketeering activity," which requires the commission of predicate felonies. Wis. Stat. § 946.82. Here, Accountants boldly assert with no support or particularity that Wisconsin Bell's billing statements—which accurately reflected the amounts that the ISPs charged Accountants—constitute ***felony theft***. (A. 40; R.1 at 21.) *See also* Wis. Stat. § 943.20(3)(a). Yet again, as the courts below found, Wisconsin Bell's statements of account are clear; Wisconsin Bell has not

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[11] Accountants also lack standing to sue under section 100.18 because they are not members of "the public." *See Kailin*, 252 Wis. 2d 676, ¶¶ 43–44. In *Kailin*, the Court identified a contractual relationship as a "particular relationship" and held that because the appellants were parties to that "particular relationship" with the defendant, they were not members of "the public" for purposes of standing under section 100.18. *See id.*; *Automatic Merchandisers.,* 64 Wis. 2d at 664.- Accountants admit that they have a contractual relationship with Wisconsin Bell. (*See* A. 15–16; R.15 at 8–9; A. 114; R.80 at 44.). Under *Kailin*, Accountants do not constitute "the public" and therefore lack standing to bring a claim under section 100.18. *See also Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶ 14, 279 Wis. 2d 335, 693 N.W.2d 756.

made any false statements, let alone has Wisconsin Bell "stolen" money from Accountants.

Based on the foregoing, the lower courts dismissed Accountants' claims under sections 100.18, 100.207, and WOCCA, because the claims fail as a matter of law.

II. *PUTNAM* REQUIRED DISMISSAL OF ACCOUNTANTS' CLAIMS.

Accountants argue that Judge Sankovitz erred in adhering to this Court's decision in *Putnam* when he dismissed their claims under 100.18, 100.207, and WOCCA. To the contrary, *Putnam* is recent authority, directly on point both legally and factually, has not been modified by this Court through more recent decisions, and makes sense when applied to this common commercial practice.

A. Wisconsin Bell Provided Accountants a "Statement of Account."

As a backdrop for the discussion of the voluntary payment doctrine, it is important to consider the commercial relationship between Wisconsin Bell and

Accountants, as well as the long-settled law regarding statements of account and claims related to such statements.

Accountants and Wisconsin Bell established a typical commercial relationship where Wisconsin Bell provided to Accountants telephone services "on account." On a monthly basis, Wisconsin Bell sent to Accountants a statement of account detailing the prior balance, credits, charges and adjustments, and the new account balance, basically setting forth the amount that Accountants owed for the month's telecommunication services. (*See* A. 15–16; R.15 at 8–9.) The statement of account included a toll-free number to assist Accountants in making inquiry or objection to any amounts reflected as owed. (*Id*.) When Accountants received their statement of account, they had two choices: they could either remit full payment or they could object to the amount reflected on the statement. (*See id*.) In either instance, though, it was incumbent on Accountants to read the statement of account.

If Accountants failed to make their monthly payment, Wisconsin Bell could bring an account-stated claim to recover the sum reflected as owed on the account. *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 499–500, 288 N.W.2d 829 (1980). In the context of an account stated claim, Accountants' failure to object to the amount within a reasonable time would have been evidence of "acquiescence in or assent to the correctness of the account." *Id*. at 503. Indeed, the gravamen of an account stated claim is the failure of the debtor to make an objection to the account within a reasonable time. *Stan's Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 568, 538 N.W.2d 849 (Ct. App. 1995). Put differently, under long-established Wisconsin commercial law, an account debtor—here Accountants—waives its ability to later challenge a statement of account if it does not timely object. *See Estate of Vicen v. Tamer*, 1 Wis. 2d 193, 199, 83 N.W.2d 664 (1957).

B. THIS COURT'S WELL-REASONED DECISION IN *PUTNAM* COMPELS THAT THE TRIAL COURT AND APPELLATE COURT BE AFFIRMED.

The voluntary payment doctrine is simply another component of the long-established body of law regulating the commercial practice of stating accounts, in the context of the provision of goods or services. The doctrine provides that money paid voluntarily on an unambiguous statement of account, with knowledge of the material facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of law. *Putnam,* 255 Wis. 2d 447, ¶ 13 (citing *Frederick v. Douglas County*, 96 Wis. 411, 423, 71 N.W. 798 (1897)).

In *Putnam*, this Court affirmed, in part, the dismissal of a customer class action pursuant to the voluntary payment doctrine. *Putnam*, 255 Wis. 2d 447, ¶¶ 1, 3. Putnam alleged that Time Warner had unlawfully charged customers a late fee for failure to timely pay monthly cable bills. *Id*. ¶¶ 4, 5. Putnam alleged that the late fee constituted unlawful liquidated damages. *Id*. As here, Putnam sought damages under a statute (section 100.18) that itself did not contain a protest requirement. *Id*. ¶ 4n.2. This Court found that Time Warner had plainly set forth Putnam's late fee on the itemized cable account statement, and as such, Putnam was on notice of the charge and had the opportunity to object. *Id*.

Because Putnam did not object to the late fee before or when making payment, this Court held that the voluntary payment doctrine operated as a defense to recovery of the late fees already paid and any damages sought under section 100.18. *Id*. ¶¶ 7–8, 53. This Court explained that "[t]he voluntary payment doctrine places upon a party who wishes to challenge the validity or legality of a bill for payment the obligation to make the challenge either before voluntarily making payment, or at the time of voluntarily making payment." *Id*. ¶ 13 (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 108 (2001)).

This Court identified two primary public policy foundations underlying the voluntary payment doctrine. *Id.* ¶ 16. The first is economic efficiency. The doctrine allows businesses that regularly issue statements of account and receive customer payments, to rely upon these accounting tools and the funds received and use them unfettered on future activities. *Id.*

Second, the doctrine operates as an important means of promptly resolving disputes short of litigation, by imposing a simple, common sense requirement: a party receiving an unambiguous statement of account demanding payment of itemized charges must read the statement and notify the payee of any concerns (for example, that a given charge was unauthorized) before or when remitting payment. *Id.* Upon receiving such notification, a payee who has included an incorrect charge can rectify the situation. *Id.* Courts should not be overburdened with claims litigants simply could have resolved without judicial involvement. *See id.* Indeed, the very purpose of an itemized statement of account is to allow the account holder to inspect and examine the charges contained therein, and to object to any improper or unauthorized charges.

Just as in *Putnam*, here the voluntary payment doctrine is a complete defense for Wisconsin Bell. Accountants' itemized monthly statements were clear and unambiguous and put Accountants on notice of the ISPs' charges. (*See* A. 15–16; R.15 at 8–9.) Despite this clear notice of the ISPs' charges, Accountants paid them without protest for fourteen months. *See Freund v. Avis Rent-A-Car Sys., Inc.*, 499 N.E.2d 473, 475-77 (1986) (appearance of a disputed charge on bill is sufficient "knowledge" for purposes of dismissing a complaint under the voluntary payment doctrine) (*See* A. 34–35; R.1 at 15–16.) Accountants had the ability, and under *Putnam* and the long line of account stated cases, the obligation, to review their monthly statements to determine whether any charge was unauthorized and, if so, to call the toll-free number listed next to the charge to challenge or question the charge before running off to court. *See Putnam*, 255 Wis. 2d 447, ¶¶ 3, 13.[12] Under these facts, *Putnam* applies and allows Wisconsin Bell to assert the voluntary payment doctrine as a complete defense.

Accountants' knowledge of the subject charges is further evidenced by Accountants' familiarity with the process of disputing charges using the toll free telephone number shown on the monthly statements. (A. 27; R.1 at 8.) Indeed, Accountants allege that in the past they had previously used the toll free telephone number for billing inquiries, and a credit was given. (*See id*.) With knowledge of the ISPs' charges and the process to dispute them, Accountants nevertheless voluntarily paid the charges. (A. 21; R.1 at 2.) Under these facts, *Putnam* unequivocally applies and allows

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[12] For example, one of Accountants' statements includes a credit of $29.72 for charges from U.S. Connect. (*See* A. 117; R.80 at 46-47). To obtain such credits, Accountants would have used the toll free number to dispute the charges. (*See id*.). Accountants' knowledge of the subject charges is evidenced by their familiarity with this process of disputing charges. (A. 8; R.1 at 27.) Indeed, Accountan ts allege they had previously used the toll free number, and a credit was given. (*Id*.) With knowledge of the IPSs' charges and the process to dispute them, Accountants nevertheless voluntarily paid the charges. (See A. 89–90; R.80 at 19–20.)

Wisconsin Bell to assert the voluntary payment doctrine as a complete defense.

C. ACCOUNTANTS CANNOT DISTINGUISH *PUTNAM* ON THE FACTS OR LAW.

Accountants contend that this Court in *Putnam* did not address the application of the voluntary payment doctrine to Putnam's statutory claims against Time Warner. Accountants are incorrect. Putnam asserted a statutory claim under section 100.18, which like section 100.207, does not include a so-called "protest requirement." *Putnam,* 255 Wis. 2d 447, ¶ 4 n.2. In the face of Putnam's statutory claim, this Court held that "[t]he rule is well settled that a person cannot recover money that he or she has voluntarily paid with full knowledge of all of the facts and without fraud, duress, or extortion in some form, and that ***<u>no action</u>*** will lie to recover the voluntary payment." *Id*. ¶ 13 (quoting 66 Am. Jur.2d *Restitution and Implied Contracts* § 108 (emphasis added)). This Court's holding is unequivocal and included Putnam's statutory claim under section 100.18.

Accountants also suggest that in *Putnam,* this Court did not appreciate or intend that its holding apply to the statutory claim. This is also incorrect. This Court explained that each of Putnam's claims was premised on a theory of liability that Time Warner had imposed an unlawful liquidated damages clause via a $5.00 late-payment fee in its service contract with cable subscribers. *Id*. ¶ 36 n.12. "We conclude that because the customers are precluded under the voluntary payment doctrine from seeking repayment of allegedly unlawful liquidated damages, the additional claims, with the exception of the claims for declaratory relief, are encapsulated in the overall theory and are properly subject to the voluntary payment doctrine." *Id*. Significantly, this Court did not exclude Putnam's statutory claim for damages from its holding. *Id*.

D. The Well-Established Rules of Statutory Construction Set Forth In *Fuchsgruber* Support the Application of the Voluntary Payment Doctrine in *Putnam* and Here.

Although *Putnam* held that the voluntary payment doctrine can defeat statutory claims, more general case law governing the determination of when a statute abrogates the common law also required that result. Long-standing, well-established law dictates that "[t]o accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory." (*See* R.80 at 20); *Fuchsgruber*, 244 Wis. 2d 758, ¶ 25; *see also Kranzush*, 103 Wis. 2d at 74 (legislature must express intent to change common law "beyond any reasonable doubt.").

Here, Wisconsin Statutes section 100.207 did not modify, limit, or abrogate the voluntary payment doctrine because notably absent is any reference to either the voluntary payment doctrine in particular or to payments or affirmative defenses in general. The same is true with respect to Wisconsin Statutes section 100.18 and WOCCA. Since none of the statutes contains so much as a passing reference to the voluntary payment doctrine, a right to recover payments regardless of whether they were voluntarily made, or indeed to any affirmative defense, no "clear, unambiguous, and peremptory" language exists to support the conclusion that the voluntary payment doctrine is inapplicable to claims under these statutes. For example, Wisconsin's Uniform Trade Secrets Act, section 134.90, states "this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret." Wis. Stat. § 134.90(6). Significantly, such "clear, unambiguous, and peremptory" language is noticeably absent from sections 100.207, 100.18, and WOCCA.

To ignore *Fuchsgruber* would create chaos. Any intersection of common law and a statute would require new judicial review and interpretation under a new rule—whatever it might be. The Court has long recognized that it should exercise restraint in such situations.

E. The Holdings of *Stuart* and *Novell* are Not Instructive Here.

Citing *Stuart* and *Novell*, Accountants argue that Judge Sankovitz and the Court of Appeals erred when they applied the voluntary payment doctrine to Accountants' statutory claims. Accountants contend that in *Stuart* and *Novell,* this Court implicitly overturned the well-established rule of statutory construction that "a statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute," as discussed above. Accountants suggest that in *Stuart* and *Novell,* this Court also implicitly overruled the holding of *Putman* to the extent a common law defense (*i.e.,* voluntary payment doctrine) was used as a defense to a statutory claim.

As a preliminary matter, the facts of this case are nearly identical to those in *Putnam*. Accountants' claims against Wisconsin Bell arise from the ISPs' allegedly unauthorized charges that were plainly set forth on Accountants' itemized monthly statements, which Accountants knowingly paid. (*See* A. 34–35, 39–40; R.1 at 15–16, 20–21.) In *Putnam*, as here, plaintiffs were customers of telecommunication service providers who sued under a statute for damages, after having voluntarily paid their monthly itemized bills. *Putnam,* 255 Wis. 2d 447, ¶ 1. Indeed, the only meaningful distinction of *Putnam* is favorable to Wisconsin Bell. In *Putnam,* Time Warner was the source of the alleged improper charge, Here, Wisconsin Bell merely presented the charge of another business that was allegedly unauthorized.

With precedent so squarely on point, this Court's analysis should begin and end with *Putnam* and the application of the well-established defense of voluntary payment.

Accountants misconstrue the holdings and logic of *Stuart* and *Novell,* neither of which mention *Putnam,* the rule of statutory construction reaffirmed in

Fuchsgruber, or the radical proposition that common law defenses no longer apply to statutory claims. Indeed, it is curious that Accountants rely on these two cases at all, since neither case concerns telecommunications, a statement of account, nor the voluntary payment doctrine.

Stuart concerned the application of the economic loss doctrine in the context of an action under the Home Improvement Practices Act, Wis. Admin. Code § ATCP 110 and Wis. Stat. § 100.20(5) (2003-04). The economic loss doctrine is designed to prevent lawyers from turning contract claims into tort claims to avoid unfavorable contract terms. *See, e.g., Kailin*, 252 Wis. 2d 676, ¶ 42 (cited by *Stuart*, 308 Wis. 2d 103, ¶ 36). The economic loss doctrine has no bearing on any statutory claim because a statute is neither a tort nor a contract. Moreover, the rationale for the economic loss doctrine does not justify precluding economic loss recoveries where a statute provides a claim only for individuals suffering economic loss. *See, e.g.,* Wis. Stat. §§ 100.20(5), 100.207 (affording relief to individuals suffering "pecuniary loss"). Frankly, it is hard to see how the economic loss doctrine has anything to do with the issues here since no one is trying to turn a contract claim into a tort claim.

Contrary to Accountants' assertion, common law defenses were not even at issue in *Novell*. The issue there was whether claims under section 100.18 included the element of reasonable reliance. *Novell*, 309 Wis. 2d 132, ¶ 25. Predictably, the Court held that a plaintiff need not prove elements that the legislature did not require. *Id*. ¶ 46. Here, however, the Court of Appeals correctly determined that the voluntary payment doctrine in no way inserts new elements into Accountants' statutory claims. Decision, ¶ 12. Neither *Stuart* nor *Novell* bears any relevance to the question whether the voluntary payment doctrine applies to Accountants' statutory claims.

The voluntary payment doctrine does not add a so-called "protest requirement" to the section 100.207

claim for the same reason it does not add a protest element to any other common law, contract, or statutory claim. This conclusion is based on the fundamental difference between what a defense is and what a claim is. Affirmative defenses simply do not add elements to claims. The elements of a claim are what a plaintiff must plead and prove. A plaintiff may have alleged and proven all the elements of its claim, yet the claim can be defeated by a defendant's establishment of an affirmative defense. For example, plaintiff could establish all the elements of a section 100.207 claim, but if a defendant then establishes all the elements of the affirmative defense of the settlement and release, this defense bars the plaintiff's claim without adding an additional element (the absence of a settlement and release) to the plaintiff's statutory claim.

The Legislature is responsible for enumerating all of the elements of statutory claims. Sometimes, as here with respect to section 100.207, the legislature borrows the elements from the common law. If the legislature does not include an element, plaintiff does not have the burden of establishing it. On the other hand, according to well-established rules of construction, which rules of construction and common law the Legislature is presumed to know whenever it enacts a statute, existing affirmative defenses are a component of Wisconsin's entire body of law. *Glinski v. Sheldon*, 88 Wis. 2d 509, 519–20, 276 N.W.2d 815 (1979)("[A] . . . rule of statutory construction is that the legislature is presumed to enact statutory provisions with full knowledge of the existing laws, including the decisions of this court interpreting relevant statutes.")

Under *Fuchsgruber* those defenses are not abrogated unless the statute in question manifestly expresses a legislative intent to do so. In the end, as Judge Sankovitz correctly ruled, if the Legislature had wanted to eliminate the voluntary payment doctrine as an affirmative defense, it knew how to do so. *See, e.g.*, Wis. Stat. § 134.90(6).

F. Foreign Authority Does Not Compel this Court to Overturn *Putnam* and *Fuchsgruber.*

Having failed to identify any Wisconsin authority supporting their position that this Court has modified the reasonable rules enunciated in *Putnam* and *Fuchsgruber*, Accountants cite a handful of foreign cases as support for their argument. (Petition at 13–14). These cases have little relevance here because each one is factually much different than the claim against Wisconsin Bell. Each foreign authority cited by Accountants deals with a defendant that, unlike Wisconsin Bell, directly engaged in fraudulent billing practices. *See, e.g., Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 723 (Mo. 2009) (finding cable company itself charged its customers for unsolicited channel guide, which it included as a charge on the customers' cable statements); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 12–14 (Wash. 2007) (addressing phone company that improperly assessed its own surcharge and misrepresented to customers that the surcharge was approved by the Federal Communications Commission and could not be changed); *Southstar Energy Serv., Inc. v. Ellision*, 691 S.E.2d 203, 204 (Ga. 2010) (finding natural gas company "intentionally and deceptively overcharged . . . customers as to service charges and the price for natural gas"); *Sobel v. Hertz Corp*., 698 F. Supp. 2d 1218, 1224 (D. Nev. 2010) (explaining rental car company unlawfully tacked on airport concession fee after it quoted the entire rental price to customers, in violation of statute); *Ramirez v. Smart Corp*., 863 N.E.2d 800, 806–07 (Ill. 2007) (addressing situation in which copy company overcharged patients for copies of their medical records); *Pratt v. Smart Corp*., 968 S.W.2d 868, 869–70 (Tenn. Ct. App. 1997) (copy company overcharged patients for copies of their medical records).

Significantly, these foreign jurisdictions do not strictly follow the rule that a statute does not abrogate the common law unless clearly expressed in the language of the statute. *See generally Huch*, 290 S.W.3d

721; *Indoor Billboard,* 170 P.3d 10; *Pratt*, 968 S.W.2d 868; *Southstar Energy*, 691 S.E.2d 203; *Sobel*, 698 F. Supp. 2d 1218. Because Accountants' foreign authorities do not follow this key principle of statutory construction (*see Fuchsgruber*, 244 Wis. 2d 758, ¶ 25) which is well-established in Wisconsin, the cases cannot be persuasive authority. *See, e.g., Burbank Grease Services, LLC v. Sokolowski*, 2006 WI 103 ¶32, 294 Wis. 2d 274, 717 N.W.2d 781 ("[C]ases from other jurisdictions cannot substitute for our construction of the relevant Wisconsin Statute.").

Given Accountants' reliance on foreign authority, it is important to note that many other jurisdictions besides Wisconsin continue to apply the voluntary payment doctrine to statutory claims for damages. The case of *Lady Di's, Inc. v. Enhanced Serv. Billing, Inc.*, No. 09-cv-0340-SEB-DML, 2010 U.S. Dist. LEXIS 121906, *24 (S.D. Ind. Nov. 16, 2010) presents a recent example of a court applying the voluntary payment doctrine to a statutory consumer protection claim. There, the plaintiff brought claims under the Indiana commercial deception statute. *Lady Di's,* 2010 U.S. Dist. Lexis 121906, *1. The plaintiff based its claims on allegedly unauthorized, third-party charges that appeared on its telephone bills. *Id*. at *5. The plaintiff in *Lady Di's* alleged that it was uncertain about its obligation to pay the allegedly unauthorized charges. The plaintiff nevertheless paid the bills containing the allegedly unauthorized charges. *Id*. The Court held that the voluntary payment doctrine barred the plaintiff's statutory claim for commercial deception. *Id*. at *23–*24 ("Because Plaintiff's uncertainty about its obligation to pay the charges . . . did not preclude its decision to pay them anyway, the voluntary payment doctrine . . . bars recovery of those payments by plaintiffs."). *See also* *Harris v. ChartOne*, 841 N.E.2d 1028, 1031 (Ill. App. Ct. 2005) ("The voluntary-payment doctrine applies to any cause of action which seeks to recover a payment on a claim of right, whether that claim is premised on a contractual relationship or a statutory obligation, as in the case at bar."); *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1336 (Ill. App. Ct. 1995) ("Plaintiffs [who asserted various statutory causes of action] are barred from recovering their payment of the concert charge due to the operation of the voluntary payment doctrine."); *Solomon v. Bell Atlantic Corp.*, 777 N.Y.S.2d 50, 56 (N.Y. App. Div. 2004) ("[T]he voluntary payment doctrine, which bars recovery of payments voluntarily made 'with full knowledge of the facts' . . . would bar recovery by any subscriber who, having experienced slow service and/or frequent connectivity outages, continued to use defendants' DSL service."); *Brissenden v. Time Warner Cable of New York City*, 885 N.Y.S.2d 879, 889 (N.Y. Sup. Ct. 2009) (denying class certification in part because statutory claims barred by voluntary payment doctrine); *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 657 (Fla. Dist. Ct. App. 1996) (affirming the dismissal of statutory claims, holding that "[e]very man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it."); *McWethy v. Telecomm's Inc*., 988 P.2d 356, 357 (Okla. Civ. App. 1999) (affirming the dismissal of statutory claims based upon the voluntary payment doctrine).

III. EXISTING LAW ADEQUATELY PROTECTS WISCONSIN CONSUMERS.

A. ALTHOUGH THE VOLUNTARY PAYMENT DOCTRINE PRECLUDES RECOVERY AGAINST WISCONSIN BELL, THE DOCTRINE DOES NOT BAR CONSUMERS GENERALLY FROM SEEKING DAMAGES UNDER WISCONSIN STATUTES THAT CREATE A PRIVATE RIGHT OF ACTION.

Accountants argue that the voluntary payment doctrine would somehow render section 100.207 "meaningless." Accountants' argument is misleading. Neither Judge Sankovitz nor the Court of Appeals held that the voluntary payment doctrine bars all consumers' statutory claims for bills that the consumers voluntarily paid. Judge Sankovitz and the Court of Appeals only held that the voluntary payment doctrine bars ***these***

Accountants' claims in ***this*** case.

According to Accountants, unless this Court somehow construed a statute to abrogate the voluntary payment doctrine, persons aggrieved by statutory violations have no remedy. Accountants are wrong. The voluntary payment doctrine does not bar a claim under section 100.207 to a plaintiff who first timely challenges an allegedly unauthorized charge before making payment and before running off to court. *See Putnam,* 255 Wis. 2d 447, ¶¶ 3, 34. If a statement of account contains allegedly improper charges, the customer should object. If a consumer cannot obtain relief on such a timely objection, the consumer may pursue a claim under section 100.207 against the ISP that generated an allegedly unauthorized charge. *See id*. While Accountants argue that requiring customers to challenge improper charges imposes an unreasonable burden on them (Justice Bablitch argued this in his dissent in *Putnam*), this Court has rejected this argument. *Id*., ¶¶ 3, 34 (majority opinion); ¶¶ 54–68

(Bablitch, J., concurring in part, dissenting in part).

This result makes sense as a matter of sound public policy. The fraud exception to the voluntary payment doctrine leaves a broad and powerful remedy available to consumers as to charges that were not clearly disclosed. But at the same time, the doctrine works to resolve disputes and preserve scarce judicial resources. Courts should not be overburdened with claims litigants could have resolved without judicial involvement (*e.g.*, contacting the ISP via the toll-free number.). *See id.*, ¶ 16 (majority opinion).

B. THE VOLUNTARY PAYMENT DOCTRINE DOES NOT INSERT A SO-CALLED "PROTEST REQUIREMENT" OR ELEMENT INTO THE STATUTORY CAUSES OF ACTION.

Application of the voluntary payment doctrine to a statutory cause of action does not insert a so-called "protest requirement" into the statutory cause of action; there are a number of ways in which a consumer who does not pay under protest can nevertheless prevail on statutory claims. As a starting point, the voluntary payment doctrine is an affirmative ***defense***. Defendant must plead the elements of this defense. Wis. Stat. § 802.02(3)("In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense . . . ."). Plaintiffs "are certainly not required to plead or anticipate" defenses. *Falk v. City of Whitewater*, 65 Wis. 2d 83, 86, 221 N.W.2d 915, 917 (1974); *see also Storm v. Legion Ins. Co.*, 2003 WI 120, ¶ 55, 265 Wis. 2d 169, 665 N.W.2d 353 ("[A] plaintiff is not required to anticipate this defense by pleading against it in a complaint."). Moreover, defendants—not plaintiffs—bear the burden of proof for defenses. *Zarling v. La Salle Coca Cola Bottling Co.*, 2 Wis. 2d 596, 604, 87 N.W.2d 263 (1958). Finally, "[a]ffirmative defenses generally are deemed waived if not raised in the pleadings." *Oetzman v. Ahrens*, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988). But here, Accountants' own allegations proved the defense.

In sum, the law on the voluntary payment doctrine is this: defendants must plead it, prove it, and if defendants fail to raise the voluntary payment doctrine in a timely fashion, they waive it. Accountants erroneously assume that every defendant who rightly could allege voluntary payment doctrine will do so, and will be successful.

Moreover, even if a defendant alleges and proves that a plaintiff voluntarily paid challenged statements of account, a plaintiff can still defeat the voluntary payment doctrine by showing that it paid the statement without knowledge of the material facts, paid as a result of fraud or duress, or paid under protest. The voluntary payment doctrine does not impose a protest "requirement," since plaintiffs unequivocally can prevail on a claim in instances when they have not protested.

As a final aside, if a conflict between an affirmative defense and a statute arises simply by virtue of the fact that the Legislature created a claim for relief under the statute, Accountants' argument would logically extend to all statutes that create claims. Thus, this Court would commit itself to the untenable position that in *Putnam* it improperly or unwittingly applied the voluntary payment doctrine to claims under Wisconsin Statutes section 100.18.

C. There Is No Existing Exception to the Voluntary Payment Doctrine That Specifically Covers Statutory Claims, Nor Should the Court Create One In the Absence of Legislative Guidance.

The legislature's intent is expressed in the words of the statutes at issue—none of which mention the voluntary payment doctrine or even refer to the subject of payments at all. Therefore, this Court must assume that the Legislature intended for the voluntary payment doctrine to apply to claims brought under the statutes. *See Wis. Bridge & Iron Co. v. Indus. Comm'n*, 233 Wis. 467, 474, 290 N.W. 199 (1940) ("Statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein.").

Accountants suggest that this Court create a new exception to the voluntary payment doctrine for alleged “wrongful conduct” that violates a “consumer protection statute.” (App. Brief pp. 13–15.) Accountants argue that the exception is necessary because otherwise defendants will avoid liability for alleged “wrongful conduct.” *Id*. According to Accountants, this Court should create the exception so that the Legislature’s “true intent” will be realized. Accountants argue as if they alone know the Legislature’s true intent in enacting the statutes at issue and that this intent was supposedly to abrogate the voluntary payment doctrine.

As already discussed, if the Legislature did not want the well-established common law defense of the voluntary payment doctrine to apply to the statutes at issue, then it was the Legislature’s duty to so state in the language of the statutes. *Fuchsgruber,* 244 Wis. 2d 758, ¶ 25. This Court in *Putnam* explained that “[t]he legislature has the power to create additional exceptions to the voluntary payment doctrine in particular circumstances.” *Putnam,* 255 Wis. 2d 447, ¶ 35.

Significantly, the Legislature has not amended section 100.18 (or any of the other statutes at issue here) in light of the holding in *Putnam* to address the application of the voluntary payment doctrine to statutory claims for damages. "Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act." *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 633–34, 157 N.W.2d 648 (1968).

This Court has already rejected the argument for creation of an additional exception to the voluntary payment doctrine for "wrongful conduct." *Putnam,* 255 Wis. 2d 447, ¶ 22. As this Court has explained, "[t]he [voluntary payment] doctrine presupposes mistaken or wrongful conduct by the payee." *Id.* ¶ 35. Considering "the principles of public policy and equity that gave birth to the doctrine," this Court declined to create such an exception. *Id.* ¶ 23. In this regard, this Court has already held that "[a]bandoning the voluntary payment doctrine here would open the door for a wide array of challenges to past payments in the name of protecting persons who were tardy in inquiring into and contesting demands for payments." *Id*. ¶ 34.

The voluntary payment doctrine requires no more than what common sense requires, namely, that one read their account statements before making payment. But at the same time, the exceptions to the doctrine, including for fraud, are sufficiently broad to prevent the doctrine from acting as a bar to all 100.18 and 100.207 claims.

Respect for its own precedent also requires that this Court follow *Putnam*. Accountants' petition is simply an attempt to have this Court reconsider and overrule *Putnam* and relieve them of the need to review their monthly statement of account before paying it. However, it is a longstanding rule that this Court is "bound by [its] own precedent." *See, e.g.*, *Rose Manor*, 272 Wis. at 346; *Ferron*, 219 Wis. 2d at 504 (quoting *Payne v. Tennessee*, 501 U.S. at 827 (explaining importance of respect for precedent, "because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.")). Particularly relevant is this Court's consistent admonition that respect for precedent is of heightened importance where, as here, "the legal rule impacts contractual relationships and has been relied upon by industry." *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 44, 281 Wis. 2d 300, 697 N.W.2d 417.

Accountants misguidedly argue that the voluntary payment doctrine should not apply because the doctrine conflicts with the statutes. They are wrong. Legislation admittedly overrides common-law rules to the extent that such rules conflict with a statute, but courts will not assume a conflict exists. *See Klingeisen v. Dep't of Natural Res.*, 163 Wis. 2d 921, 930, 472 N.W.2d 603 (Ct. App. 1991) (explaining fundamental notion that a statute must be construed to be consistent with common law unless a different construction is plainly expressed by the legislature).

Accountants wrongly assume that they have no remedy under the statues unless this Court eliminates the voluntary payment doctrine as an affirmative defense. But as explained above, the voluntary payment doctrine quite reasonably coexists with the statutory remedies. If there has been fraudulent conduct, the doctrine does not apply. And, a party who timely reviews its monthly statement of account and challenges an allegedly unauthorized charge before running off to court likewise avoids the defense and preserves the right to recover amounts allegedly improperly charged. Again, as stated above, what is a statement of account, but a monthly verification to each customer of the propriety of the charges. At bottom, expecting Accountants to read their monthly statements before making payment and before running off to court is ultimately reasonable.

CONCLUSION

This Court should affirm the dismissal of Accountants' claims for damages against Wisconsin Bell.

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CERTIFICATION AS TO FORM AND LENGTH

I, Ted A. Wisnefski, certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportion serif font, minimum printing resolution of 220 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum 60 characters per line of body text. The length of the brief is 8,667 words.

Dated this 9th day of May, 2011.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of section 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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CERTIFICATION OF THIRD-PARTY DELIVERY

I certify that on May 9, 2011, this brief and appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief or appendix was correctly addressed. MBS-Certified Public Accountants, LLC and Thomas H. Schmidt, CPA, d/b/a Metropolitan Business Services served its brief on Wisconsin Bell by U.S. Mail postmarked April 15, 2011.

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SUPREME COURT OF WISCONSIN

MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC, and THOMAS H. SCHMITT, CPA d/b/a METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

Appeal No. 2008AP001830
(Cir. Ct. Case. No. 06-CV-008092)

WISCONSIN BELL, INC. d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, LOCAL BIZ USA, INC., and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

APPENDIX TO DEFENDANT-RESPONDENT WISCONSIN BELL, INC. d/b/a/ AT&T WISCONSIN'S RESPONSE BRIEF

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LADY DI'S, INC., on behalf of itself and all others similarly situated, Plaintiff, vs. ENHANCED SERVICES BILLING, INC., and ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, INC., Defendants.

1:09-CV-340-SEB-DML

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

2010 U.S. Dist. LEXIS 121906

November 16, 2010, Decided
November 16, 2010, Filed

PRIOR HISTORY: Lady Di's, Inc. v. Enhanced Servs. Billing, Inc., 2010 U.S. Dist. LEXIS 29463 (S.D. Ind., Mar. 25, 2010)

COUNSEL: [*1] For LADY DI'S, INC., on behalf of itself and all others similarly situated, Plaintiff: Irwin B. Levin, Lynn A. Toops, Richard E. Shevitz, Scott D. Gilchrist, COHEN & MALAD LLP, Indianapolis, IN.

For ENHANCED SERVICES BILLING, INC., Defendant: Dina M. Cox, LEWIS & WAGNER, Indianapolis, IN; Robert M. Baker, IV, LEWIS WAGNER LLP, Indianapolis, IN.

For ILD TELECOMMUNICATIONS, INC., doing business as ILD TELESERVICES, INC., Defendant: Daniel Ryan Roy, BAKER & DANIELS - Indianapolis, Indianapolis, IN; Gregory F. Harley, PRO HAC VICE, BURR & FORMAN LLP, Atlanta, GA.

JUDGES: SARAH EVANS BARKER, United States District Judge.

OPINION BY: SARAH EVANS BARKER

OPINION

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Lady Di's, Inc. ("Plaintiff") brought this diversity of citizenship lawsuit against Defendants Enhanced Services Billing, Inc. ("ESBI") and ILD Telecommunications, Inc. d/b/a ILD Teleservices, Inc. ("ILD") on state law claims of unjust enrichment and commercial deception pursuant to I.C. 24-5-19-1 *et. seq.* 1 Before the Court currently pend several related motions: 1) Plaintiff's Motion for Class Certification [Docket No. 63]; 2) Defendants separate [*2] Motions for Summary Judgment [Docket Nos. 82, 139]; 3) Plaintiff's request that a ruling on summary judgment be deferred pending a determination by the Court of its Motion for Class Certification [Docket No. 100]; and 4) Defendant ESBI's request for oral argument on the issues raised in the parties' briefing as to class certification and summary judgment issues [Docket No. 146]. For the reasons detailed herein, Defendant ESBI's request for oral argument is DENIED, 2 Plaintiff's Motion for Class Certification is DENIED, and both Defendants' Motions for Summary Judgment are GRANTED. Because the Court has addressed Plaintiff's motion for class certification first, pursuant to the general rule in the Seventh Circuit, 3 Plaintiff's request for deferred judgment on the merits is DENIED as MOOT.

1 Originally, Plaintiff also alleged that Defendants' actions constituted constructive fraud. This claim was dismissed against ILD, however, for failure to allege facts sufficient to support a relationship creating a duty between the parties and reasonable reliance on an alleged misrepresentation. [Docket 112]. Given that decision, Plaintiff has abandoned its constructive fraud claim against ESBI as [*3] well. Pl. Opp. MSJ at 5.

2 Because we are able to reach our decision based on the parties' written submissions, oral argument on the issues before us is unnecessary.

3 The Seventh Circuit has indicated that class certification should generally be considered prior to a decision on the merits of the case. Larson v. JPMorgan Chase & Co, 530 F.3d 578, 581 (7th Cir. 2008)("All doubts would have been dispelled had the district judge certified [a class] before granting summary judgment, as he should have done anyway")(citing Fed. R. Civ. P. 23(c)(1)); Wiesmueller v. Kosobucki, 513 F.3d 784, 784 (7th Cir. 2008) ("in this case the plaintiff, as well as the district judge, put the cart before the horse, by moving for class certification after moving for summary judgment."); Bertrand ex rel. Bertrand v. Maram, 495 F.3d 452, 455 (7th Cir. 2007); Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 2008)("it is . . . difficult to imagine cases in which it is appropriate to defer class certification until after a decision on the merits.")). This "is not to say that [the trial court] may never dismiss a case on summary judgment without first ruling on the plaintiff's motion to certify a class." Weismueller, 513 F.3d at 787. [*4] In Cowen v. Bank United of Texas, FSB, the Seventh Circuit condoned the district court's initial decision on the merits of the case because "the ground on which the district court threw out the plaintiff's claims would apply equally to any other member of the class." 70 F.3d 937, 941-42 (7th Cir. 1995). However, we are not faced with such a situation here and, thus, we have followed the "general rule" to consider class certification first.

BACKGROUND

ESBI is a Delaware corporation with its principal place of business in San Antonio, Texas. Compl. ¶ 8. ILD is a Delaware corporation with its principal place of business in Ponte Vedra Beach, Florida. Compl. ¶ 9. The Complaint describes ESBI and ILD as "billing aggregator[s] that bill[] persons and entities directly, or through local telephone companies, for services that are purportedly provided by other vendors." Compl. ¶¶ 8-9. As explained by Plaintiff, third-party vendors use billing aggregators, such as Defendants, to prepare charges to be included in the vendors' customers' telephone bills and to collect payments for those charges. Compl. ¶ 26. Consequently, the vendor is three steps removed from the customer. Id. When the customer [*5] pays the bill, the payment flows from the telephone company to a billing aggregator, such as Defendants, and ultimately on to the third-party vendor. Id. The billing aggregators withhold a percentage of these payments to the vendors in return for their services. Id.

Plaintiff is an Indiana corporation and an AT&T customer. Compl. ¶¶ 7, 28. Plaintiff's October 2008 monthly telephone bill from AT&T included a $49.99 charge that came through ILD described as "ADVANCED BUS. SVCS, LLC-EFAX SVC MTHLY." Id. The vendor from whom ILD forwarded that billing data was Advanced Business Services ("ABS"). ILD Mem. in Support of MSJ ¶ 4. The Plaintiff's October 2008 bill contained a second charge that came through ESBI for $42.75 described as "MYLOCALREACH-ONLINE YP LISTNG MTH FEE." Compl. ¶¶ 7, 28. The vendor whose billing data ESBI forwarded was My Local Reach ("MLR"). Pl.'s Mem. in Support of Class Certification at 5. Plaintiff alleges that it had not authorized either of these charges on the AT&T billing statement. Compl. ¶¶ 7, 29. Plaintiff asserts that ESBI and ILD "instructed AT&T to include [these] charges on the telephone bills of the Plaintiff and other telephone customers, when [they] knew [*6] or should have known that the charges were not expressly authorized by Plaintiff or the other telephone customers." Compl. ¶¶ 8-9.

After discovering the charges on its telephone bill, Plaintiff contacted AT&T's service department to seek a refund. Compl. ¶ 31. AT&T refused to issue Plaintiff a refund and instructed Plaintiff to contact ESBI and ILD directly. Id. Plaintiff's Complaint alleges that its attempts to contact both ESBI and ILD came to naught when ESBI refused to refund the charges and ILD never returned Plaintiff's telephone call. Compl. ¶¶ 32-33. The evidence shows, however, that Plaintiff ultimately received two refunds: the first in the amount of $199.75 relating to the ESBI charges, and the other for $299.70 relating to the ILD charges. (Lady Di December 2008 AT&T Bill; Lady Di February 2008 AT&T Bill; Markin-Venn Dep. at 67-68, 95-96.) According to Plaintiff's Complaint, Lady Di paid the entire October 25, 2008, bill prior to discovering the unauthorized charges. Compl. ¶ 34. However, the deposition testimony of Plaintiff's President and Rule 30(b)(6) representative, Ms. Markin-Venn, shows that she disputed the charges initially and only subsequently paid the entire [*7] AT&T bill. Markin-Venn Dep. at 47-53 (Q: "Had you already paid [the bill] when you reviewed it?" A: "I don't think so, no, because I call [sic] them up and said, 'What is this?'. . . ."). 4

4 At one point, Ms. Markin-Venn testified that she could not recall whether she disputed the charges from ESBI and ILD before or after she paid her AT&T bill. Markin-Venn Dep. at 50. However, despite some initial inconsistencies, her testimony considered as a whole establishes that the payment occurred after she had disputed the charges.

Plaintiff alleges that the Defendants' actions constitute "cramming," a practice defined by the Federal Communications Commission ("FCC") as the placement of unauthorized charges on telephone bills. Compl. ¶ 19. Indiana Code § 8-1-29-5 provides that "[a] customer of a telecommunications provider may not be . . . billed for services by a telecommunications provider that without the customer's authorization added the services to the customer's service order." Indiana Administrative Code tit. 170 r. 7-1.1-19(p) ("Administrative Code") provides: "No . . . billing agent acting for . . . a PIC [provider of long distance telecommunications services] or LEC [provider of switched [*8] telecommunications service that carries calls originating and terminating within the local call area] shall bill a customer for any service unless the PIC, LEC, or billing agent possesses written or electronic documentation [that meets various criteria.]" Plaintiff alleges that Defendants failed to possess evidence of such authorization as required by Indiana law. Compl. ¶¶ 22-23. Rather than framing its cause of action pursuant to the aforementioned sections of the Indiana Code, however, Plaintiff has brought its claims based on theories of common law unjust enrichment and commercial deception pursuant to I.C. § 24-5-19-3.

I. Class Certification

Plaintiff seeks to certify the following classes, referred to respectively as the "ESBI Class" and the "ILD Class."

> All persons or entities in Indiana who paid any charges during the six years preceding the filing of this action that were included on their local telephone bills at the direction of ESBI and for which ESBI did not possess, and did not deliver to such persons' or entities' local telephone company, written or electronic documentation showing the name of the customer requesting the services, a description of the service requested [*9] by the customer, the date on which the customer requested the service, the means by which the customer requested the service, and the name, address, and telephone number of all sales agents involved.

> All persons or entities in Indiana who paid any charges during the six years preceding the filing of this action that were included on their local telephone bills at the direction of ILD and for which ILD did not possess, and did not deliver to such persons' or entities' local telephone company, written or electronic documentation showing the name of the customer requesting the services, a description of the service requested by the customer, the date on which the customer requested the service, the means by which the customer requested the service, and the name, address, and telephone number of all sales agents involved.

This language clearly tracks the provisions of the Indiana Administrative Code. In addition to certification of these two classes, Plaintiff further requests that the Court designate it as the representative of both classes and its counsel as counsel for both classes.

To prevail on its motion for class certification, Plaintiff must satisfy all of the familiar threshold requirements [*10] of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequate representation. If successful in that regard, Plaintiff must satisfy the final requirement by showing that the circumstances of this case fit one of the three "types" of class actions as defined by Rule 23(b).

Here, Plaintiff maintains that all four Rule 23(a) requirements are met and that certification under Rule 23(b)(3) is appropriate, which provides that a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Common questions of law or fact predominate when they "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." In Re Bromine Antitrust Litig., 203 F.R.D. 403, 412 (S.D. Ind. 2001). Rule 23(b)'s predominance inquiry is more demanding than Rule 23(a)'s commonality requirement. Wahl v. Midland Credit Management, Inc., 243 F.R.D. 291, 299 (N.D. Ill. 2007). Here, [*11] Plaintiff must establish that the common questions of law or fact predominate with respect to the elements of the unjust enrichment and commercial deception claims as applicable to both subclasses of plaintiffs.

Plaintiff maintains that "the claims of the Plaintiff and the members of each Class are bound together by a basic factual scenario subject to common, class-wide proof." Pl.'s Mem at 23. This "basic factual scenario," according to the Plaintiff, is Defendants' placement of charges "on the telephone bills of Plaintiff and the Classes for which ESBI and ILD did not possess, and did not forward to local telephone companies, written or electronic documentation as required by Indiana law." Id. ESBI and ILD respond that in determining liability the Court will be required to make individual determinations for each proposed class member with regard to whether that member authorized the charges for which he/she was billed by Defendants, whether that authorization was done knowingly, and whether the member utilized the services for which he/she was charged or otherwise benefitted. Defendants further argue that any common questions of law or fact will not predominate over these individualized [*12] inquiries. For the reasons discussed below, we agree with Defendants that class certification would be inappropriate under the circumstances of this case.

Plaintiff's proposed classes conflate the requirements of the Indiana Administrative Code IAC § 7-1.1-19(p) which it alleges Defendants violated, with the common law claim of unjust enrichment and the statutory claim of commercial deception. Had Plaintiff framed its causes of action based on Defendants' failure to comply with the Administrative Code's possession requirement, Plaintiff's lawsuit would implicate the practices of each Defendant rather than focusing on the actions of individual class members. But Plaintiff's Complaint does not allege a cause of action pursuant to the Administrative Code. Rather, as we have noted, it asserts claims of unjust enrichment and deceptive practices -- claims which do not typically lend themselves to a showing that common questions of law or fact predominate over the individual issues.

In Brown v. SBC Communications, Inc., et al., 2009 U.S. Dist. LEXIS 7987 (S.D. Ill. Feb. 4, 2009), a case markedly similar to the one before us (in fact, that case involved the same defendants, the same cramming [*13] allegations, and the same unjust enrichment and state law commercial deception claims), the trial court denied Plaintiff's request for class certification. In finding that questions of law or fact common to class members did not predominate over individual issues of authorization for the billed services, the court explained:

> [T]he Court will need to make individual determinations as to whether each proposed class member authorized the charges for which he was billed by defendants. The result will be multiple mini-trials, each requiring individual proofs. Consequently, there will be no judicial economy realized from certifying this action as a class action. Defendants contend that [named Plaintiff], himself, does not qualify as a class member because the services for which he was billed were actually authorized by him. The Court will not address the merits of that argument here. However, the evidence presented by both sides as to whether the charges were actually authorized, whether such authorization was done knowingly, and whether [named Plaintiff] utilized the services for which he was charged, is a

> good indication of the type of evidence the Court may expect to weigh for each and [*14] every potential class member.

2009 U.S. Dist. LEXIS 7987 at *9-10. Thus, based on the Brown Court's finding that customer authorizations would defeat claims of unjust enrichment and statutory deception under Illinois law, the Court ruled that common questions of law or fact would not predominate over such individualized inquiries.

The only salient difference between Brown and the case before us seems to be that our Plaintiff may be able to derive some evidentiary benefit from of the fact that the complained of conduct by Defendants constitutes a violation of the Administrative Code. See Austin Lakes Joint Venture v. Avon Utilities, Inc., 648 N.E.2d 641, 649 (Ind. 1995) (holding that the defendant's failure to comply with the regulation at issue in that case "was simply a fact or evidence in support of [the plaintiff's] claim of breach of contract and fraud."). However, were we to certify the classes as Plaintiff requests, the action would essentially equate a violation of the Administrative Code with unjust enrichment and commercial deception. We disagree that a violation of the Administrative Code is tantamount to claims for unjust enrichment and commercial deception, and thus we decline [*15] to certify these classes which seek to pursue such relief.

To recover under a theory of unjust enrichment, a party must show that a measurable benefit has been conferred on a party under such circumstances that retention of the benefit without payment would be unjust. Stoneware, Inc. v. TecServ, Inc., 2009 U.S. Dist. LEXIS 119624, *26 (S.D. Ind. Dec. 21, 2009) (J. Barker)(citing Dominiack Mechanical, Inc. v. Dunbar, 757 N.E.2d 186, 190 (Ind. Ct. App. 2001)). Undoubtedly, whether the enrichment received by Defendants in our case was just will turn in part, if not entirely, on whether each class member authorized the challenged service and whether each class member received and benefitted from that service. Likewise, I.C. § 24-5-19-3 provides that a claim against Defendants exists if goods or services were billed that were "not yet ordered" by a class member. See I.C. § 24-5-19-3 ("A person may not, with intent to deceive, knowingly or intentionally send, deliver, or transmit a bill, an invoice, or a statement of account due, or a writing that could reasonably be interpreted as a bill, an invoice, or a statement of account due, to solicit payment of money by another person for goods not [*16] yet ordered or for services not yet performed and not yet ordered.") Thus, based on the reasoning in Brown, it is clear that this court would also be required to make individual determinations as to whether each class member victim had authorized the billing service. The necessity of this kind of individualized assessment makes class certification inappropriate. [5]

5 Because Plaintiff has sought certification only pursuant to Fed. R. Civ. P. 23(b)(3), we need not consider other Rule 23(b) avenues by which certification may have been appropriate. Furthermore, because we have found that Plaintiff has failed to show that certification is appropriate pursuant to Rule 23(b), we need not consider whether Plaintiff has established the additional requirements imposed by Rule 23(a).

In support of its motion for class certification, Plaintiff directs us to Stammco, LLC v. United Telephone Co. of Ohio, No. F-07-024, 2008 Ohio 3845, 2008 Ohio App. LEXIS 3243 (Ohio Ct. App. Aug. 1, 2008) and Beattie v. Centurytel, Inc., 511 F.3d 554 (6th Cir. 2007). Plaintiff contends that these cases in which the trial courts granted certification are analogous to our case. In Stammco, the Ohio Court of Appeals affirmed the trial [*17] court's certification of a class of telephone service customers who were billed for charges on their local telephone bills as a result of "a standardized policy of not requiring written authorization from Ohio telephone customers before placing third-party charges against a customer's account." Stammco, LLC, 2008 Ohio 3845, 2008 Ohio App. LEXIS 3243, at **14. Significant is the fact that the Ohio Supreme Court reversed that decision by its Court of Appeals and remanded the case to the trial court to clarify the class definition, because the identity of the entity to whom the individual customers/plaintiffs were to have given authorization for the charges at issue was not disclosed and further the form that authorization should have taken was not spelled out. Stammco, LLC v. United Telephone Co. of Ohio, 125 Ohio St. 3d 91, 94-95, 2010 Ohio 1042, 926 N.E.2d 292 (2010).

Plaintiff's reliance on Beattie v. Centurytel, Inc. is also unpersuasive. 511 F.3d 554 (6th Cir. 2007). In Beattie, a group of consumers alleged that the defendant company had used deceptive billing practices to bill them for an optional wire maintenance program without their knowledge or permission. Plaintiff asserted claims for various violations of federal and state [*18] law, including a violation § 201(b) of the Federal Communications Act, as well as for unjust enrichment and a violation of the Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 et seq. The district court certified the class and the Sixth Circuit affirmed. The Sixth Circuit noted, however, that it was unclear whether the certification pertained to all of the plaintiff's claims or only those brought under federal statutes. Beattie, 511 F. 3d at 567-68. Thus, the Sixth Circuit did not decide whether certification was proper as to Plaintiff's state law claims, which is significant because only state law claims are before us here. Id.

Accordingly, we hold that, because common questions of law or fact do not predominate over the issues affecting individual members of the proposed classes, we must and do therefore deny Plaintiff's motion for class certification.

II. Summary Judgment

Defendant ESBI's October 19, 2009, Motion for Summary Judgment was filed concurrently with its Brief in Opposition to Plaintiff's Motion for Class Certification. [Docket No. 82]. ILD filed its Motion for Summary Judgment on August 26, 2010. [Docket No. 139]. As appropriate and where possible, we address [*19] Defendants' motions together below.

Standard of Review

Summary judgment is appropriate when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See id. at 255. However, neither the "mere existence of some alleged factual dispute between the parties," id., 477 U.S. at 247, nor the existence of "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), will defeat a motion for summary judgment. Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district [*20] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing an absence of evidence to support the non-moving party's case. Id. at 325.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994). Therefore, after drawing all reasonable inferences from the facts in favor of the non-movant, if genuine doubts remain and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. See Shields Enterprises, Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992); Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only appropriate, but mandated. See Celotex, 477 U.S. at 322; Ziliak v. AstraZeneca LP, 324 F.3d 518, 520 (7th Cir. 2003). [*21] Further, a failure to prove one essential element "necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

Application of the Voluntary Payment Doctrine

Both ESBI and ILD assert that Plaintiff's claims are subject to summary judgment because they are barred by the voluntary payment doctrine. In 2004, the Indiana Supreme Court extensively discussed this doctrine, summarizing the applicable rule as follows: "Money voluntarily paid *in the face of a recognized uncertainty as to the existence or extent of the payor's obligation to the recipient* may not be recovered, on the ground of "mistake," merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation." Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 892 (Ind. 2004) (quoting Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. e (Tentative Draft No. 1, 2001))(emphasis in original). In Time Warner, the plaintiffs disputed certain late fees that they had paid to their cable company. The

Indiana Supreme Court reversed an adverse summary judgment ruling against them, holding that there was a genuine issue of material fact with regard to whether plaintiffs [*22] had faced such a recognized uncertainty at the time the payments at issue were made. 802 N.E.2d at 892. Applying the same reasoning as the Court in Time Warner, we, nonetheless, come to a different conclusion in the case now before us. Unlike the plaintiffs in Time Warner, we hold that Lady Di's has failed to create such an issue of material fact so as to defeat Defendants' motions for summary judgment.

Both ESBI and ILD argue that the voluntary payment doctrine is clearly applicable to Plaintiff, based on Lady Di's President and 30(b)(6) witness Ms. Markin-Venn's concession that she recognized a potential dispute regarding the October 2008 charges but nonetheless voluntarily paid them. Plaintiff argues that because Ms. Markin-Venn did not know that ESBI, ILD, and AT&T failed to possess the required authorization pursuant to the Administrative Code, the voluntary payment doctrine does not apply. Plaintiff relies on yet another iteration of the Time Warner holding, namely, that "money voluntarily paid *with a full knowledge of all the facts*, and without fraud or imposition on the payor, cannot be recovered back, although it was not legally due." 802 N.E.2d at 889. As Defendant ESBI correctly [*23] notes, however, this argument and the resultant confusion it generated were what spurred the Supreme Court to clarify the rule to eliminate the "full knowledge of the facts" language. As the Supreme Court explained, "[W]hen properly employed, a reference to "voluntary payment" is judicial shorthand for a truth of common experience: that a person must often choose to act on the basis of imperfect knowledge, accepting the risk that further information . . . may reveal the choice to have been less than optimal." 802 N.E.2d at 892. Thus, it is the payor's "recognition" of not knowing whether or not a payment is owed that makes the doctrine applicable. Id.

In our case, at the very least, Plaintiff's recognition of the uncertainty of its obligation to pay is clear. Ms. Markin-Venn testified that, upon reviewing her October 2008 bill, she noticed the charges at issue and contested them before she paid them. Markin-Venn Dep. at 47-53 (Q: "Had you already paid [the bill] when you reviewed it?" A: "I don't think so, no, because I call them up and said, 'What is this?'. . . ."). This evidence is uncontested in the record before us. Plaintiff attempts to hang its hat on the fact that Ms. Markin-Venn [*24] was not aware that ESBI and ILD lacked appropriate authorization for placing these charges on the phone bill as required by the Administrative Code. As explained above, however, possession of full and accurate knowledge of Defendants' legal obligation is irrelevant to the application of the voluntary payment doctrine. Because Plaintiff's uncertainty about its obligation to pay the charges by ESBI and ILD did not preclude its decision to pay them anyway, the voluntary payment doctrine as enunciated by the Indiana Supreme Court bars recovery of those payments by Plaintiffs.

Interestingly, Plaintiff has not argued that application of the voluntary payment doctrine is limited only to those payments made after Ms. Markin-Venn noticed the charges. Ms. Markin-Venn testified that she believed the charges from both ILD and ESBI had been on her bills since the preceding April or May. Markin-Venn Dep. at 66, 86. Apparently, ILD began transferring charges on behalf of ABS to Plaintiff in May 2008 and continued to do so through October 2008 (ILD Resp. to Pl.'s First Set of Interrogatories at Resp. No. 13), but the evidence of the call detail provided by Plaintiff reflects that Plaintiff was billed [*25] via ESBI only in August, September, October, November, and December 2008. Pl.'s Ex. A8, ESBI LD 00027. Because Ms. Markin-Venn testified that she didn't "catch" the charges until she reviewed her October bill (Markin-Venn Dep. at 52), it is clear that Plaintiff did not pay its bill "in the face of recognized uncertainty" until October. Thus, the doctrine does not apply to foreclose reimbursement of payments made prior to that date. Regarding the payments Plaintiff may have made prior to October, we must now examine the merits of its unjust enrichment and commercial deception claims.

Plaintiff's Unjust Enrichment Claim

As discussed above regarding class certification, to recover under a theory of unjust enrichment a party must show that a measurable benefit has been conferred on a party under such circumstances that retention of the benefit without payment would be unjust. Stoneware, Inc. v. TecServ, Inc., 2009 U.S. Dist. LEXIS 119624, *26 (S.D. Ind. Dec. 21, 2009) (J. Barker)(citing Dominiack Mechanical, Inc. v. Dunbar, 757 N.E.2d 186, 190 (Ind. Ct. App. 2001)). "The proper measure of damages for unjust enrichment is restitution." Allgood v. General Motors Corp., 2006 U.S. Dist. LEXIS 70764, at *106-07 (S.D. Ind. September 18, 2006). [*26] "Restitution requires the disgorgement of the benefit received by the defendant." Id. (citing Confold Pacific, Inc. v. Polaris Industries, Inc., 433 F.3d 952, 957-58 (7th Cir. 2006); Rollings v. Smith, 716 N.E.2d 502, 507 (Ind. App. 1999)).

Both ESBI and ILD argue that they are entitled to summary judgment on Plaintiff's unjust enrichment claim because there is no evidence of a measurable benefit that either defendant has unjustly retained. We address these arguments in turn as to each defendant.

ESBI claims that Plaintiff's payments have been refunded in full. Mem. at 23. According to Plaintiff's December 2008 and February 2009 telephone bills, Lady Di was credited $39.95 and $159.80, respectively. (Lady Di December 2008 AT&T Bill; Lady Di February 2008 AT&T Bill; Markin-Venn Dep. at 95-96.) Together these amounts total $199.75, or, as construed otherwise, five payments of $39.95. As previously noted, the call detail provided by Plaintiff demonstrates that she was billed via ESBI in August, September, October, November, and December, 2008. Pl.'s Ex. A8, ESBI LD 00027. Ms. Markin-Venn testified that she does not know whether ESBI refunded all of the payments she paid but that, rather [*27] than pursuing further negotiations and attempts to obtain appropriate credits, she simply turned the matter over to her lawyers. Markin-Venn Dep. at 96. Plaintiff contends that there is a genuine issue of material fact with regard to whether ESBI received a measurable benefit because: (1) ESBI received payments from LECs based on the amount of charges that it forwarded to them; (2) the credits appear to be for monthly amounts of $39.95, as opposed to the $42.75 Plaintiff was charged; and (3) My Local Reach, not ESBI, was the entity that issued Plaintiff the refund.

We agree with ESBI that, based on the undisputed evidence, it has retained no measurable benefit that Plaintiff can seek to recover on its unjust enrichment claim. Plaintiff cites no specific measurable benefit that ESBI retained at Plaintiff's expense. The amount of the August and September repayments (which are the only payments that remain at issue in light of our application of the voluntary payment doctrine) exceeded any amount due Plaintiff as a refund, regardless of whether the refund was provided by My Local Reach or ESBI. [6] Assuming ESBI (and not My Local Reach) was the beneficiary of this transaction, My Local Reach, [*28] not Plaintiff, may be entitled to recover the refunded amount from ESBI. To hold otherwise would allow Plaintiff a double recovery. Likewise, any benefit that AT&T or any other LEC provided to ESBI would be a dispute only between those two parties, and clearly does not involve Plaintiff.

6 ESBI explains the discrepancy between the monthly payment of $42.75 and the five credits that came to Plaintiff in installments of $39.95 as being the result of $2.80 in state sales tax. ESBI Reply at 13-14. Plaintiff's October 2008 AT&T telephone bills is consistent with this explanation. Pl. Combined Appendix, Ex. C1, Lady Di October 2008 AT&T Bill. Even if we were to conclude that ESBI must refund the tax Plaintiff paid as a result of the transaction, Plaintiff has already received repayment in an amount that exceeds its losses.

ILD claims that it also fully refunded all charges previously assessed to Plaintiff. ILD Mem. at 21. In support, it proffers the sworn testimony of ILD Vice President of Billing Operations Kathy McQuade which states that "all of the disputed charges from Advanced to Lady Di's have been credited." [7] McQuade Decl. ¶ 11. Furthermore, Ms. Markin-Venn admits that Lady Di's February [*29] 2009 AT&T telephone bill reflects a credit from ILD in the amount of $299.70. Markin-Venn Dep. at 67-68; Lady Di February 2008 AT&T Bill. Plaintiff's response to the evidence of the $299.70 credit is limited to the unsubstantiated assertion that there was only one $49.95 credit and that "[i]t is not at all clear that these charges were refunded to the Plaintiff in full." Pl.'s Resp. at 29. Ms. Markin-Venn further testified that she does not know of any other charges that may be owed to her company from ILD, but that her lawsuit is in a broader sense an attempt by her to seek "justice" for those others who may have also made payments to ILD that were similarly unauthorized. Id. ILD correctly notes, however, that summary judgment is Plaintiff's opportunity to come forward with any evidence that may exist of unrefunded charges. Plaintiff has not done so. Plaintiff argues, alternatively, that ILD has retained a measurable benefit based on payments it may have received from LECs and also because it was ABS who issued the credit to Plaintiff, not ILD. As we discussed with regard to ESBI, we find no compelling basis on which to accept these unsubstantiated contentions.

7 Plaintiff requested [*30] that the Court disregard this portion of Ms. McQuade's

declaration on the grounds that the statements conflict with Ms. McQuade's deposition testimony. "Under Seventh Circuit law, a plaintiff may not introduce a sworn declaration that conflicts with prior deposition testimony in an attempt to create an issue of fact to survive summary judgment." Herring v. Disetronic Med. Sys., 2010 U.S. Dist. LEXIS 54365, at *3-4 (S.D. Ind. June 1, 2010) (J. Barker)(citing Piscione v. Ernst & Young, L.L.P., 171 F.3d 527, 532 (7th Cir. 1999)). Similarly, a party may not introduce a sworn declaration "that includes details the party previously testified he or she could not remember without providing a sufficient explanation as to why those facts were subsequently able to be recalled." Herring, 2010 U.S. Dist. LEXIS 54365, at *3-4 (citing Adusumilli v. City of Chicago, 164 F.3d 353, 360 (7th Cir. 1998); Unterreiner v. Volkswagen of America, Inc., 8 F.3d 1206, 1210-11 (7th Cir. 1993)). After reviewing Ms. McQuade's testimony, however, we find no such conflict. The deposition testimony that Plaintiff cites as conflicting with the declaration is clearly focused on who (as between ILD, Advanced Business [*31] Services, and AT&T) made the decision to issue a refund to Plaintiff, not whether such a refund was actually paid. McQuade Dep. at 112-13. Moreover, although Ms. McQuade could not answer certain questions about Exhibit 9 at her deposition, the declaration explains that Ms. McQuade has knowledge regarding the credits "because [she had] reviewed ILD's records related to the telephone number at issue which are maintained in the regular course of business and are maintained under [her] direction, control and supervision." McQuade Decl. ¶ 11. Such an explanation is consistent and relevant under the circumstances; (we assume, of course, as we must that Exhibit 9 contains the relevant information).

Plaintiff has failed to create a genuine issue of material fact with regard to ESBI's or ILD's retention of any measurable benefit from these transactions. Accordingly, Defendants' motions for summary judgment on their unjust enrichment claims are entitled to be granted.

Plaintiff's Statutory Deception Claim

According to the commercial deception statute under which Plaintiff brings this claim, "a person may not, with intent to deceive, knowingly or intentionally send, deliver, or transmit a bill, [*32] an invoice, or a statement of account due, or a writing that could reasonably be interpreted as a bill, an invoice, or a statement of account due, to solicit payment of money by another person for goods not yet ordered or for services not yet performed and not yet ordered." I.C. § 24-5-19-3. The section applies to "a person that sends, delivers, or transmits by mail, private delivery, facsimile transmission, or electronic mail a solicitation offering goods or services for sale, lease, or rent . . . ." I.C. § 24-5-19-1.

Both ESBI and ILD seek summary judgment on Plaintiff's deception claim, arguing that the statute does not apply to them and that, in any event, there is no evidence of any "intent to deceive" on their part, as required by the statute. We begin our analysis by noting that our research discloses no Indiana cases in which these Code sections have been judicially construed. Thus, we proceed cautiously in our efforts to decide whether, as a matter of law, the statute applies to Defendants. However, because Plaintiff has offered no evidence whatsoever upon which a reasonable jury could find an intent to deceive on the part of either Defendant, we need go no further in construing [*33] the meaning or reach of the applicable statute.

Defendants have proffered evidence establishing that, when they transmitted Plaintiff's billing data to AT&T, they believed the services had been expressly ordered. Specifically, ESBI highlights evidence of their due diligence efforts with vendors with whom they do business, which included confirmation of express customer authorization, monthly monitoring of those vendors, and other confirmation of authorization. (Coleman Dep. at 18-20, 37-42, 51-78; Due Diligence Checklist for My Local Reach; Enhanced Services Best Practices Manual.) ESBI also asserts that when it forwarded the billing data relating to Plaintiff's disputed charges, it had no "intent to deceive"; to the contrary, it acted on the basis of its knowledge and belief "that Plaintiff had authorized those charges." ESBI Reply at 18. Likewise, ILD submits testimony from its Vice President of Billing Operations that it was ILD's practice to require its vendors to have specific authorization from their customers. McQuade Decl. ¶ 11.

The only evidence Plaintiff cites in rebuttal in an effort to establish an intent to deceive on the part of either Defendant is Defendants' alleged violation [*34] of the Administrative Code. With regard to ESBI, Plaintiff maintains that the company's due diligence and monthly monitoring do not comport with the Administrative Code and further that ESBI's assurances in its contracts with AT&T conflict with similar provisions in contracts it has entered into with vendors, such as MLR. Pl.'s Surreply at 4-9. Plaintiff also claims that ILD "trusts" its vendors to possess customers' authorizations and that ILD's contracts with AT&T thus conflict with provisions of their contracts with other vendors, such as ABS. Pl.'s Resp. at 31-35.

Even if true, this evidence fails to establish any genuine issues of material fact that would foreclose summary judgment in Defendant's favor. Plaintiff's arguments, at best, establish Defendants' intent to ignore or violate the Administrative Code, not an intent to deceive Plaintiff, as required under I.C. § 24-5-19-3. Where, as here, Defendants have based their summary judgment motions on evidence establishing a lack of any genuine issues of material fact, Plaintiff is obligated to come forward with "specific facts showing that there is a genuine issue for trial" by references to specific evidence in the record. Fed. R. Civ. Pro. 56(e); [*35] Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978-79 (7th Cir. 1996). This Plaintiff has failed to do, thereby justifying entry of summary judgment in favor of Defendants on the commercial deception claim against them.

CONCLUSION

For the reasons stated herein, we find that Plaintiff has failed to establish that class certification is appropriate, pursuant to Fed. R. C. P. 23(b) and, thus, Plaintiff's Motion to Certify Class [Docket No. 63] is DENIED. Because the class certification issue was considered and resolved first, which was the gist of Plaintiff's Motion to Defer Ruling on ESBI's Motion for Summary Judgment Pending a Determination of Class Certification [Docket No. 100], that Motion is DENIED as moot. Plaintiff's failure to create a genuine issue of material fact with regard to its claims against ESBI requires that ESBI's Motion for Summary Judgment [Docket No. 82] be GRANTED. Similarly, Plaintiff's failure to create a genuine issue of material fact with regard to its claims against ILD requires that ILD's Motion for Summary Judgment [Docket No. 139] be GRANTED. Judgment shall enter accordingly.

IT IS SO ORDERED

Date: [*36] 11/16/2010

/s/ Sarah Evans Barker

SARAH EVANS BARKER, JUDGE

United States District Court

Southern District of Indiana

CERTIFICATION

I hereby certify that this appendix complies with section 809.19(2)(a) and contains: a table of contents; a copy of any unpublished of any unpublished opinion cited under section 809.23(3)(a) or (b). I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of May, 2011.

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WISCONSIN SUPREME COURT

THOMAS H. SCHMITT, CPA, d/b/a
METROPOLITAN BUSINESS SERVICES, and
MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

WISCONSIN BELL INC., d/b/a
AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC., d/b/a
ILD TELESERVICES, AMERICATEL
CORPORATION, and LOCAL BIZ USA, INC.,

Defendants-Respondents-Cross-Appellants,

-and-

US CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

BRIEF OF DEFENDANT-RESPONDENT-CROSS-APPELLANT
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I. INTRODUCTION.

This putative class action case is brought by a CPA and his professional accounting firm (hereinafter referred to as “the Accountants”) to recover fourteen months of payments they voluntarily made for charges that were prominently set forth both on the cover page as well as a stand alone page of the Accountants’ monthly telephone bills. The charges at issue were set forth so conspicuously that the circuit court held:

> Given the rather specific and explicit nature of the charges, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized those services. To the contrary, the charges were stated with sufficient particularity that a reasonable customer would be startled to find such a charge on the bill . . . . At the very least, I think a reasonable customer would have been put on notice that something was fishy and it would be unreasonable to pay the bill on the assumption that such service had been authorized.

(A.98-99).[1]

Based on the fact that the Accountants paid the clearly disclosed charges without protest, the circuit court held that the voluntary payment doctrine barred the Accountants’ claims. The circuit court specifically found there was no fraud, duress or mistake of fact which caused the Accountants to pay the charges. (A.133). Thus, no exception to the

[1] Appendix citations refer to the Appendix of Plaintiffs-Appellants-Cross-Respondents-Petitioners.

voluntary payment doctrine applied. The Accountants do not contest these findings.

Rather, the Accountants seek to overturn 150 years of Wisconsin precedent and ignore *stare decisis* by requesting that this Court: (1) issue a remarkable holding that common law defenses never apply to statutory claims; or (2) create a new exception that the voluntary payment doctrine should not apply to statutory claims. As set forth below, there are numerous reasons the Accountants' request must be rejected:

(1) There is no need to overturn settled law regarding the voluntary payment doctrine, which simply requires that customers first voice some objection to a purportedly unlawful demand for payment before filing a lawsuit for damages. Wisconsin courts have been applying the voluntary payment doctrine for over 150 years without need for recognizing the exception that the Accountants ask this Court to create. Indeed, in 2002, this Court affirmed the dismissal of statutory claims pursuant to the voluntary payment doctrine in *Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626. Other Wisconsin decisions have also held that the voluntary payment doctrine is a potential defense to statutory claims. *See*

e.g., *Butcher v. Ameritech Corp.*, 2007 WI App 5, 298 Wis. 2d 468, 727 N.W.2d 546. This Court should decline the Accountants' invitation to apply the voluntary payment doctrine on an *ad hoc*, piecemeal basis.

(2) In addition to rewriting the voluntary payment doctrine to create a new exception, Appellants also ask this Court to ignore its own precedent which provides: "a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent." *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. Here, as both courts below correctly held, there is not a word in any of the statutes at issue which indicates, much less clearly expresses, that the voluntary payment doctrine and other common law defenses do not apply to the statutes at issue.

(3) Next, contrary to the Accountants' contentions, the voluntary payment doctrine does not allow ILD and Wisconsin Bell to escape liability if the Accountants can somehow demonstrate that they "deceived" people into paying "hidden charges" on their phone bill. The voluntary payment doctrine does not apply if the payment was induced by fraud. But here, the circuit court properly held that there was no fraud and that finding was

affirmed by the Court of Appeals. The Accountants do not challenge that finding on appeal.

(4) Indeed, regardless of the fraud exception, the doctrine would not apply if the alleged cramming victim makes the slightest protest—but, it is undisputed that no protest occurred here (despite the fact that the charges at issue were prominently displayed on both the first page and a stand-alone page of Accountants' phone bills). Further, the doctrine would not prevent victims of cramming from pursuing injunctive relief to stop alleged cramming schemes, nor would it prohibit the district attorney or the department of justice from pursuing claims on behalf of aggrieved customers, including restitutionary relief for any money paid. Thus, contrary to the Accountants' contentions, an array of remedies already exist for alleged victims of cramming.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

Does the voluntary payment doctrine bar the Accountants' claim for monetary relief to recover payments for prominently disclosed charges the Accountants voluntarily made for 14 months which were not induced by fraud, duress or mistake of fact?

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Oral argument and publication of the Court's decision are appropriate, consistent with the Court's general practice.

IV. STATEMENT OF THE CASE.

A. Statement Of Facts.

This action was filed by the Accountants individually and as putative representatives of a proposed class of Wisconsin consumers. (Compl., ¶¶ 4, 5, A.22). As it relates to the charges at issue in this appeal, the Accountants claim that between October, 2004 and December, 2005, their Wisconsin Bell phone bill contained unauthorized charges from an entity called Local Biz USA, Inc. ("Local Biz") for a $37.75 Internet Service Monthly Fee. (Compl., ¶¶ 15, 44, A.25, 34). It is undisputed that the Accountants paid the charges without any protest or dispute.

The Accountants' Complaint does not allege that ILD had any role in selling, marketing or enrolling the Accountants in the disputed service, nor does the Complaint allege that ILD billed the Accountants for the disputed charges. (A.26, ¶ 18; A.32, ¶ 37(a); A.34, ¶ 43-44). Rather, the Complaint describes ILD as an intermediary in the billing process, specifically alleging that ILD

> is in the business of providing billing aggregation and clearinghouse services, whereby it contracts with various service providers [like Local Biz] . . . to aggregate the service providers' charges and forward them on to local exchange carriers . .. such as [Wisconsin Bell] so that the charges can be incorporated in consumers' telephone bills.

(A.23, ¶ 7).[2]

The charges at issue were prominently displayed in two separate places on the Accountants' phone bills. On the very first page, underneath the "Billing Summary" header, the charges forwarded by ILD were just one of four to six conspicuously listed items. (A.15). More importantly, however, the Local Biz charges were also always separately set forth on a stand alone page of the bill. (A.16). The stand alone page of the bill set forth the amount of the charges, a description of the services, the date they were incurred, etc. (*Id.*) Finally, in at least three separate places on the bill, the Accountants were provided with a toll free number to call in the event that they disputed the charges. (*Id.*) That phone never rang even though

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[2] After this case was appealed, the Accountants began to inaccurately allege that ILD was actually a service provider of some unknown and unspecified service. Not only is this untrue, it is flatly contradicted by the allegations in the Accountants' Complaint. More importantly, it was not raised in the circuit court, thus it cannot be argued in these appellate proceedings. *See Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998) ("The often repeated rule of Wisconsin appellate practice is that issues not raised in the trial court will not be considered for the first time on appeal.").

the Accountants specifically allege that they disputed other charges on their phone bills. (A.27, ¶ 22).

B. Procedural History Of The Case.

1. The Accountants' Class Action Complaint.

On August 25, 2006, the Accountants filed their Complaint asserting claims for injunctive relief, unjust enrichment and claims for alleged statutory violations including Wis. Stat. §§ 100.207(2) and 100.207(3) (false advertising and sales representations), 100.20(5) (unfair competition and trade practices), 100.18 (Wisconsin Trade Practices Act), and 946.80 (Wisconsin Organized Crime Control Act). (A.20-70). ILD (and the other Defendants) moved to dismiss all damages claims on December 18, 2006. (R.12, 13). Prior to the hearing on the motion to dismiss, the Accountants abandoned their § 100.20(5) claim.

2. The Circuit Court Dismisses the Accountants' Damages Claims.

On November 12, 2007, after full briefing, the circuit court held a hearing on Defendants' Motions to Dismiss. (A.71). The circuit court addressed the motions via a three step process, determining: (1) whether independent of the voluntary payment doctrine, each count in the complaint stated a claim for relief; (2) whether the voluntary payment doctrine applied to those claims; and (3) whether any recognized exceptions to the doctrine (fraud, duress, or mistake of fact) possibly applied, based on the allegations in the Complaint. (A.80).

The circuit court first concluded that the Accountants failed to state a claim for relief under Wis. Stat. § 100.18 (Wisconsin Trade Practices Act) because the "complaint fails to allege the receipt of any untrue, deceptive, or misleading advertising and sales promotions from the defendants." (A.103). The Court noted that the allegedly unauthorized service charges contained in the "telephone bills themselves do not constitute advertisements or sales promotions," but were simply "a demand for payment." (A.103). **Specific to ILD**, the circuit court held that ILD could not be liable for a violation of Wis. Stat. § 100.207(3) because it did not "bill" the Accountants as would be required to state a claim under that subsection. (A.84). Subject to the application of the voluntary payment doctrine, the circuit court held that the complaint otherwise stated a claim for relief against all defendants under Wis. Stat. § 100.207(2).[3] (A.80-89).

[3] This aspect of the trial court's decision was the subject of ILD's cross-appeal in the Court of Appeals. That court affirmed the circuit court without deciding ILD's cross-appeal. (A.14). Thus, if this Court finds that the voluntary payment doctrine does not bar the Accountants' claim, the matter should be remanded for resolution of ILD's cross-appeal.

After evaluating whether the various counts in the Complaint stated a claim, the circuit court next turned to the voluntary payment doctrine. Relying upon this Court's decision in *Putnam v. Time Warner*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626, the circuit court observed that payments made by a customer who neglects to read the description of charges listed in his telephone bills are paid "voluntarily" within the meaning of the voluntary payment doctrine. (A.89) "If the plaintiffs voluntarily paid the charges," the circuit court reasoned, "then, under the voluntary payment doctrine, they cannot recover in damages what they had paid." (*Id*.)

Next, the circuit court studied the complaint to see if any of the three recognized exceptions to the voluntary payment doctrine-fraud, duress or mistake of fact-had been properly alleged. The Accountants did not allege that the payments were made because of duress or mistake of fact, so the circuit court turned to the fraud exception. (A.94). Relying principally upon this Court's decision in *Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, 281 Wis. 2d 39, 697 N.W.2d 61, the circuit court concluded that no reasonable jury could find that the language, format, font or any other aspect of service charge descriptions had fraudulently induced the

Accountants to pay the disputed charges. (A.97) The Court specifically noted:

> Given the rather specific and explicit nature of the charges, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized [] services [they had not ordered].
>
> . . .
>
> At the very least I think a reasonable customer would have been put on notice that something was fishy [if he had not ordered the service], and it would be unreasonable to pay the bill on the assumption that such services had been authorized.

(A.98-99)

The circuit court also addressed the contention that the voluntary payment doctrine somehow was inapplicable to the Accountants' statutory claims. Quoting from this Court's decision in *Fuchsgruber v. Custom Accessories*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833, the circuit court stated that "a court cannot read a statute to override the common law unless the legislative purpose to do so is clearly expressed in the language of the statute." (A.90). The circuit court continued that based on *Fuchsgruber* we "presume that the legislature knew about the [voluntary payment] doctrine and knew this would be raised as a defense, if [the legislature] didn't want it raised as a defense, they would have said so."

(A.110). The circuit court concluded that only the legislature can recognize new exceptions to the doctrine, and noted that *Putnam* had specifically found that the defense applied to § 100.18 Trade Practice Act claims. (A.92-94, 131-132) (citing *Putnam* at ¶ 4 n.2, ¶ 36 n.12).

The circuit court also rejected the Accountants' argument that the specificity of Wis. Stat. § 100.207 precluded application of the voluntary payment doctrine. The circuit court reasoned that the Accountants had misapprehended the fundamental assumption of the voluntary payment doctrine-namely, that the challenged payment might be entirely wrongful, unlawful and illegal. (A.92) Accordingly, the circuit court dismissed all of the monetary claims for relief, including the statutory claims under Wis. Stat. §§ 100.18, 100.207, and 946.80. (A.68, 103, 116)

C. Plaintiffs Abandon Their Injunction Claim.

The circuit court did not dismiss the Accountants' request for injunctive relief based on the alleged statutory violations. In refusing to grant the Accountants' request for a statement in support of interlocutory appeal, the Court reasoned:

> <u>If cramming is a real concern for the plaintiffs</u> and members of the proposed class, then it seems to me that the plaintiffs' request for injunctive relief, which is not barred by the voluntary payment doctrine, is just as urgent as, if not more urgent than, their claim for

> damages, and can be litigated without the year-long delay that might attend an interlocutory appeal.

(A.137) (emphasis added). The Accountants declined the circuit court's invitation to pursue their injunctive relief claim and instead stipulated to the dismissal of their claims for equitable relief while expressly preserving their right to pursue their "claims seeking monetary damages." (R.66, 68).

D. The Court of Appeals Decision.

The Accountants appealed to the Wisconsin Court of Appeals. (R.72). On August 10, 2010, that court affirmed the dismissal of the Accountants' claims. (A.1-16). The Court of Appeals' decision was noteworthy in several respects.

First, the Court of Appeals independently reviewed the record to determine if there could be a jury question as to whether the charges were procured by fraud, rendering the voluntary payment doctrine inapplicable. The court noted:

> Having independently reviewed [the Accountants] claims and the charges involved, we agree with the trial court's assessment that the clarity of the statement on the bills calls into question MBS' ability to form the basis for a fraud claim.

Id. at ¶ 20. The court also cited *Putnam* for its holding plaintiff's allegations of fraud did not support the fraud exception to the voluntary payment doctrine where the challenged fee clearly appeared on the bills.

The Court of Appeals also rejected the Accountants' argument that since ILD and Wisconsin Bell had allegedly engaged in wrongful conduct, the doctrine should not apply, reasoning "the voluntary payment doctrine presupposes mistaken or wrongful conduct by the payee." *Id.* at ¶ 9. Finally, the Court of Appeals flatly rejected the Accountants' argument that the voluntary payment doctrine nullified the statutes at issue: "If a timely objection is made to an unauthorized charge and no relief ensues, the customer may pursue a claim for damages." *Id.* at ¶ 11.

V. ARGUMENT.

A. The Voluntary Payment Doctrine Applies To Statutory Claims.

1. Wisconsin Courts Have Applied the Voluntary Payment Doctrine to Statutory Claims.

The Accountants' first argument is that the voluntary payment doctrine does not apply to statutory claims. This argument must be rejected. Wisconsin courts have been applying the voluntary payment doctrine for over 100 years and no case has ever held that the voluntary payment doctrine does not apply to statutory claims. Indeed, this Court, and other courts in Wisconsin, have previously applied the voluntary payment doctrine to bar statutory claims.

In *Putnam*, this Court's seminal decision on the voluntary payment doctrine, the Court applied the doctrine to bar statutory and other claims arising from allegedly improper charges on a cable television bill. Indeed, as shown, the *Putnam* Court dismissed a claim for violation of Wisconsin's Trade Practices Act, one of the very claims that was asserted by the Accountants in this case.

The Accountants apparently contend, however, that the *Putnam* Court really did not understand the significance of the dismissal of the statutory claim based on the doctrine. This contention is belied by numerous statements and express holdings in *Putnam*. First, in *Putnam*, this Court described the voluntary payment doctrine in all encompassing terms: "The voluntary payment doctrine places upon a party who wishes to challenge the validity or legality of a bill for payment the obligation to make the challenge either before voluntarily making payment, or at the time of voluntarily making payment." *Putnam*, 2002 WI 108 at ¶ 13 (emphasis added). There is no limitation in this holding based on the type of claim asserted. This Court also noted that the "voluntary payment doctrine developed as a common law principle and has been applied in various contexts." *Id.*, ¶ 14 (emphasis added).

The statutory claim in *Putnam* was not dismissed by oversight. Prior to reaching its decision that the doctrine precluded the claims, the *Putnam* Court specifically recognized that the plaintiffs had asserted seven claims for monetary relief, including a purported "violation of Wisconsin's Trade Practices Act," Wis. Stat. § 100.18. *Putnam*, 2002 WI 108 at ¶ 4 n.2. After recognizing that a statutory claim had been asserted, the *Putnam* court explicitly recognized that the voluntary payment doctrine encompassed any and all damages claims asserted by plaintiffs seeking to recover the voluntary payments:

> <u>[D]espite some legal differences</u> between the customers' claim of unlawful liquidated damages and their other claims for monetary relief, the customers' unlawful liquidated damages claim was also properly dismissed based on their voluntary payments.

Id., ¶ 9 (emphasis added). The Court added:

> <u>Each of the claims for relief</u> stated in the amended complaint <u>is premised on a theory of liability</u> that Time Warner imposed an unlawful liquidated damages clause through the insertion of the $5.00 late-payment fee in its service contracts with cable subscribers. <u>Each count alleges, in some manner</u>, that Time Warner received payments from the late fees "which are not reasonably related to its actual costs."

Id., ¶ 36, n.12 (emphasis added).

Notably, even prior to *Putnam*, the Court of Appeals acknowledged the applicability of the voluntary payment doctrine to consumer class action claims premised on the alleged violation of statutory rights. *See Cruz v. All Saints Healthcare System, Inc.*, 2001 WI App 67, ¶ 23 n.10, 242 Wis. 2d 432, 625 N.W.2d 344 (voluntary payment doctrine was a potential defense to the consumer class action claims).

Finally, the Accountants' contention that the voluntary payment doctrine does not apply to statutory claims is contradicted by the Court of Appeals' decision in *Butcher v. Ameritech Corp.*, 2007 WI App 5, 298 Wis. 2d 468, 727 N.W.2d 546. Like the instant case, *Butcher* involved allegedly unlawful charges on a phone bill. The Court of Appeals rejected the nearly identical argument advanced by the Accountants here, namely that "applying the [voluntary payment] doctrine in this case is inequitable and violates public policy as expressed in Wis. Stat. § 77.59(4)." *Id.* at ¶ 12. The Court of Appeals concluded in *Butcher*—as this Court did in *Putnam*—that the voluntary payment doctrine applies to common law and statutory claims. *Id.* at ¶ 23.

Like the Accountants here, the Plaintiff in *Butcher* complained that the voluntary payment doctrine should not be applied if it would eviscerate statutory rights. The *Butcher* court rejected the argument. 2007 WI App 5 at ¶ 39. The Court of Appeals noted that § 77.59(4) afforded multiple avenues for relief other than a private action for damages, including the filing of “a petition with the appropriate agency for a declaratory ruling on the legal issue of what services are taxable and obtain[ing] judicial review if the ruling is unfavorable.” *Id*.

The *Butcher* court also specifically rejected the plaintiff’s argument that applying the voluntary payment doctrine wrongly inserted a protest requirement into the statute, reasoning:

> WISCONSIN STAT. § 77.59(4)(A) authorizes a taxpayer to file with DOR a claim for a refund for taxes paid to the seller if the claim is for at least fifty dollars. Plaintiffs point out that this section does not include a protest requirement and they argue that this shows the legislature intended that the voluntary payment doctrine not apply to actions such as this to recover from the seller. We do not agree. Section 77.59(4)(a) expresses the legislature’s intent that taxpayer need not protest the tax when paying it in order to recover a refund under the procedure established in § 77.59(4)(a). The statute expresses no intent and no policy judgment on whether the common law voluntary payment doctrine should apply in a court action outside the statutory scheme.

Id. at ¶ 31. Importantly, this Court declined the *Butcher* appellants’ petition to review the decision. *See Butcher v. Ameritech Corp.*, 2007 WI 61, 300 Wis. 2d 193, 732 N.W.2d 859 (denying petition for review).

In contrast to *Putnam*, *Cruz* and *Butcher*, the Accountants are unable to cite a single Wisconsin decision purporting to restrict the voluntary payment doctrine to particular causes of action, because no such decisions exist. In fact, Wisconsin has always recognized the voluntary payment doctrine as a complete defense to any and all damages claims—however characterized—to recover payments made voluntarily and without fraud, duress, or mistake of fact.[4] This Court should not accept the Accountants' invitation to tinker with 150 years of precedent.

The Accountants likely understand that there is no Wisconsin case law supporting their proposition that the voluntary payment doctrine does not apply to statutory claims. Thus, the Accountants shift gears and apparently now contend that common law defenses should never bar statutory claims. Specifically, the Accountants assert: "Since the circuit court granted Defendants' motion to dismiss . . ., the Supreme Court has twice considered whether common law defenses apply to defeat statutory claims." (Accountants' Brief, p. 8).

[4] *See, e.g.*, *Clancy* v. *McEnery*, 17 Wis. 177, 1863 WL 1117, at *3 (1863) (holding that payment "was entirely voluntary, and gives [plaintiff] no right of action."); *Van Buren* v. *Downing*, 41 Wis. 122, 1876 WL 3965, at *4 (1876) ("It is therefore to be considered as a voluntary payment, by mutual mistake of law; and, in such case, no action will lie to recover back the money."); *Parcher* v. *Marathon County*, 52 Wis. 388, 9 N.W. 23, 24 (1881) (defendant in receipt of voluntary payment "*was not liable* after [the plaintiff] had paid the money."); *Raipe* v. *Gorrell*, 105 Wis. 636, 81 N.W. 1009, 1011 (1900) ("If one pays money to another voluntarily, without mistake or fraud, he cannot reclaim it."); *Shirley* v. *City of Waukesha*, 124 Wis. 239, 102 N.W. 576, 577 (1905) ("[T]his general doctrine [also] applies to the payment of taxes. Hence, taxes voluntarily paid, in the absence of fraud, misrepresentations, duress, or coercion, cannot be recovered back," and "the plaintiff has no cause of action.").

However, the two cases cited by the Accountants did not hinge on the legal principle the Accountants advance. For example, the Accountants mysteriously cite *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762, for the proposition that the economic loss doctrine does not apply to statutory claims. (Accountants' Brief, p. 8). Of course, the economic loss doctrine, by definition, only applies to attempts to recover under a <u>tort</u> theory for damages stemming from a contract. *Linden v. Cascade Stone Co.*, 2005 WI 113, ¶ 6, 283 Wis. 2d 606, 699 N.W.2d 189. Thus, unlike the generally applicable voluntary payment doctrine, there is no need for the Legislature to explicitly provide that the economic loss doctrine is inapplicable to statutory claims. The economic loss doctrine was developed to preclude tort claims where a contract exists between parties. It simply does not apply to claims based on a statute.

Next, the Accountants cite *Malzewski v. Rapkin*, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156 for the proposition that a claim under Wis. Stat. § 100.18 was proper even though common law reasonable reliance was not satisfied. (Accountants' Brief, p. 8). It is hard to understand how this decision impacts the issue before this Court. In *Malzewski*, the Court simply held that reasonable reliance was not an element of a claim under Wis. Stat. § 100.18, even though it is an element of a common law fraud claim. *Malzewski* at ¶ 24. Simply put, reliance is an element of common law fraud (not a defense), but it is not an element (or a defense) to a claim under Wis. Stat. § 100.18.

Actually, *Malzewski* demonstrates that the Legislature knew what it was doing (which is, of course, what *Fuchsgruber* instructs) when it drafted § 100.18 and made clear that reliance was not an element. The *Malzewski* decision in no way holds or even implies that common law defenses are not applicable to statutory claims—unless, of course, the Legislature includes language clearly showing that such defenses are inapplicable.

2. The Policy Reasons Behind the Voluntary Payment Doctrine Apply Equally to Common Law and Statutory Claims.

The Accountants' argument should also be rejected because the policy reasons underlying the voluntary payment doctrine apply with equal force to statutory claims. The first policy behind the doctrine is to foster settlement between parties short of litigation. *Putnam*, 2002 WI 108 at ¶ 16. Surely it is good policy that a party that disputes a charge on a phone bill will first at least call its phone company before filing a class action lawsuit. Such a policy will lower attorneys' fees for litigants, ease court congestion and avoid litigation over what may be an innocent mistake. For example, unbeknownst to the complaining party, someone in his or her household may have authorized the disputed charges. Parties should be both allowed and encouraged to resolve these disputes without court intervention.

Indeed, this policy is even more applicable to the instant case than it was in *Putnam* and *Butcher*, two cases that applied the voluntary payment doctrine to bar statutory claims. In *Putnam*, the plaintiffs sought recovery of a late fee on the grounds that it constituted an unlawful penalty. The doctrine barred recovery even though the customer's review of the bill would not have revealed that the fee exceeded Time Warner's actual costs. In *Butcher*, the doctrine precluded recovery of payment of charges on a phone bill even though a review of the phone bill would not have revealed that the customer was being overcharged for sales tax.

In contrast, the Accountants in this case would have known whether they authorized the charges if they simply reviewed their phone bill. *See Freund v. Avis Rent-a-Car Systems, Inc.*, 114 Ill.2d 73, 499 N.E.2d 473, 475 (1986) (appearance of a disputed charge is "knowledge" for purposes of dismissing a complaint under the voluntary payment doctrine). Clearly, if the voluntary payment doctrine bars recovery of charges that payors may not have known were improper when they paid them, it bars recovery here. Indeed, the Accountants certainly scrutinize financial statements far more complex than the charges that were stated "with sufficient particularity" here.

The second policy reason is to allow payees to reasonably rely on revenues they receive when the payor has not given any notice that a dispute exists, such that the payee might be required to return the payment. *Putnam*, 2002 WI 108 at ¶ 16. In *Putnam*, this Court specifically held that the policy applies to private businesses and governmental entities alike. *Id.* at ¶ 34. The policy is particularly applicable here where the Accountants paid the clearly disclosed charges for 14 months without a word of protest.

B. The Legislature Did Not Intend To Abrogate The Voluntary Payment Doctrine Because Its Intent To Do So Is Not Expressed In The Statute.

The Accountants' position ignores 100 years of precedent on the voluntary payment doctrine. However, leaving principles of *stare decisis* regarding the voluntary payment doctrine aside, the Accountant's assertion that this Court should simply assume the Legislature did not intend for the doctrine to apply to statutory claims would also radically change how

Wisconsin courts determine legislative intent and constitute an implicit reversal of *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. In *Fuchsgruber,* this Court held:

> It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent. Statutes in derogation of the common law are strictly construed. A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. <u>To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory</u>.

Id. at ¶ 25 (emphasis added, citations omitted). *Accord Wisconsin Bridge & Iron Co. v. Indus. Comm'n.*, 233 Wis. 467, 474, 290 N.W. 199, 202 (1940) ("statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein.").

The *Fuchsgruber* axiom was applied in *Putnam*, where this Court held that only the "legislature has the power to create additional exceptions to the voluntary payment doctrine in particular circumstances." *Putnam,* 2002 WI 108 at ¶ 35. Thus, the Accountants request that the Court <u>assume</u> legislative abrogation should be rejected.

When the legislature enacted each of the statutes at issue in this case, Wisconsin's voluntary payment doctrine was the law of the land and had been applied without exception over the years. Nevertheless, contrary to

Fuchsgruber's instruction, the Accountants speculate that the legislature never intended that Wis. Stat. § 100.207(3)(a) should be subject to the voluntary payment doctrine. The circuit court and Court of Appeals correctly concluded that the opposite was true. The circuit court conducted a thorough review of the legislation and held:

> I find a lack of any explicit reference to voluntary payment in section 100.207 and that lack of any explicit reference to the possibility of voluntary payment leads me to conclude that the Legislature did not intend for the statute to override this common law doctrine. I simply do not find any words suggesting that you can claim damages under the statute even if you voluntarily paid.

(A.91). The circuit court concluded: "there's nothing in the legislation that says that it overrides this well understood, long standing doctrine about voluntary payment." (A.93).

Likewise, based on its own independent review of the legislation at issue, the Court of Appeals held:

> We agree with the trial court's conclusion that if the legislature had intended to "abrogate" the voluntary payment doctrine, it needed to do so expressly when it enacted the statutes at issue. [The Accountants have] not directed us to any language to this effect.

(A.9-10, ¶ 25).

Nothing in Wis. Stat. § 100.207 suggests or implies—much less "clearly expresses in the language of the statute"—any intent to override the long-standing voluntary payment doctrine. Indeed, it would have been simple for the legislature to provide in § 100.207(6)(a) that the voluntary payment doctrine specifically, or common law defenses in general, did not apply. The legislature declined and *Fuchsgruber* does not permit abrogation by implication. Rather, statutory abrogation must be "clearly expressed" and "must leave no doubt."

Moreover, the legislature's acquiescence to the *Cruz, Putnam,* and *Butcher* decisions confirms the legislature's intent to reject a new "statutory rights" exemption to the voluntary payment doctrine. In *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis. 2d 626, 633-34, 157 N.W.2d 648 (1968), this Court held that legislative acquiescence to a judicial interpretation of a statute is dispositive of legislative intent:

> Where a law passed by the legislature has been construed by the courts, <u>legislative acquiescence</u> in or refusal to pass a measure that would defeat the courts' construction is <u>not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged</u>; for the principle of the courts' decision-legislative intent-is a historical fact and, hence, unchanging. Thus, when the legislature acquiesces or refuses to change the law, <u>it has acknowledged that the courts' interpretation of legislative intent is correct</u>.

(emphasis added). *Accord State v. Olson,* 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993) ("We presume that the legislature is aware that absent some kind of response this court's interpretation of the statute remains in effect. Legislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions.") (citations omitted).

In sum, on three occasions in the last ten years the Legislature has been reminded that Wisconsin courts apply the voluntary payment doctrine to statutory claims. Yet, the Legislature has not inserted language in any of the statutes abrogating the doctrine. This legislative acquiescence confirms that the *Cruz-Putnam-Butcher* analysis is consistent with legislative intent.

Nor can the Wisconsin legislature be accused of being asleep at the wheel. The legislature has a history of responding promptly to court decisions at odds with the legislature's policy preferences. On March 14, 2004, for example, the legislature passed 2003 Wis. Act 148 (enacting Wis. Stat. §§ 895.049 and 901.053) to override *Stehlik v. Rhoads*, 2002 WI 73, 253 Wis. 2d 477, 645 N.W.2d 889, which recognized a "helmet defense" for comparative negligence purposes. Moreover, on April 6, 2006, the legislature passed 2005 Wis. Act 183, amending the statutory caps for medical malpractice in response to *Ferndon v. Wis. Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.[5]

Here, based on *Fuchsgruber*, this Court must assume that the legislature is well aware of the 2001, 2002 and 2006 decisions in *Cruz, Putnam* and *Butcher*. Therefore, the voluntary payment doctrine is applicable to the statutory claims in this lawsuit. If the Accountants do not like the fact that they must read their phone bills before paying them and make some form of slight protest before filing a class action lawsuit over disputed charges, the Accountants' solution lies with the Legislature, not the courts.

C. The Accountants' Policy Arguments For Abrogating The Voluntary Payment Doctrine Are Not Persuasive.

In tacit recognition that Wisconsin's existing voluntary payment doctrine bars their claims, the Accountants make three arguments for not applying the doctrine here: (1) it allows the perpetrators of fraudulent charges to profit; (2) it leaves cramming victims without a remedy; and (3) wrongful conduct is alleged to have occurred.

[5] The Wisconsin legislature even has its eye on legal decisions outside of Wisconsin, as it did on April 14, 2006 when it passed 2005 Wis. Act 325, creating a liability exemption in Wis. Stat. § 895.506 for "weight gain and obesity claims." This legislation was in response to the much-publicized claims discussed in *Pelman v. McDonald's Corp.*, 237 F.Supp. 2d 512 (S.D.N.Y. 2003).

1. There is Already a Fraud Exception to the Voluntary Payment Doctrine.

The Accountants repeatedly argue that the voluntary payment doctrine should not apply because fraud allegedly occurred here and application of the doctrine would allow wrongdoers to "avoid liability for statutory damages simply because their deceptive conduct had the desired effect—specifically causing customers to unwittingly pay unauthorized charges." Accountants' Brief, p. 9; *see also id.*, p. 10 (voluntary payment doctrine should not apply because "only those who were not deceived . . . could sue for damages."). Tellingly, despite their conclusory allegations, the Accountants never allege they were actually misled by the charges at issue.

In any event, there is no need to rewrite Wisconsin law to address the Accountants' concerns. There is already a fraud exception to the voluntary payment doctrine. The problem for the Accountants is that the circuit court and Court of Appeals both held it was inapplicable because the Accountants' payments were not induced by fraud. (A.98-99). This determination was legally proper and is absolutely supported by the record.[6]

[6] In *Meyer v. The Laser Vision Institute*, 2006 WI App 70, ¶ 14, 290 Wis. 2d 764, 714 N.W.2d 223, the court of appeals emphatically rejected the contention that whether challenged statements are "deceptive or misleading cannot be resolved on a motion to

As both courts noted, the charges that the Accountants allege were "hidden" and "deceptive" were anything but—they were actually prominently and conspicuously displayed on the phone bills. The Court of Appeals affirmed the circuit court's finding that "the charges were stated with such particularity that a reasonable customer would be startled to find such a charge on the bill." (A.98-99). This finding should not be disturbed.

Thus, the Accountants did not pay the conspicuously disclosed charges because they were deceived into paying them, they paid them without protest because apparently they either knew what they were paying or decided not to review their itemized phone bill—not for one month, but for 14 months.[7] Not only does the Accountants' lack of ordinary diligence preclude a finding of fraud, its pay without objection for 14 months and then sue approach is one of the problems the voluntary payment doctrine is designed to prevent. *See Putnam*, 2002 WI 108 at ¶ 30 ("We agree with the

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dismiss." Likewise, in *Butcher* the court of appeal's review of the phone bills and the pleadings led to its conclusion that the plaintiffs did not pay the phone bills because of a mistake of fact. *See Butcher,* 2007 WI App 5 at ¶ 29.

[7] On this issue, there is another gigantic chasm between the Accountants' generalized allegations and the actual charges. The Accountants' Complaint alleges that one of the reasons the charges allegedly go unnoticed is that they are "relatively small." (Accountants' Brief, p. 3). In fact, the Local Biz charges at issue were $37.75 per month. (A.16). It does not seem that a reasonable person would be lulled into paying a $37.75 erroneous charge, much less certified public accountants that are trained to locate mistakes in financial documents.

general principle that a person who receives payment from another without any protest from the payor should be allowed to rely on the use of funds . . . . This principle applies with equal force when the payor is a cable television customer and the payee is that customer's cable provider.").

2. Alleged Cramming Victims Are Not Left Without a Remedy.

The Accountants argue that Wisconsin law must be rewritten because to require persons to read their phone bill and dispute unauthorized charges before bringing class action lawsuits would deprive parties like them of a remedy for alleged cramming. On the contrary, Wis. Stat. § 100.207 provides numerous options for relief to the Accountants, despite the fact that a claim for money damages might be barred by the voluntary payment doctrine (if, like the Accountants, a party pays clearly disclosed charges and said payment was not induced by fraud, duress or mistake of fact). For example, Section 100.207(6)(b)1., permits the department of justice or any district attorney to pursue claims for declaratory and injunctive relief on behalf of aggrieved consumers, <u>and to seek restitution of all pecuniary losses sustained</u> as a result of violations of Wis. Stat. § 100.207. Moreover, sections 100.207(6)(b)2, (6)(c), and (6)(f) also provide for a variety of fines, forfeitures, and administrative "hammers" to address and enjoin any violations of the statute. The legislature has decided which remedies are sufficient to address violations of Wis. Stat. § 100.207(3)(a). The fact that the Accountants do not agree with the remedies provided does not justify piecemeal nullification of the voluntary payment doctrine.

In fact, the voluntary payment doctrine does not even prevent Wisconsin consumers from filing private actions to recover allegedly unlawful "cramming" charges so long as the claimants simply object to the purportedly unlawful payment demand before, or at the time of, making the payment, and before initiating a lawsuit. As this Court held in *Putnam*, all that a payor has to do to sidestep the voluntary payment doctrine is to make some form of protest over the fee prior to, or contemporaneous with, payment. *Putnam*, 2002 WI 108 at ¶ 33. Thus, contrary to the Accountants' contentions, alleged cramming violations are clearly <u>not</u> without a remedy. Indeed, it is not as if the Accountants do not know how to contest charges. They admit that they contested other charges on their phone bills prior to bringing this lawsuit. (A.27, ¶ 22). For some reason, however, they chose to bring a class action lawsuit before disputing the instant charges. The Accountants even acknowledged that other persons were successful in getting challenged Local Biz charges reversed without litigation. (A.26, ¶ 17). Finally, as the circuit court found, the Accountants would have been able to pursue injunctive relief—but the Accountants chose to abandon this remedy.

3. The Voluntary Payment Doctrine Presupposes Alleged Wrongful Conduct.

The Accountants' final policy argument for overturning settled Wisconsin law is that the voluntary payment doctrine should not bar their claims because Wis. Stat. § 100.207(3)(a) prohibits the charges at issue. However, Wisconsin courts have repeatedly emphasized that the voluntary payment doctrine presupposes the challenged payment may have been wrongful or illegal. *See, e.g., Owens v. Milwaukee*, 47 Wis. 461, 3 N.W. 3, 11 (1879) (voluntary nature of payment would "conclusively bar [plaintiff] from claiming that the city should respond to him in damages for the voluntary performance of the acts *so illegally ordered to be done*."); *Powell v. St. Croix County Sup'rs,* 46 Wis. 210, 50 N.W. 1013, 1014 (1879) ("if a person voluntarily pays a void tax, with knowledge of the facts which render it void, he cannot recover back the money thus paid."); *Custin v. City of Viroqua*, 67 Wis. 314, 30 N.W. 515, 516 (1886) (even though payment had been "unlawfully, wrongfully, and illegally exacted" from the plaintiff, "the payment was clearly a voluntary payment, and cannot be recovered back again."); and *Burgess v. Commercial Nat'l Bank of Appleton*, 144 Wis. 59, 128 N.W. 436, 438 (1910) (despite fact that payment had been "wrongfully, fraudulently, and unlawfully obtained and exacted," the court held that the voluntary payment "cannot be recovered back upon well-settled principles of law.").

While the Accountants contend customers should not have to protest to secure relief, this contention is simply a policy preference similar to the one rejected in *Putnam*. Thus, it does not matter that the Accountants claim Wisconsin Bell and ILD violated the statutes at issue. The voluntary payment doctrine still applies.

D. Other Jurisdictions Hold That There Is No Statutory Rights Exception To The Voluntary Payment Doctrine.

Contrary to the Accountants' contentions, *Putnam's* rejection of a "statutory rights" exemption to the voluntary payment doctrine is consistent with the weight of authority from other jurisdictions. *See e.g., Harris v. ChartOne,* 841 N.E.2d 1028, 1031 (Ill. App. 2005) (voluntary payment doctrine required dismissal of consumer class action alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Antitrust Act, holding that the doctrine "applies to any claim of right, whether that claim is premised on a contractual relationship or a statutory obligation."). *Cotton v. Med-Cor Health Info. Solutions, Inc.,* 472 S.E.2d 92, 96 (Ga. App. 1996) (dismissal of putative class action for violations of the Georgia Health Records Act not "avoided by reason of the fact that the charges were imposed on plaintiffs *in contravention of a statute,"* as doctrine applies to legal, equitable, and statutory claims alike) (emphasis added); *Dupler v. Costco Wholesale Corporation,* 249 F.R.D. 29, 38-39, 46 (E.D.N.Y. 2008) (voluntary payment doctrine is a viable defense to consumer class action damages claims premised on violations of New York's unfair business practices statute); *Solomon v. Bell Atlantic Corp.,* 777 N.Y.S.2d 50, 54 (N.Y. Sup. Ct. 2004) (decertified consumer class action based on violations of New York's unfair business practices statute due to the manageability concerns posed by the voluntary payment doctrine defense); *Rivera v. Network Health Plan of Wisconsin, Inc.,* 2003 WL 22794439 (E.D. Wis. 2003) (citing *Putnam,* and applying voluntary payment doctrine to consumer's statutory claim under ERISA).

The Accountants cite to a series of cases from other jurisdictions allegedly in support of their contention that the voluntary payment doctrine should not apply. These cases are not persuasive because they ignore

Fuchsgruber's mandate that a statute does not abrogate the common law unless the abrogation is clearly expressed in the language of the statute. Finally, two of the primary cases cited by the Accountants only address the applicability of the voluntary payment doctrine to late fees charged by cable companies. *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837 (Tx.Ct.App. 2000); *Time Warner Entertainment Co., L.P. v. Whiteman*, 802 N.E.2d 886 (Ind. 2004). Neither of these cases discuss whether the voluntary payment doctrine, as a common law defense, applies to bar statutory claims. *Id.*

VI. CONCLUSION.

The circuit court and the Court of Appeals properly applied longstanding Wisconsin common law to the allegations of the complaint, and correctly concluded that the claims must be dismissed. ILD respectfully requests that this decision be affirmed. In the event the court holds that the voluntary payment doctrine does not apply, the court should remand the case to the Court of Appeals for resolution of ILD's cross appeal.

Dated this _____ day of May, 2011.

By:________________________________

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that Defendant-Respondent-Cross-Appellant ILD Telecommunications, Inc.'s Brief. conforms to the rules contained in § 809.19(8)(b) and (c)2, Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 7,645 words.

Dated at Milwaukee, Wisconsin this _____ day of May, 2011.

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CERTIFICATION OF MAILING

I hereby certify that on this 9th day of May, 2011, pursuant to § 809.19(8), Wis. Stats., the original and twenty-one (21) copies of Defendant-Respondent-Cross-Appellant ILD Telecommunications, Inc.'s Brief were deposited in the United States mail correctly addressed and postage prepaid for delivery to the Clerk of the Wisconsin Supreme Court by first-class mail. Three (3) copies of the same were also deposited in the United States mail correctly addressed and postage prepaid for service upon counsel of record by first-class mail.

ILD was served with Plaintiffs-Appellants-Cross-Respondents-Petitioners Brief and Appendix via first-class mail, received on April 16, 2011.

Dated at Milwaukee, Wisconsin this ___ day of May, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(12)

I hereby certify I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ______ day of May, 2011.

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SUPREME COURT OF WISCONSIN

MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC and THOMAS H. SCHMITT, CPA, d/b/a METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents, Petitioners,

v.

WISCONSIN BELL INC., d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, LOCAL BIZ USA, INC., and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

U.S. CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' REPLY BRIEF RESPONDING TO ILD'S BRIEF

Appeal from the Circuit Court for Milwaukee County
The Honorable Richard J. Sankovitz, Presiding

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I. ILD Is A Service Provider, According To Telephone Bills That All Parties Agree Were Properly Considered On Motions to Dismiss

ILD disputes that it is a "service provider of some unknown and unspecified service." ILD's Brief at 6, n.2. Schmitt's allegation that ILD is a service provider is supported by telephone bills that AT&T attached *to its reply brief* on motions to dismiss below. R.37, pp. AT&T 73, 77, 83 and 88. Schmitt did not have all of these bills when this lawsuit was filed, but the parties agreed that they were effectively incorporated into Schmitt's complaint because they "are referred to in the plaintiff's complaint and central to [his] claim." *See Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

Now, despite arguing that the bills should be considered below (R. 13, p. 4, n. 1), ILD asks this Court to ignore those showing that "ILD Teleservices, Inc." charged Schmitt for an alleged service described as "Nat'l Online Internet Mnthly Fee." Ironically, ILD itself cannot explain what these services were (calling them "some unknown and unspecified service"). ILD's Brief at 6, n.2. Based on these bills, it appears that ILD is not only a billing aggregator, but a service provider. Although this fact may not bear directly on the outcome of this appeal, it is a point worth clarifying so that there is no misunderstanding about the nature of ILD's business.

II. The Issues Presented Here Were Not Addressed Or Decided In *Putnam*, *Butcher* or *Cruz*

For reasons set forth in Schmitt's reply to AT&T's brief, this appeal is not governed by *Putnam v. Time Warner Cable of SE Wis. Ltd. P'ship*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626, as the issues presented were not squarely addressed or decided in that case. *Colby v. Columbia County*, 192 Wis. 2d 397, 405, 531 N.W.2d 404 (Ct. App. 1995), *citing Webster v. Fall*, 266

U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been [so] decided as to constitute precedents.").

Moreover, *Butcher* and *Cruz* are decisions of the Court of Appeals. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶51, 324 Wis. 2d 325, 782 N.W.2d 682 (only Supreme Court may overrule, modify or withdraw language from a prior Supreme Court opinion). Nonetheless, to the extent the analysis in *Butcher* is persuasive, that decision supports Schmitt's position.[1] In *Butcher*, the plaintiffs alleged common law claims and a claim under a tax statute, Wis. Stat. § 77.51, *et seq*., which did not authorize a private right of action for damages in court. *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶ 6, 298 Wis. 2d 468, 727 N.W.2d 546. With regard to the tax statute, the plaintiffs asserted that the voluntary payment doctrine did not bar their claim *in court* because the statute did not require a protest *in administrative proceedings* under § 77.59(4)(a). *Id.* at ¶ 31. The Court of Appeals agreed that the statute (through its silence regarding the need for a protest) expressed the legislature's intent that no protest was required in an administrative proceeding, but stated that this did not show that the legislature was authorizing claims for damages to be brought *in court* without a protest. *Id.* ("The statute expresses no intent and no policy judgment on whether the common law voluntary payment doctrine should apply *in a court action* outside the statutory scheme.") (emphasis supplied).

The critical fact is that the statute at issue in *Butcher* did not authorize a private right of action for damages in court. If it had, the Court of Appeals would have concluded (as it did regarding the administrative claim) that the legislature's "silence" on the need for a protest evidenced its intent that no protest was required before seeking damages in court. *Id.* at ¶ 31 ("Section 77.59(4)(a) [which is "silent" as to protest] expresses the legislature's intent that a taxpayer *need not protest* the tax

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[1] Tellingly, AT&T does not cite or discuss *Butcher* at any point during its 67-page brief.

when paying it in order to recover a refund *under the [administrative] procedure established in §77.59(4)(a).*") (emphasis supplied).

Here, each of the statutes at issue specifically authorizes a claim for damages without requiring a protest. Applying the reasoning of *Butcher*, the legislature's "silence" demonstrates its intent that a plaintiff "need not protest" before seeking damages. *Id.* at ¶ 31. Accordingly, to the extent the reasoning of *Butcher* has any persuasive value, that decision favors Schmitt's position.

As for *Cruz v. All Saints Healthcare System, Inc.*, 2001 WI App 67, ¶ 23, n. 10, 242 Wis. 2d 432, 625 N.W.2d 344, that case involved the review of a decision granting class certification. In a footnote, the Court of Appeals made a passing reference to the voluntary payment doctrine because it had been raised as potential defense before the circuit court. *Id.* None of the issues presented by this appeal were analyzed or decided in *Cruz*. In short, *Cruz* contains no analysis that would have any persuasive value here.

III. *Stuart* And *Novell* Are Instructive

ILD attempts to distinguish *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762, asserting that "of course" the economic loss doctrine does not apply to statutory claims, as it only applies when parties pursue "a tort theory." ILD's Brief at 19. While this may seem an obvious conclusion to ILD now, it was not always so. *See MBI Acquisition Partners, LP v. Chronicle Publishing Co.*, 301 F. Supp. 873, 886 (W.D. Wis. 2002) (dismissing § 100.18 claim based on economic loss doctrine); *Dow v. Poltzer*, 364 F. Supp. 2d 931, 940 (E.D. Wis. 2005) (dismissing § 895.80 claim based on economic loss doctrine).

Moreover, ILD's argument ignores this Court's analysis and reasoning in *Stuart*. There, as in *MBI* and *Dow*, defendants argued that a statutory claim should be dismissed based on the voluntary payment doctrine because it was akin to a tort claim. While the Court might have held (as other courts had) that some statutory claims are nothing more than "codified torts" to which the economic loss doctrine applies, it did not reach that conclusion in *Stuart*. Rather, it showed deference to the legislature's public policy decision to provide plaintiffs with a statutory remedy. As the Court explained:

> [T]o apply the ELD to the HIPA claims would defeat the public policies underpinning the HIPA and the remedies it provides. Public policy concerns require consumer protection statutes and administrative regulations be read in *pari materia* to achieve the goals of providing consumers, as well as persons engaged in legitimate businesses, with necessary protections and appropriate remedies.

Stuart, 2008 WI 22, ¶ 35. Notably, nowhere in its decision did the Court assume that "of course" the economic loss doctrine did not apply to statutory claims, as ILD now argues.

Likewise, in *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544, the Court considered whether the reasonable reliance element of common law fraud was necessary to state a valid claim under Wis. Stat. § 100.18, which is titled "Fraudulent Representations." Despite the term "fraudulent" in the statute's title, the Court held that a plaintiff need not prove reasonable reliance, an element of common law fraud. *Id.* ¶ 27. As in *Stuart*, the Court focused on the plain language of the statute, which had no reliance element. *Id.* ("A plain reading of the statute reveals that reasonable reliance is not an element of a statutory false representation claim."). In addition, the Court stated that it would be improper to limit the remedies available under the statute by imposing a reliance requirement, as that would be inconsistent with the legislature's purpose of deterring sellers from making false and misleading representations. *Id.* ¶ 32 ("Deterrence does not depend on reasonable reliance.").

As in *Novell*, this case involves a statute that was enacted to deter trade practices deemed to be illegal (here, cramming) and provide remedies for those harmed. Wis. Stat. §§ 100.207(3) and (6). Imposing a protest prerequisite would be inconsistent with the statute's remedial purpose and, therefore, consistent with *Novell*, the Court should not allow crammers to avoid liability based on the common law voluntary payment defense.

ILD argues that the result in *Novell* is irrelevant as the legislature "made clear that reliance was not an element" when it made no mention of reliance in § 100.18. ILD's Brief at 20. The same can be said for § 100.207 and the other remedial statutes at issue, where the legislature made clear that damage remedies were available without any mention of a protest requirement. If the legislature had intended to require a protest, it certainly knew how to do so. *See* Wis. Stat. § 426.110 (requiring plaintiff to provide notice and an opportunity to cure before filing a class action under the Wisconsin Consumer Act).

Finally, when deciding *Stuart* and *Novell*, the Court did not focus on whether the legislature included language "abrogating" the common law. Rather, it analyzed the statutory language to determine whether imposing common law requirements would be consistent with, or *conflict* with, the remedial purposes of the statutes. Where the common law *conflicted* with the remedial purposes, the statutes controlled. The same approach should be used here. There is nothing in the relevant statutes to suggest a protest requirement, and imposing one would be inconsistent with the statutes' remedial purposes. Therefore, the voluntary payment rule should not apply.

IV. ILD's Policy Arguments For Imposing A Protest Requirement Are Misplaced

ILD argues that the same policy arguments that justify a protest requirement for common law claims (*i.e.* restitution or liquidated damages) support a protest requirement for statutory claims. ILD's Brief at 20. ILD's arguments are misplaced. The merits of the public policy underlying the voluntary payment rule are not the issue. Rather, the issue is whether the public policy rationale for the common law doctrine must give way to public policy decisions made by the legislature when it enacted the remedial statutes at issue.

ILD argues that, despite the legislature's decision not to require a protest in § 100.207, one should be imposed "to foster settlement between parties short of litigation." ILD's Brief at 20. ILD also incorrectly and irrelevantly suggests that this entire case could have been avoided if Schmitt "simply reviewed [his] phone bills." ILD's Brief at 21. What such arguments fail to recognize is that regardless of whether ILD believes Schmitt is to blame for unauthorized charges on his phone bill, the legislature disagreed when it enacted Wis. Stat. § 100.207. Indeed, the legislature took precisely the opposite view, deciding that telecommunications companies that allow cramming to persist, and who earn substantial profits by billing for services that are not authorized (or even provided to customers), are the ones responsible for this illegal practice. Whether or not one believes, in hindsight, that Schmitt's telephone bills were "clear and unambiguous" or that Schmitt should have read his bills more carefully, the fact remains that the legislature decided that victims of cramming are not to be blamed if they fail to notice an unauthorized charge, or fail to dispute charges every single month, as they are removed and then put back onto phone bills (time and again) without customer authorization. *See* A. 27, ¶ 22 (alleging that even after Schmitt disputed some charges, they would reappear, requiring him to object time and time again).

ILD, given the nature of its business, might question the legislature's judgment in deciding to make cramming illegal and holding companies like ILD responsible. It may also question the wisdom of not including a protest requirement in the statute. But, none of that matters here, because the legislature (not ILD) makes such public policy judgments. Obviously, the legislature believes that cramming is a serious problem and that a private right of action for damages is necessary to remedy it. It enacted Wis. Stat. § 100.207, which clearly makes the practice illegal. The statute should be interpreted as written, without imposing a protest requirement that would undermine the remedial nature of the statute.

Here, rather than the voluntary payment doctrine, the more important judicial statement of public policy is set forth in decisions holding that where statutes conflict with common law, the statutes control. *See Kensington Dev. Corp. v. Israel*, 139 Wis. 2d 159, 167, 407 N.W.2d 269 (Ct. App.1987), *aff'd*, 142 Wis. 2d 894, 419 N.W.2d 241 (1988) ("In cases of conflict between legislation and the common law, legislation will govern because it is the latest expression of the law"). As this Court held when affirming the Court of Appeals in *Kensington*, if the application of common law would effectively nullify a statutory claim, the common law rule should not apply. *Kensington*, 142 Wis. 2d at 903 ("If the absolute privilege rule is applied, the slander of title statute, sec. 706.13, would be nullified because it would be virtually impossible to assert a claim if all communications in judicial proceedings relating to property were absolutely privileged.").

For these reasons, the voluntary payment doctrine should not be a defense to Schmitt's statutory claims.

V. ILD's Suggestion That The Voluntary Payment Doctrine's Impact Would Be Limited Is Also Misguided

ILD next argues that applying the voluntary payment rule would not seriously undermine the remedies provided by the legislature, as victims of cramming could still argue "mistake of fact" or "fraud." ILD's Brief at 28. These arguments are also misguided.

If the remedies provided at common law for claims such as equitable restitution (based on "mistake of fact" or "duress") and fraud were sufficient, the legislature would not have needed to enact § 100.207. By asserting that Schmitt must prove common law "mistake of fact," "duress" or "fraud" to seek damages under § 100.207, ILD tries to turn back time and essentially takes the position that the statutory damages remedy serves no purpose, but merely duplicates relief already available at common law.

One must presume that the legislature intended to broaden the remedies available to victims of cramming when it enacted § 100.207. Indeed, the legislature specifically contemplated that class actions could be brought. Wis. Stat. § 100.207(6)(a). If ILD was correct, then the legislature's decision to authorize damages for individuals (or classes of individuals) harmed by cramming makes little sense, as those individuals would still need to prove the common law elements of fraud, mistake of fact or duress in any case.

VI. The Non-Wisconsin Cases Cited By ILD Are Not Persuasive

As set forth in Schmitt's reply to AT&T's Brief, the overwhelming majority of courts considering the issue have held that the voluntary payment doctrine does not apply to statutory claims. ILD cites some of the same non-Wisconsin decisions relied upon by AT&T. ILD's Brief at 33, 34. For instance, ILD relies on *Harris v. ChartOne*, 841 N.E.2d 1028, 1031 (Ill. App. 5th Dist. 2005). However, *Harris* is contradicted by a 2007 decision of the Illinois Court of Appeals, which specifically holds that the voluntary payment rule does not apply to statutory claims. *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 810 (Ill. App. 3rd Dist. 2007) ("[T]his state has an interest in transactions that violate 'statutorily-defined public policy.' The effect of such transgressive acts, generally speaking, is that the voluntary payment rule will not be applicable.").

ILD also cites *Cotton v. Med-Cor Health Info. Solutions, Inc.*, 472 S.E.2d 92, 96 (Ga. App. 1996). Notably, in Georgia, the voluntary payment doctrine is codified by statute. *Id*. at 611, *citing* OCGA §13-1-13. In *Cotton*, the Georgia Court of Appeals was asked to decide whether the *statutory* voluntary payment defense applied to a statutory claim, and the Court of Appeals decided that it did. *Cotton*, 472 S.E.2d at 96. However, ILD fails to mention that, in a more recent decision, the Georgia Supreme Court reached the opposite conclusion, applying the rule of statutory construction favoring a specific statute over a general one. *Southstar Energy Services, LLC v. Ellison*, 691 S.E.2d 203, 206 (Ga. 2010) (statute that "specifically authorizes a private right of action for damages, must prevail over the general statute setting forth the voluntary payment doctrine.").

Similarly, ILD cites *Solomon v. Bell Atlantic Corp.*, 777 N.Y.S.2d 50, 54 (N.Y. App. Div. 2004), which involved a motion for class certification, and the issue of whether the voluntary payment rule applied to statutory claims was not addressed. Moreover, ILD ignores other New York decisions that consider the relevant issue, likely because they favor Schmitt's position. *See*

MacDonell v. PHH Mortgage Corp., 846 N.Y.S.2d 223, 224 (N.Y.A.D. 2 Dept. 2007) ("This Court has determined that the voluntary payment doctrine will not bar such statutory causes of action").[2]

Finally, ILD cites *Rivera v. Network Health Plan of Wisconsin, Inc.*, 2003 WL 22794439 (E.D. Wis. 2003). In that case, the federal court did not apply the voluntary payment doctrine because the plaintiff had paid money "under protest." *Id.* at *12. The questions presented by this appeal were not addressed.

CONCLUSION

For the foregoing reasons, the decisions below should be reversed and this case should be remanded for further proceedings.

Dated this 23rd day of May, 2011

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[2] ILD also cites *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 38-39, 46 (E.D.N.Y. 2008), which involved both common law and statutory claims. There, the federal court was also considering a motion for class certification. *Id.* at 38-39. Again, the court did not consider the issues presented here and, therefore, the decision carries no weight.

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CERTIFICATION AS TO
FORM & LENGTH

I, Douglas P. Dehler, certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 220 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,921 words.

Dated this 23rd day of May, 2011

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION OF MAILING PURSUANT TO RULE 809.30(3)(b) STATS.

I, Douglas P. Dehler, certify that on May 23, 2011, Plaintiffs-Appellants-Cross-Respondents-Petitioners' Reply Brief Responding to ILD's Brief was correctly addressed and deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court via first-class mail, postage pre-paid, pursuant to Rule 809.80(3)(b) Stats.

SIGNED: ____________________________
Douglas P. Dehler

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MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC and THOMAS H. SCHMITT, CPA, d/b/a METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents, Petitioners,

v.

WISCONSIN BELL INC., d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a ILD TELESERVICES, LOCAL BIZ USA, INC., and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

U.S. CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' REPLY BRIEF RESPONDING TO AT&T'S BRIEF

Appeal from the Circuit Court for Milwaukee County
The Honorable Richard J. Sankovitz, Presiding

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ARGUMENT

I. AT&T's Arguments Concerning "Verification Only" Statements Should Be Disregarded

AT&T suggests that the only way it can combat cramming is to provide customers with "verification only" statements. AT&T's Brief at 6. This assertion is contained in the Introduction to AT&T's brief, and is not supported by any citation to the record.[1] In addition, AT&T's assertion is contradicted by the "Anti-Cramming Best Practices Guidelines" it helped to draft. A.21, ¶ 2, *Exh. A* and *Exh. B* (A. 58) (AT&T's predecessor was an "active participant" in formulating the guidelines). In adopting those guidelines, AT&T acknowledged that cramming is a serious problem, and that AT&T has a role in addressing it. *Id*. Among the "best practices" were procedures for LECs, like AT&T, to obtain documentation from service providers to ensure that they are not engaged in cramming. *See* A.54-55 (describing process for LECs to obtain "assurance" and "documented authorization" from service providers). Now, despite these "best practices," AT&T misleadingly argues that all it can do to fight cramming is to provide customers with so-called "verification only" statements.

That "verification only" statements are a newly invented fiction is evidenced by the fact that there is no reference to them in the "best practices" guidelines. Rather, those guidelines anticipate that service providers will document customer authorizations through voice recordings, a written and signed document authorizing the service, or third-party independent verification. A.54-55. For its part, AT&T is supposed to monitor complaints, establish "complaint thresholds," and implement notice programs for customers when such thresholds are exceeded. A.51-52.

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[1] In other parts of its "Introduction," (and, indeed, throughout its brief), AT&T makes other assertions that are unsupported by citations to the complaint or other documents of record (*i.e.* alleged concessions by Schmitt, alleged waiver of arguments and other factual assertions). To be clear, Schmitt does not concede or assent to such assertions, particularly where they lack support in the record.

AT&T's position is difficult to understand, if it has any true concern for its customers. After all, AT&T is protected. If, as AT&T argues, the service providers are responsible (rather than AT&T) for these illegal charges, AT&T can rely on agreements with service providers and require them to indemnify AT&T for costs incurred as a result of cramming. *See* A.27, ¶ 23 (referencing contracts between defendants). Accordingly, one would expect AT&T to side with its customers, rather than argue that they alone are responsible because they allegedly did not "read their bills."

II. AT&T's Arguments Concerning *Stare Decisis* Are Misguided

AT&T, invoking *stare decisis*, argues that the Court is bound by *Putnam v. Time Warner Cable of SE Wis. Ltd. P'ship*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626. *Stare decisis* applies where issues have been raised and squarely addressed in prior decisions. *See Brecht v. Abrahamson*, 507 U.S. 619, 631, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (*stare decisis* does not apply where an issue is not raised or "squarely addressed" in a prior decision); *Colby v. Columbia County*, 192 Wis. 2d 397, 405, 531 N.W.2d 404 (Ct. App. 1995), *citing Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been [so] decided as to constitute precedents."). The general rule has been explained as follows:

> For a case to be *stare decisis* on a particular point of law, *that issue must have been raised in the action decided by the court, and its decision made part of the opinion of the case*; accordingly, a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced. Thus, a case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.

20 Am. Jur. 2d Courts § 134 (emphasis supplied).

The issues presented here were neither raised nor addressed in *Putnam*, and the arguments being briefed now certainly were not developed in that case. For these reasons, the fact that the Court did not address these issues in *Putnam* comes as no surprise. *State v. Johnson*, 153 Wis. 2d 121, 124, 449 N.W.2d 845 (1990) (courts need not consider arguments that parties fail to advance). AT&T's assertion that Schmitt's arguments are "foreclosed" by *Putnam* is incorrect and inconsistent with principles of *stare decisis*.

III. The Overwhelming Majority of Authority From Other States Supports Schmitt's Position

AT&T incorrectly asserts that Schmitt cites only a "handful" of authority from other jurisdictions, suggesting that there might be a relatively even split of authority. AT&T's Brief at 51. As set forth herein, the overwhelming majority of courts considering the issues presented here have held that the voluntary payment doctrine does not bar statutory damage claims. *See* Appellants' Brief at 11-13, *citing Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 727 (Mo. 2009); *Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash, Inc.*, 170 P.3d 10, 24 (Wash. 2007) (*en banc*); *Southstar Energy Services, LLC v. Ellison*, 691 S.E.2d 203, 206 (Ga. 2010); *Sobel v. Hertz Corp*., 698 F.Supp.2d 1218, 1223-24 (D. Nev. 2010); *Ramirez v. Smart Corp*., 863 N.E.2d 800, 804-05 (Ill. App. 3rd Dist. 2007); *Pratt v. Smart Corp*., 968 S.W.2d 868, 872 (Tenn. App. 1997); *see also MacDonell v. PHH Mortgage Corp*., 846 N.Y.S.2d 223, 224 (N.Y.A.D. 2 Dept. 2007) ("This Court has determined that the voluntary payment doctrine will not bar such statutory causes of action"), *citing Dowd v. Alliance Mortgage Co.*, 822 N.Y.S.2d 558, 559 (N.Y.A.D. 2 Dept. 2006); *Dougherty v. North Fork Bank*, 753 N.Y.S.2d 130, 131 (N.Y.A.D. 2 Dept. 2003) ("The assertion that the plaintiff voluntarily agreed to pay those fees is not a defense to this [statutory] claim.").

In the face of this overwhelming authority, AT&T cites decisions where, as in *Putnam*, the pertinent issues were neither presented by the parties nor addressed by the courts. *See* AT&T's Brief at 54-56, *citing Lady Di's, Inc. v. Enhanced Serv. Billing, Inc*., 2010 U.S. Dist. LEXIS 121906, *24 (S.D. Ind., Nov. 16, 2010); *Solomon v. Bell Atlantic Corp.*, 777 N.Y.S.2d 50 (N.Y. App. Div. 2004); *Brissenden v. Time Warner Cable of New York City*, 885 N.Y.S.2d 879 (N.Y. Sup. Ct. 2009); *Hall v. Humana Hosp. Daytona Beach*, 686 So.2d 653 (Fla Dist. Ct. App. 1996); *McWethy v. Telecomm's Inc.*, 988 P.2d 356 (Okla. Civ. App. 1999).

For example, in *Lady Di's*, an unpublished federal court opinion from Indiana, the plaintiff never argued that the common law voluntary payment doctrine did not apply to bar statutory claims, as Schmitt argues here. Accordingly, as in *Putnam*, no such arguments were developed and the Indiana court did not consider them. *Lady Di's*, 2010 U.S. Dist. LEXIS 121906 at *21-25. As such, *Lady Di's* is of no moment, as confirmed by the fact that ILD's counsel in the present case (who represented ILD in *Lady Di's*) does not even cite *Lady Di's* in its brief. *See* ILD's Brief at 33-35.

Similarly, AT&T cites two inapposite New York decisions. In *Solomon*, the New York court was deciding a motion for class certification, and explained that the voluntary payment rule potentially involved individual issues, suggesting that class certification was not proper. *Solomon*, 777 N.Y.S.2d at 57. Similarly, in *Brissenden*, the court was considering a motion for class certification, and the issues presented here were not before the court. *Brissenden*, 885 N.Y.S.2d at 889. In neither case did the courts analyze the types of questions presented by this appeal. Indeed, as set forth above, where New York appellate courts have considered such issues, they have decided that the voluntary payment doctrine does *not* bar statutory claims. *See MacDonell, supra*; *Dowd, supra*; *Dougherty*, *supra*.

AT&T also cites irrelevant decisions from Florida and Oklahoma. *See Hall*, 686 So.2d at 656 (involving common law claims, including a claim for unjust enrichment based on a statute that *did not create a private right of action*); *McWethy*, 988 P.2d at 357 (involving common law claims arising from contract provisions allegedly rendered void by statutes, *where statutes did not create private rights of action*). Unlike here, the statutes at issue in *Hall* and *McWethy* did not authorize private rights of action for damages and, therefore, the Florida and Oklahoma courts were not called upon to decide the issues presented here.

Finally, AT&T relies on two decisions from the Illinois Court of Appeals, without giving proper weight to a *more recent decision* of the same court, which decided the issues presented here consistent with Schmitt's position. *Ramirez*, 863 N.E.2d at 804-05. As explained in *Ramirez*, where a statute defines the public policy of a state, the voluntary payment rule does not apply to acts that violate that "statutorily-defined public policy." *Id.* at 804, *citing Pratt*, 968 S.W.2d at 872. Notably, in *Ramirez*, the Illinois Court of Appeals distinguished its decision in *Harris v. ChartOne*, 841 N.E.2d 1028 (Ill. App. 5th Dist. 2005), upon which AT&T relies.[2]

In sum, except for two Illinois Court of Appeals decisions that are contradicted by *Ramirez,* AT&T cites no decision from any court outside Wisconsin that even begins to address the issues presented here. In contrast, Schmitt cites cases from numerous jurisdictions where courts have specifically considered such issues and decided that the voluntary payment rule does not apply to statutory claims. *See Huch*, 290 S.W.3d at 727 (Missouri law); *Indoor Billboard*, 170 P.3d at 24 (Washington law); *Southstar Energy*, 691 S.E.2d at 206 (Georgia law); *Sobel*, 698 F.Supp.2d at 1223-24 (Nevada law); *Ramirez*, 863 N.E.2d at 810 (Illinois law); *Pratt*, 968 S.W.2d at 872 (Tennessee law); and *MacDonell*, 45 A.D.3d at 539 (New York law).

Accordingly, the great weight of authority from other jurisdictions that have *actually considered* questions such as those presented here favors Schmitt. In each of the above states (Missouri, Washington, Georgia, Nevada, Illinois, Tennessee and New York), courts held that the voluntary payment doctrine does not apply to statutory claims. Indeed, each time that the highest court of a state has been asked to consider the question, it has ruled that the voluntary payment doctrine does not apply to defeat

[2] In *Harris*, although the plaintiff alleged a violation of the same statute at issue in *Ramirez*, that statutory claim was not viable because there was no *written* request for records, as required by the statute. *Ramirez*, 863 N.E.2d at 803.

statutory claims. *See Huchs, supra* (Missouri Supreme Court); *Indoor Billboard, supra* (Washington Supreme Court, *en banc*); *Southstar Energy, supra* (Georgia Supreme Court).

As these courts recognize, where the legislature enacts a remedial statute and does not require the person harmed by illegal conduct to "protest" before pursuing statutory remedies, the judiciary should not engraft a protest requirement onto the statute, particularly where the result would be to significantly limit or vitiate remedies provided thereunder. Similarly, Wisconsin law provides that statutes enacted to remedy a perceived harm should be construed broadly, not narrowly. *Garcia v. Mazda Motor of America, Inc.*, 2004 WI 93, ¶ 8, 273 Wis. 2d 612, 682 N.W.2d 365 (remedial statutes are construed broadly "to suppress the mischief and advance the remedy that the legislature intended to afford."). Applying the voluntary payment rule to the remedial statutes at issue here would essentially vitiate the damage remedies provided thereunder, and this result should be avoided.

IV. *Fuchsgruber* Does Not Apply Because This Case Does Not Involve Abrogation of The Voluntary Payment Doctrine

AT&T next argues, incorrectly, that the outcome of this appeal is dictated by *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. In *Fuchsgruber*, the Court considered whether the legislature intended a new comparative negligence statute to apply to strict product liability claims. The statute was titled "Comparative Negligence" and its text contained references to "negligence" throughout. *Id.* ¶ 12, *quoting* Wis. Stat. § 895.045. The statute made no reference to strict product liability claims, which are not based on negligence. *Id.* at ¶ 15 (no *negligence* must be proven on a strict product liability claim). As *Fuchsgruber* explained, strict product liability law recognized a defense akin to comparative negligence, whereby juries would "apportion the extent to which the plaintiff's injuries were attributable to his own *contributory* negligence *as compared to the product's defectiveness.*" *Id.* at ¶¶ 17-24. However, there was no *comparative negligence* analysis of the sort required for negligence claims, where the negligence of one party was compared to that of others. *Id.* Given this background, the Court held that the "Comparative Negligence" statute did not "explicitly or even implicitly suggest a legislative purpose to change the common law of strict product liability." *Fuchsgruber*, 2001 WI 81, ¶ 26.

AT&T relies on a discrete portion of *Fuchsgruber*, which states in relevant part: "It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent." *Id.* at ¶ 25, *citing Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 74, 307 N.W.2d 256 (1981); *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 836, 520 N.W.2d 93 (Ct. App. 1994). AT&T contends that this language requires the legislature to amend each of the pertinent statutes (and potentially many others) to include language specifically "abrogating" the voluntary payment doctrine. However, as shown by *Fuchsgruber* and the cases cited therein, AT&T's interpretation of Wisconsin law is incorrect.

For example, in *Kranzush*, the Court reviewed insurance statutes and regulations to determine whether they created a private right of action for individuals harmed by an insurer's bad faith refusal to settle, even though no such claim was viable at common law. Notably, the Court stated:

> Such a private right of action, *if it is found in the statutes* or the insurance provisions of the Administrative Code, *would be in clear derogation of the common law*.

Kranzush, 103 Wis.2d at 74 (emphasis supplied). Thus, if legislature had enacted a statute creating a private right of action for the wrongful conduct at issue in *Kranzush* (as it did here for cramming by enacting § 100.207), the Court would recognize and enforce the statutory claim, even if inconsistent with common law. After examining the insurance statutes, the Court found no express or implied right of action and, therefore, the plaintiff could not maintain a claim. *Id.* at 81-82. Notably, the Court did not confine its analysis to whether there was *express* statutory language authorizing a right of action, but also considered whether an *implied* right existed to trump common law. *Id.*

Similarly, in *NBZ*, the Court of Appeals considered whether Wis. Stat. § 103.465 expressed a legislative intent to change the common law rules of contract as they pertained to restrictive covenants. The employer argued that, based on the statute, no consideration was required for restrictive covenants. *NBZ,* 185 Wis. 2d at 835. The Court of Appeals disagreed, holding: “We do not discern from § 103.465 any legislative intent to abandon the principles by which a contract is formed in the first instance.” *Id.* at 837.

By comparison, in this case, the legislature clearly expressed its intent to create a private right of action for damages by enacting Wis. Stat. § 100.207(6). Those harmed by cramming can sue, and the legislature did not require a “protest.” Accordingly, applying the voluntary payment rule here would conflict with a private right of action created by the legislature, as it would impose a protest requirement where the statute does not have one. In such circumstances (where there is a “conflict” rather than complete “abrogation”), the law is clear – the statute controls over the common law. *See Kensington Dev. Corp. v. Israel*, 139 Wis. 2d 159, 167, 407 N.W.2d 269 (Ct. App.1987) (“In cases of conflict between legislation and the common law, legislation will govern because it is the latest expression of the law”), *aff'd* 142 Wis. 2d 894, 419 N.W.2d 241 (1988). As this Court held in *Kensington*, if the application of common law would effectively nullify a statutory claim, the common law rule should not apply. *Kensington*, 142 Wis. 2d at 903 (“If the absolute privilege rule is applied, the slander of title statute, sec. 706.13, would be nullified because it would be virtually impossible to assert a claim if all communications in judicial proceedings relating to property were absolutely privileged.”).[3]

Here, like in *Kensington*, applying the voluntary payment rule to a §100.207 claim would fundamentally

[3] AT&T cites Wis. Stat. § 134.90(6), wherein the legislature supplanted and “abrogated” an entire field of common law concerning trade secrets. Here, it was not necessary for the legislature to abrogate a similar common law scheme.

change and effectively nullify the statute by writing a protest requirement into it, thereby dramatically limiting the relief provided thereunder. Unlike *Fuchsgruber*, *Kranzush* and *NBZ*, here, the Court is being asked to *ignore* clear statutory language and impose a common law protest requirement that is unsupported by any statutory language. Indeed, not only is the voluntary payment rule inconsistent with the statutory damage claims at issue, but its application would substantially undermine remedies that the legislature clearly intended to afford.

V. AT&T's Arguments On Issues That Were Not Certified Should Be Disregarded

As set forth in Rule 809.62(6), "[i]f a petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." The Court has not ordered briefing on additional issues. Order dated March 16, 2011. Nonetheless, AT&T devotes a substantial portion of its brief to issues that were not the subject of any petition for review, and for which the Court did not grant review. AT&T's Brief at pp. 20-33. In light of the Court's Order, Schmitt does not address these issues here, but will provide additional briefing should the Court require it.

CONCLUSION

For the foregoing reasons, the decisions below should be reversed and this case should be remanded for further proceedings.

Dated this 23rd day of May, 2011

SHEPHERD, FINKELMAN, MILLER & SHAH, LLP

By: ______________________________

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CERTIFICATION AS TO FORM & LENGTH

I, Douglas P. Dehler, certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 220 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,996 words.

Dated this 23rd day of May, 2011

Signed:

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<u>CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)</u>

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of May, 2011

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CERTIFICATION OF MAILING PURSUANT TO RULE 809.30(3)(b) STATS.

I, Douglas P. Dehler, certify that on May 23, 2011, Plaintiffs-Appellants-Cross-Respondents-Petitioners' Reply Brief Responding to AT&T's Brief was correctly addressed and deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court via first-class mail, postage pre-paid, pursuant to Rule 809.80(3)(b) Stats.

SIGNED: __________________________
Douglas P. Dehler

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OF WISCONSIN

SUPREME COURT OF WISCONSIN
APPEAL NO. 2008AP1830

MBS-CERTIFIED PUBLIC ACCOUNTANTSS, LLC
and THOMAS H. SCHMITT, CPA d/b/a
METROPOLITAN BUSINESS SERVICES,,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

WISCONSIN BELL, INC., d/b/a
AT&T WISCONSIN,

Defendant-Respondent

ILD TELECOMMUNICATIONS, INC. d/b/a
ILD TELESERVICES, LOCAL BIZ USA, INC.,
and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

AMICUS CURIAE BRIEF OF STATE OF WISCONSIN

Appeal from the Circuit Court for Milwaukee County
The Honorable Richard J. Sankovitz, Presiding

J.B. VAN HOLLEN, Attorney General
JOHN S. GREENE, State Bar #1002897
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Wisconsin consumers, like those elsewhere, are continually confronted with new threats to their pocketbooks, ranging from subtly deceptive schemes to outright fraud. Practices that did not exist even a few years ago are now commonplace: cramming, slamming, phishing, malware, skimming, and scareware, to name but a few.

This case spotlights a practice known as "stealth billing" that is causing massive injury to consumers. Stealth billing involves the use of phone and credit card bills, or electronic bank account debits, to sneak unauthorized charges past unsuspecting consumers.[1] In holding that the common law voluntary payment doctrine provides a defense to a consumer's statutory claim under statutes explicitly prohibiting unauthorized billing, the decision below creates hurdles for consumers the Legislature did not

[1] Those issuing the bills, such as Wisconsin Bell, are not necessarily intending to perpetrate fraud. There are legitimate and legal reasons for a phone company to add charges from another company to its bill. In many instances, the billing entity reasonably accepts the representation that a legitimate charge has been incurred, in good faith, before adding it to a consumer bill.

impose, and threatens to undermine basic consumer protections under a variety of statutes and rules.

The Stealth Billing Phenomenon

In the past, it was generally obvious when a consumer had purchased a product. The seller of the product would either demand payment at the time of the transaction, or would send the purchaser a bill. While consumers might have had a dispute about some feature of the transaction, at least it was clear that the consumer had intended to make a purchase.

This is no longer true. Within the past twenty years, unscrupulous businesses increasingly began to realize that they had a powerful new tool at their disposal, namely the ability to place unauthorized charges on consumers' telephone bills, a practice known as "cramming." Telephone bills work well for this purpose because they can be complicated and difficult to understand, and many consumers will not notice a modest, vague charge buried in the phone bill, especially given the trust most consumers have in the accuracy of their phone bills. By bundling third-party charges in with regular phone bills, the odds that a consumer will notice a phony charge are greatly diminished.

Wisconsin Bell understandably emphasizes the efficiency of aggregated billing in its brief, noting that without it consumers "would have had to write and mail multiple checks to settle their multiple accounts." (Wis. Bell brf. at 2) However, while the aggregation of charges can be efficient, there is an downside. In the absence of adequate controls over the third-party charges being included, it can also be a "fraud-friendly" device for unscrupulous businesses. *F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. CA, 2010). By contrast, a separate bill from Acme Internet Yellow Pages doubtless would arouse suspicion in the mind of a consumer required to make a separate payment to that merchant.

Cramming exploded on the scene in the 1990's, and has persisted as a major consumer problem since, despite the efforts of federal and state regulators and enforcers—and the telephone industry.[2] (Amicus Appendix ("Am-App." 101-136)

The appeal of cramming to unscrupulous businesses is obvious—it is highly effective and lucrative, as illustrated by a recent federal court decision. In *Inc21.com*, the defendants extracted over $37 million through the placement of bogus charges on the telephone bills of tens of thousands of individuals and businesses, nearly 97 percent of whom "had *not* agreed to purchase defendants' products." 745 F.Supp.2d at 982. "Even more egregious, only five percent of them were even aware that they had been billed." *Id.* A document found in the defendants' files reveals that crammers are well-versed in how to maximize the odds of slipping phony charges past consumers:

> Never bill more than 29.95 per month. The average small business sees this as phone charges and does not review for five months.

Id. at 986.

[2] Wisconsin has brought enforcement actions to curtail cramming, one of which resulting in a stipulated judgment against ILD. (Am-App. B-1 at 137-141)

Individuals have enough difficulty deciphering their telephone bills, but for businesses the problem can be even worse, since the person paying the bill may assume that someone else has authorized the charges on the bill. Even if half of the billed consumers notice the charges and refuse to pay, cramming can generate huge sums given the large numbers of consumers that can be fleeced and the relative ease and low cost of doing so.

But the practice of stealth billing using a third-party is not limited to telephone bills. Another hugely popular—and, unfortunately, effective—billing vehicle of choice for deceptive businesses are credit card statements. The emergence of the internet has spawned a large industry of unauthorized billing using credit card accounts.

Nearly every internet user has encountered pop-up ads, banners, or offers of “free” items or trials. Here is a typical scenario: a consumer is making an on-line purchase, and as they are completing their transaction, a pop-up ad asks if they would like a “free” gift card, or $10 off their next purchase, or the like. Needless to say, many consumers click “yes.” What they do not realize is: a) they are unlikely to ever obtain the free item; and b) they are being enrolled in a perpetual membership program for which they will be charged on their credit card statement and from which they will never receive any benefits. While there may be a subtle disclosure of this for the discerning consumer, it likely is buried in tiny type in a small box of terms and conditions designed to be unnoticed by most consumers.

A recent trial court decision exposes this practice. The State of Iowa sued Vertrue, a large marketing company that partners with numerous established businesses to enroll consumers in its many discount membership programs. The court found that in Iowa alone Vertrue had “sold” more than 860,000 separate memberships in its more than 200 programs, and that over a twenty-year period “91.5% of membership involved no benefit usage whatsoever.” (Am-App. 162-63) The court observed that “[t]he membership charges on their credit card statements, typically in modest amounts unlikely to draw close scrutiny, either went unnoticed or were misinterpreted." (Am-App. 175) These modest amounts add up, however; the court ordered restitution of nearly $30 million to Iowa consumers injured by the scheme. (Am-App. 178)

Vertrue is just one player in a large industry. A 2009 staff report issued by the U.S. Senate Committee on Commerce, Science, and Transportation concluded that Vertrue, along with two similar companies, "use highly aggressive sales tactics to charge millions of American consumers for services the consumers do not want and do not understand they have purchased." (Am-App. 182; 180-214)

These stealth billing tactics work. Few "members" are aware that they have enrolled in a membership club, and "[o]verwhelmingly, consumers cancel their memberships once they realize they are being charged on a monthly basis and very few consumers use the benefits offered by the membership programs." (Am-App. 206)

The report found that as of 2009 the three companies had generated revenue of $1.4 billion, based on 35 million enrollments in their various buying clubs.

(Am-App. 183) There are many other businesses engaging in similar stealth billing tactics.

No longer is it necessarily obvious to a consumer when they have—at least according to a merchant—"purchased" a product or service.

<u>Wisconsin's Statutory Protections Against Stealth Billing</u>

The Wisconsin legislature has responded to the rising tide of unauthorized billing through the enactment of two statutes specifically targeting this practice. The first—Wis. Stat. § 100.207(3)—expressly prohibits "bill[ing] a customer for any telecommunications service that the customer did not affirmatively order . . ." This is, plain and simple, a prohibition of cramming.[3]

The second statute is broader. Whereas Wis. Stat. § 100.207(3) is limited to telecommunications, Wis. Stat. § 100.195, entitled "Unfair billing for consumer goods or services," provides that a seller may not "[b]ill a consumer

[3] Wisconsin Bell, in its brief at pp. 20-33, argues that it is not liable under Wis. Stat. § 100.207, for reasons unrelated to the voluntary payment doctrine. This issue appears to fall outside the scope of this appeal.

for consumer goods or services that the consumer has not agreed to purchaser or lease."[4] Wis. Stat. § 100.195(2)(a).

Notably, neither statute requires proof of intentional (fraudulent) conduct. The Legislature was not simply adding a remedy for common law claims, just as this Court has held was the case with another consumer statute, Wis. Stat. § 100.18. *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶ 36, 301 Wis. 2d 109, 732 N.W.2d 792, *citing Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676, 708, 643 N.W.2d 132. Had the Legislature intended to require each element of common law fraud as an element of an action for unauthorized billing, there would have been no need to enact new statutes.

The defendants object to billing agents being held liable when the true culprit is the service provider claiming bogus charges. However, it certainly is a rational legislative policy choice to conclude that a biller—even an innocent biller—is in the best position to

[4] Telecommunications services are excluded. Wis. Stat. § 100.195(1)(c)2.

identify and deal with illegal billing and fraudsters.[5] This is particularly true given that many fraudsters are defunct, overseas, or otherwise impossible to reach through litigation.

Both statutes provide mechanisms for enforcement not only by the State, but by injured parties. Wis. Stat. §§ 100.207(6)(a) and 100.195(5m)(b). The defendants' argument creates the anomaly that the State could recover consumers' pecuniary losses (§§ 100.195(5m)(c) and 100.207(6)(b)1.) but the consumers could not. Further, limiting recoverable damages to payments made under protest is inconsistent with the Legislature's imposition of a $200 minimum recovery for each violation of Wis. Stat. §100.95 established by a consumer "suffering pecuniary loss." Wis. Stat. §100.195(5m)(b), reflecting its intention to provide broad remedies to consumers.

It is well-settled that, as remedial laws, our consumer protection statutes "must be liberally construed to advance the remedy that the legislature intended to be

[5] As detailed in a recent public report by AT&T, there are many steps aggregators and phone companies can and do take to detect and prevent cramming. (Am-App. B-1 at 142-154)

afforded." *Stuart v. Weisflog's Showroom*, 2008 WI 22, ¶ 21, 308 Wis. 2d 103, 746 N.W.2d 762. *See also Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 36, 303 Wis. 2d 258, 735 N.W.2d 93. The defendants' arguments run counter to this basic principle.

Defendants assert that *Putnam v. Time Warner Cable*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626 held that the voluntary payment doctrine applies to statutory causes of action. A fair reading of that decision, however, shows otherwise.

Although the plaintiffs in *Putnam* asserted multiple causes of action, including one under Wis. Stat. § 100.18, the Court found that all of them were "encapsulated in the overall theory" of "unlawful liquidated damages," which is of course a common law claim. *Id.* at ¶ 36, n.12. Accordingly, "[a]ny claims for monetary relief of these payments *deriving from an unlawful liquidated damages* claim were correctly dismissed." *Id.* at ¶ 36; s*ee also* ¶ 12 (damages issue was "whether the voluntary payment doctrine bars customers of Time Warner from recovering damages for an unlawful liquidated damages claim.").

Moreover, the plaintiffs did not argue—and the Court did not discuss—the question whether a purely statutory claim (i.e. not premised on a common law claim such as liquidated damages) could be foreclosed by the defense of voluntary payment. *Id.* at ¶¶ 7 and 24-29. *Putnam* thus did not, as defendants argue, definitively establish that statutory claims are subject to the voluntary payment doctrine.

The second pillar of defendants' argument is that common law principles survive legislation unless the Legislature explicitly states that they do not. However, the case cited, *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833, does not support this notion.

The issue in *Fuchsgruber* was whether the comparative negligence statute applies to product liability claims. At the time the legislation was adopted, this Court had, through common law, interpreted the term "negligence" to exclude product liability. ¶¶ 1-2. When the Legislature subsequently enacted a statute governing the apportionment of liability in negligence cases, it was presumed to use the prevailing common-law definition of the term, absent any indication to the contrary. Here no such judicially-defined terms appear in the consumer statutes at issue here.

Under the defendants' theory, the Legislature must list all of the common law principles that do not apply to statutory causes of action it is creating. Presumably, the Legislature would have to state things like, "the common law doctrines of laches, estoppel, unclean hands, voluntary payment, etc. do not apply to claims brought pursuant to this section." Of course, no such statutes exist, and for good reason.[6]

If defendants' argument were correct, then in *Stuart*, the Court would have reached the opposite conclusion—namely, that the common law economic loss doctrine supplied a defense to the plaintiff's statutory consumer claims because the Legislature did not explicitly

[6] The only example offered by the defendants of this type of legislative abrogation of common law is Wis. Stat. § 134.90(6), which simply displaces all common law actions involving trade secrets in creating a new, exclusive statutory claim. The consumer statutes at issue here merely supplement but do not extinguish any common law causes of action, as *Putnam* itself shows.

repudiate the common law doctrine when it enacted the statute at issue. Instead, it held that the doctrine did not apply because of the "public policies" underlying enactment of the consumer statute. 2008 WI 22 at ¶33.

The operative question is not whether the Legislature used explicit words of abrogation—which it almost never does—but whether the intent of the Legislature is inconsistent with the common law. Defendants' position conflicts with the bedrock principle that "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Further, "[i]t is fundamental that we must favor a construction of a statute or regulation which will fulfill the intent of the statute or regulation over one which defeats its manifest object." *Baierl v. McTaggart*, 2001 WI 107, ¶ 21, 245 Wis. 2d 632, 629 N.W.2d 277.

Adding a common law protest requirement to the remedial statutes enacted by the Legislature, would defeat the plain purpose of the statutes, namely protecting consumers against unauthorized billing. Limiting the reach of the statute to consumers who noticed the charges and protested—while paying the disputed charges—would apply to so few consumers as to be virtually meaningless. In fact, most phone companies and aggregators instruct their customer service personnel to cancel charges when a consumer complains, so the likelihood of an actionable claim arising is slim. The very people most injured by unauthorized billing—those who unwittingly pay unauthorized charges—would be left without recourse.

Affirming the decision below would also potentially undermine numerous other statutes and decisions involving consumers' statutory claims for the return of funds already paid. For example, in *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 978, 542 N.W.2d 148 (1996), the Court held that, because of the public policies behind the statute, "pecuniary loss" under the lemon law encompasses the full purchase price of the vehicle, not merely the customer's out-of-pocket expenses (as might have been the outcome under common law principles). *See Benkoski v. Flood*, 2001 WI App 84, ¶ 27, 242 Wis. 2d 652, 626 N.W.2d 851. *See also Moonlight v. Boyce*, 125 Wis. 2d 298, 372 N.W.2d 479 (Ct. App. 1985) (tenant entitled to a doubling of an improperly withheld security deposit, even though the tenant's liability on the landlord's counterclaim for damages exceeded the amount of the deposit); *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 2009 WI App 65, ¶ 24, 318 Wis. 2d 802, 767 N.W.2d 394 (pecuniary loss of a consumer whose vehicle was repaired without authorization is the full amount paid to the repair shop). Were common law principles of damages and remedies—quantum meruit, set-off, mitigation, causation, and the like—applicable, arguably none of the consumer plaintiffs in these and many other cases would have received the statutory damages awarded by the courts.

And, as the Court observed in *Fuchsgruber*, "there is nothing in the language of the new statute that even hints at a legislative purpose to accomplish such a sweeping change" in the legal status quo. 2001 WI 81 at ¶ 29. Overlaying consumer statutes with the myriad of possible common law principles and doctrines would indeed accomplish a sweeping change in the law of this state.

Even if precedent supported the applicability of common law principles to statutory consumer claims, this Court is the ultimate creator and modifier of the common law. Just as the Legislature responds to new behaviors and threats, this Court adjusts common law principles to accommodate changed circumstances and conditions: "common law is law subject to continuing judicial development, including abrogation." *State v. Picotte*, 2003 WI 42, ¶ 19, 261 Wis. 2d 249, 262, 661 N.W.2d 381; *see also id.* at n.21.

The predation of consumers by unscrupulous merchants and service providers is draining millions of dollars every year from the pockets of Wisconsin consumers, from "transactions" of which they are not even aware. The Legislature acted to provide consumers the means to seek relief in the courts for their injuries from unauthorized billings. This Court should refrain from grafting onto the statutes common law principles that are inconsistent with the Legislature's obvious intent in crafting private statutory claims to remedy the targeted practices.

Dated this 6th day of June, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,983 words.

Dated this 6th day of June, 2011.

____

John S. Greene
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of June, 2011.

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John S. Greene
Assistant Attorney General

SUPREME COURT OF WISCONSIN
APPEAL NO. 2008AP1830

MBS-CERTIFIED PUBLIC ACCOUNTANTSS, LLC
and THOMAS H. SCHMITT, CPA d/b/a
METROPOLITAN BUSINESS SERVICES,,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

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AT&T WISCONSIN,

Defendant-Respondent

ILD TELECOMMUNICATIONS, INC. d/b/a
ILD TELESERVICES, LOCAL BIZ USA, INC.,
and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

APPENDIX OF STATE OF WISCONSIN, AMICUS CURIAE

Appeal from the Circuit Court for Milwaukee County
The Honorable Richard J. Sankovitz, Presiding

J.B. VAN HOLLEN, Attorney General
JOHN S. GREENE, State Bar #1002897
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Post Office Box 7857
Madison, Wisconsin 53707-7857

INDEX TO APPENDIX

United States General Accounting Office

GAO

Testimony

Before the Committee on Small Business, U.S. Senate

For Release on Delivery
Expected at
1:00 p.m. EDT
Monday
October 25, 1999

TELECOMMUNICATIONS

Overview of the Cramming Problem

Statement of Stanley J. Czerwinski, Associate Director, Housing and Community Development Issues, Resources, Community, and Economic Development Division

GAO
Accountability * Integrity * Reliability

GAO/T-RCED-00-28

Mr. Chairman and Members of the Committee:

We are pleased to be at this hearing on Internet-related cramming directed at small businesses. As you know, Mr. Chairman, cramming is the inclusion of unauthorized, misleading, or deceptive charges on a consumer's telephone bill. Telephone companies can cram consumers by adding unauthorized charges for telephone-related services, such as call messaging. Cramming can also involve third-party vendors, who offer products and services that are unrelated to telephone services, such as live or recorded information about the stock market, sports, or products; chat lines and dating services; club memberships; and services such as Internet Web site designs.

Our statement today is based on our July 1999 report for Senator Susan M. Collins, Chairman of the Senate Permanent Subcommittee on Investigations, along with updated information that we obtained earlier this month at your request.[1] Details of our scope and methodology are found in appendix I. We will discuss three topics: (1) the extent of cramming complaints, (2) state and federal regulatory initiatives to protect consumers from cramming, and (3) state and federal enforcement actions against companies engaged in cramming. We will also mention actions being taken by major regional telephone companies to curb cramming.

In summary:

Although there is no central source for the number of confirmed cramming cases nationwide, we were able to gather information on consumers' complaints about cramming from state and federal regulators and major regional telephone companies. Overall, we found that consumers' complaints to state authorities about cramming rose dramatically from about 850 in 1996 to nearly 20,000 in 1998. While only 3 states reported receiving cramming complaints in 1996, the total increased to 36 states by 1998. At the federal level, cramming complaints became the fourth most common type of written complaint received by the Federal Communications Commission (FCC) and the second most common type of complaint received by the Federal Trade Commission (FTC) during 1998. Four major regional telephone companies reported to us that they received a combined total of about 160,000 unconfirmed cramming complaints during 1998, and a fifth company reported substantially more than that number during 1998. The picture for 1999 is a mixture of declines

[1]Telecommunications: State and Federal Actions to Curb Slamming and Cramming (GAO/RCED-99-193, July 27, 1999).

and increases, depending on the data source. Both FCC and FTC are reporting declines in their complaint rates, as are all of the major regional telephone companies. However, the situation at the state level remains disturbing. Of the 38 state public utilities commissions we contacted this month to obtain updated information on their cramming complaints, 18 reported declines in the number of complaints received, but 20 reported either increases or no changes in the number of complaints received. In addition, 23 of the 38 commissions noted that small businesses were being charged for Web page designs and other Internet services that were never authorized.

Both state and federal agencies are taking steps to protect consumers from cramming. Most state public utilities commissions told us that they provide consumers with information on ways to prevent cramming and have administrative procedures for resolving complaints about telephone billing. In addition, 18 of the 38 state public utilities commissions we contacted this month reported enacting or proposing new rules designed to combat cramming. At the federal level, FCC has developed consumer information about cramming and streamlined the process by which consumers can file complaints. In addition, FCC adopted a new order in April 1999 requiring telephone companies to format their bills so that consumers can more easily identify any unauthorized charges. Key parts of this order are scheduled to become effective on April 1, 2000, though some outstanding issues raised by members of the industry have not been resolved. FTC also provides information to consumers about cramming and takes their complaints. In October 1998, FTC proposed new rules for combating cramming that, among other things, would require a consumer's express authorization before charges other than for local or long-distance calling could be placed on the consumer's telephone bill and would allow the consumer to dispute any unauthorized charges. FTC plans to issue a final rule this winter.

In the area of enforcement, public utilities commissions and attorneys general in 16 states reported to us that from 1996 through 1998, they completed 25 enforcement actions against companies or individuals for cramming violations, resulting in over $3.5 million in penalties and customer restitution. Eight states also reported initiating 22 enforcement actions for cramming that had not been finalized when we conducted our survey in early 1999. This month we learned that, since the beginning of 1999, 13 state attorneys general have reported completing an additional 22 enforcement actions, none of which were included in our July 1999 report. These actions resulted in at least $460,000 in penalties and customer restitution. As of mid-October 1999, FCC had taken one enforcement action against cramming, and was working with FTC on another case. FTC has taken nine enforcement actions that have resulted in injunctions, restraining orders, and at least $52 million in consumer credits and restitution.

FCC and FTC are also working with the states and telecommunications industry to curb this abuse. For example, in 1998, FCC sponsored a workshop with industry representatives to develop a set of "best practices" for combating cramming that telephone companies could use in developing their own anticramming procedures. The major regional telephone companies recently reported that they have a variety of measures in place to combat cramming, including several of the "best practices" developed at the FCC-sponsored workshop. FTC has also sponsored public workshops with telecommunications representatives, consumer groups, FCC officials, the National Association of Attorneys General, and others to address cramming and provide additional consumer education.

Background

Cramming is the inclusion on consumers' telephone bills of charges that they did not knowingly authorize. Unauthorized charges can originate in a variety of ways. For example, a consumer may call a vendor's advertised number to receive information or a service. Having obtained the consumer's name and telephone number, the vendor may then levy a hidden or deceptive charge, even a recurring monthly charge, that the consumer did not know about and did not authorize. A consumer's name and telephone number can also be obtained through sweepstakes entry forms, which may include some obscurely worded fine print authorizing charges to be placed on the consumer's telephone bill. Some vendors apparently have simply lifted names and numbers from telephone directories to charge businesses for nonexistent services.

In order to have charges placed on a consumers' telephone bills, vendors typically use the services of companies called "billing aggregators," which bundle billing information from many vendors. Billing aggregators contract with telephone companies to have the vendors' charges included as part of the consumers' telephone bills.

The format of telephone bills can make it hard for consumers to recognize that they have been crammed, especially when the charges are identified only by nondescript phrases, such as "monthly fee," "membership fee," or "service charge." The bills may not even clearly identify the names of the vendors charging for these services, making it difficult for consumers to contact them directly to have the charges explained or removed.

Both state and federal agencies are responsible for protecting consumers from cramming and for taking regulatory and legal enforcement actions against entities engaged in this abuse. At the state level, public utilities commissions are responsible for regulating intrastate telephone services and resolving consumers' complaints, while attorneys general are responsible for resolving consumers' complaints about unfair and deceptive marketing practices. At the federal level, FCC's authority is focused on preventing cramming by common carriers (telephone companies) engaged in common carrier activities, while FTC's authority is focused on preventing cramming by companies that are not common carriers, such as third-party vendors that charge for their services through telephone bills. The Congress has, in some limited circumstances, granted FTC concurrent authority with FCC to establish rules concerning certain areas of telephone billing and collection.

Consumers who are the victims of cramming can attempt to resolve the problem by directly contacting their telephone company or the vendor involved. They can also file a complaint with their state public utilities commission or their state attorney general's office. These two state-level bodies may attempt to resolve the complaint informally, or they may take formal regulatory or legal action, as authorized by state statute, against the offending company. In addition, consumers can send complaints about cramming to both FCC and FTC. Each complaint that FCC receives is sent to the appropriate company. The company in turn sends its response to the complaint to both FCC and the affected consumer. On the basis of these complaints, FCC investigates patterns of cramming and takes enforcement actions when appropriate. FTC uses the cramming complaints it receives, along with complaint data provided by state-level sources and other contributors to its complaint database, to take law enforcement actions against individuals and companies engaged in this abuse.

Cramming Complaints to State and Federal Authorities

The number of cramming complaints received by state and federal agencies increased dramatically from 1996 through 1998 (see table 1). In 1996, only three states reported receiving complaints about cramming. In 1997, 16 states received a total of 1,188 cramming complaints. By the end of 1998, 36 states had received 19,543 complaints about this abuse. The situation is similar at the federal level. FCC and FTC have seen cramming emerge as a major problem as the number of cramming complaints to both agencies sharply increased from 1997 to 1998. In 1998, cramming became the fourth most common cause of written complaints received by FCC and the second most common cause of complaints received by FTC.[2]

Table 1: Number of Cramming Complaints Reported to State Public Utilities Commissions, FCC, and FTC for Calendar Years 1996-98

Calendar year	Cramming complaints received by state public utilities commissions	Cramming complaints received in writing by FCC[a]	Cramming complaints received by FTC[b]
1996	852	0	221
1997	1,188	0	3,173
1998	19,543	4,558	9,827

[a]A consumer may call FCC's National Call Center with either an inquiry or a complaint. While FCC keeps track of inquiries and complaints received by the Call Center for trend and analytical purposes, it did not, until recently, take action until a consumer had submitted a written complaint, accompanied by bills and any other supporting documentation. These FCC numbers reflect written complaints only.

[b]The numbers for FTC include complaints received by mail, telephone, and the Internet.

Sources: State public utilities commissions' responses to GAO's survey and data from FCC and FTC.

The numbers in table 1 do not capture complaints about cramming that consumers tried to resolve by dealing directly with their telephone company or third-party vendor without filing a complaint with state or federal authorities. At present, there is no central source of data on verified cases of cramming. During early 1999, we contacted major regional telephone companies to obtain data directly from them on the number of cramming complaints they received during 1998.[3] The results we obtained were incomplete and highly qualified. Several companies told us that they did not begin tracking cramming complaints until the middle of 1998 and that, in any event, their numbers represented unverified complaints, which may prove to be unwarranted upon investigation. Four companies reported a combined total of about 160,000 unverified

[2]The data in table 1 have some important qualifications. The complaint numbers do not equate to verified cramming incidents, since a complaint could prove to be unwarranted upon investigation. For example, a customer might misinterpret a legitimate service charge and mistakenly complain about being crammed. Also, adding state and federal complaint numbers together could result in some double-counting because consumers can complain to both state and federal authorities about a single cramming incident.

[3]The regional companies consider the cramming data provided to us to be proprietary. To protect the confidentiality of the data, we agreed to report only cumulative totals for all companies. The companies included Ameritech, Bell Atlantic, BellSouth, SBC Telecommunications, and US WEST. We did not attempt to gather data from hundreds of smaller local service providers.

cramming complaints for all or part of 1998, and a fifth company reported substantially more than that number.

The situation for 1999 is a mixture of declines and increases, depending on the data source. At the federal level, FCC reported 2,929 cramming complaints from January 1999 through September 1999, and FTC reported 5,153 cramming complaints. For both agencies, these numbers for the first 9 months of 1999 represent a downward trend from 1998 levels. Major regional telephone companies are also reporting declines in cramming complaint levels, according to information they provided to FCC this summer. The companies attributed their improved numbers to actions they have taken to crack down on cramming.

At the state level, the complaint numbers remain disturbing. We contacted 38 state public utilities commissions this month to obtain updates on their cramming complaints. While 18 states reported declines in the number of complaints received, 20 states reported either increases or no changes in the number of complaints received.[4] In addition, 23 of the 38 states noted that small businesses were being charged for Web site designs and other Internet services that were never authorized. The offices of attorney general in North Carolina and North Dakota have begun to track this type of cramming as a separate category.

Consumer Protections Against Cramming

Both the states and the federal government have taken action to help protect consumers against cramming. Most states have some protections against cramming, and many are making efforts to alert consumers to cramming and provide guidance on dealing with this abuse. At the federal level, FCC adopted a new order in April 1999 ("Truth-in-Billing") to combat cramming. This order requires telephone bills to clearly identify all charges and highlight any changes in service so that consumers can more easily spot unauthorized charges. FTC has also proposed regulatory changes that would address cramming by, among other things, requiring a consumer's express authorization to charge for services other than local or long-distance calling, enhancing the consumer's right to dispute

[4] The public utilities commissions reporting declines in cramming complaint levels were Alabama, Arizona, Delaware, Florida, Idaho, Illinois, Indiana, Maryland, Michigan, Montana, Nevada, Ohio, Oregon, Pennsylvania, Texas, Vermont, Wisconsin, and Wyoming. The public utilities commissions reporting increases in cramming complaint levels were Iowa, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Virginia. The public utilities commissions in Arkansas, Connecticut, Hawaii, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, and Washington reported that the number of cramming complaints they received in 1999 was about the same as they had received in 1998.

unauthorized charges, and imposing liability on those engaged in cramming.

State-Level Consumer Protections Against Cramming

In early 1999, 41 state public utilities commissions reported to us that they had initiated some actions to help prevent cramming. These actions included providing consumers with educational brochures and information on Internet sites and establishing procedures for handling cramming complaints. Some state commissions reported that they refer cramming complaints to FCC. In addition, a few state commissions reported taking additional actions to increase their ability to protect consumers from cramming. For example, during 1998, Illinois passed legislation that in part enhanced the enforcement actions the Illinois Commerce Commission can take to protect customers from telephone cramming. Specifically, the legislation gave the Commission the authority to fine an offending company up to $1,000 for each repeated and intentional cramming violation as well as revoke the company's certificate to provide service in the state. In addition, the Tennessee Regulatory Authority implemented new regulations in 1998 against cramming that require the prior consent of an authorized individual before charges for additional services can be placed on the telephone bill. The Authority can assess a maximum fine of $100 per day, per offense, against a company engaging in cramming. The California Public Utilities Commission and the Indiana Utility Regulatory Commission also recently implemented rules detailing the types of information required before charges for other services can be added to a consumer's telephone bill. In addition, 18 of the 38 public utilities commissions we contacted this month stated that their states had either enacted or proposed new rules to combat cramming.[5]

Federal Consumer Protections Against Cramming

Both FCC and FTC have undertaken rulemakings to provide consumers with greater protections against cramming. They have also increased their consumer education efforts and are making it easier for consumers to file complaints about this abuse.

FCC's "Truth-in-Billing" Order to Help Combat Cramming

According to FCC, over 60,000 consumers made inquiries to the agency in 1998 about the confusing format of their telephone bills. FCC believes that this confusion is contributing to the rise in cramming because consumers are having difficulty detecting unauthorized charges. On April 15, 1999, FCC adopted its "Truth-in-Billing" order, which establishes principles and

[5]These states include Alabama, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Montana, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.

guidelines to make telephone bills easier for customers to understand.[6] The new rule, which FTC commented on and supports, requires that telephone bills (1) clearly identify who is responsible for each charge, (2) include full and nonmisleading descriptions of the services being billed, and (3) provide telephone numbers for consumers to call for more information about specific charges on their bills.

This new order was originally to go into effect earlier this year. However, in September 1999, FCC announced that the implementation date for parts of the order was being postponed until April 1, 2000. This date applies to compliance with the requirement that common carriers highlight new service providers and identify deniable and nondeniable charges. All other deadlines under the rule, including a requirement that common carriers separate charges on bills by service provider, take effect 30 days after the notice's publication in the Federal Register on October 12, 1999. FCC stated that the postponement came about because the Office of Management and Budget raised concerns that the original implementation date could impair the ability of some telephone companies, especially small and medium-sized ones, to ensure that their computer systems were Year 2000 compliant.[7] FCC has also received several petitions for waivers, stays, and other forms of relief from the guidelines adopted in the order and continues to work to resolve these issues.

FTC's Proposed Revision to the "Pay-per-Call" Rule

FTC is also taking action to combat cramming. Under a proposed revision to its "Pay-per-Call" rule, FTC has laid out a fourfold approach to cramming.[8] First, a consumer's express authorization generally would be required for purchases unrelated to local or long-distance telephone service that are billed to the consumer's telephone account. Second, a vendor would be prohibited from placing monthly or other recurring charges for pay-per-call service on a telephone bill without prior

[6] "Truth-in-Billing and Billing Format," CC Docket No. 98-170, FCC 99-72 (rel. May 11, 1999).

[7] The Year 2000 problem is rooted in how dates are recorded and computed. For the past several decades, systems have typically used two digits to represent the year, such as "98" for 1998, to save electronic storage space and reduce operating costs. In this two-digit format, however, 2000 is indistinguishable from 1900. Because of this ambiguity, date-dependent software, firmware, and hardware could generate incorrect results or fail to operate altogether when processing years beyond 1999.

[8] Under the authority of the Telephone Disclosure and Dispute Resolution Act of 1992, FTC adopted its Pay-per-Call rule to curtail the unfair and deceptive practices engaged in by some pay-per-call businesses. 16 C.F.R. part 308. At that time, pay-per-call services were generally provided via "900" numbers that were billed directly to a consumer's local telephone company. Since then, "telephone-billed purchases" have expanded beyond simply "900" numbers. The Telecommunications Act of 1996 authorized FTC, through its rule, to extend the definition of the term "pay-per-call service." On October 30, 1998, FTC published a notice of proposed rulemaking to revise the rule. 63 Fed. Reg. 58524. Part of this revision focuses on cramming.

agreement with the customer billed for the service. Third, consumers would have the legal right to dispute unauthorized charges "crammed" onto their telephone bills and to have these charges removed. Finally, dispute resolution protections would be provided for all transactions that resulted in the placement of nontoll charges on a customer's telephone bill. Violators would be liable for civil penalties, currently $11,000 per violation. FTC officials currently expect to issue a final rule sometime this winter.

Federal Complaint-Reporting and Education Initiatives

FCC and FTC are augmenting their regulatory efforts with expanded consumer outreach and education, which are key elements in combating cramming. FCC is making it easier for consumers to submit complaints about cramming. In the past, FCC required consumers to submit complaints in writing before it took action on them. Since January 1999, consumers have been able to file complaints electronically via FCC's Internet Web site. And in June 1999, operators at FCC's National Call Center started taking consumers' complaints over the telephone and electronically submitting them for action directly to FCC's Common Carrier Bureau. In response to each complaint, the Bureau electronically issues an "Official Notice of Informal Complaint" to all companies identified in the complaint.[9] A served company has 30 days to respond to FCC. FCC is also automating some of its old manual processes for handling consumers' complaints in order to shorten its response time. In addition, FCC is bolstering its customer education efforts by making information about cramming available on its public Internet Web site. FCC is in the process of establishing a centralized Consumer Information Bureau to be more responsive to consumers' concerns and requests for information. It is also in the process of establishing a centralized Enforcement Bureau to better marshal its resources for taking actions against entities that violate its rules.

FTC has expanded its efforts to educate consumers about telephone billing abuses by creating a Web page on cramming and has formed a telecommunications working group to develop consumer education publications. These materials emphasize that a consumer does not owe a payment for unauthorized (crammed) services just because the call for the service may have been placed from his or her home. In 1999, FTC added a toll-free number for consumers to call with complaints about cramming and other abuses and to obtain information on how to avoid such problems. FTC's database system, called the Consumer Sentinel, also

[9]The issuance of a notice of informal complaint does not necessarily indicate wrongdoing by the served company.

contains details on over 210,000 consumer complaints on all topics, including complaint data provided by a variety of organizations, such as Better Business bureaus, state attorneys general, the National Fraud Information Center, Phone Busters, and private companies. FTC uses the database to develop enforcement strategies against companies engaged in abusive trade practices, including cramming.[10]

State and Federal Enforcement Actions Against Cramming

Both state and federal enforcement actions against companies engaged in cramming have resulted in financial penalties, restitution, and discontinued operations.

Completed State Enforcement Actions, 1996-98

As of the end of 1998, 16 states had successfully completed 25 enforcement actions against companies and individuals engaged in cramming that have resulted in over $3.5 million in fines and other penalties. In each of these cases, the public utilities commission and/or the attorney general's office participated in a formal hearing against the violator that resulted in a final disposition or resolution of the case.

Usually, the accused company or individual was ordered to resolve the complaint by providing consumers with some restitution, paying a penalty, or providing an assurance that the cramming would stop. As shown in table 2, the 16 states ordered companies to pay at least $1.7 million in customer restitution[11] and $1.8 million in penalties and fines.[12] These completed enforcement actions affected at least 42,000 consumers. These totals, however, understate the actual outcomes of these actions because the survey responses of state public utilities commissions and attorneys general did not always include the number of consumers affected or the amount of customer restitution and penalties involved.

[10]Over 170 law enforcement agencies in the United States and Canada also have access to this database to assist them in their own consumer protection efforts.

[11]Customer restitution can include a complete or partial refund of the money consumers paid for unauthorized services.

[12]Penalties and fines include charges to cover the costs of court proceedings and investigations. In some cases, the penalties and fines were used to cover the costs of consumer education campaigns.

Table 2: Completed Enforcement Actions Taken by State Public Utilities Commissions and State Attorneys General for Cramming, 1996-98

State	Number of completed enforcement actions	Number of customers affected	Total amount of customer restitution reported	Total amount of penalties and fines reported
California	2	30,000[a]	$650,000	$25,000
Florida	3	2	579	21,000
Georgia	1	[a]		
Idaho	1	5	[b]	1,500
Illinois	1	57	500,000	20,000
Kentucky	1	[a]		2,000
Missouri	2	[a]	[b]	[c]
New York	3	172	67,000[b]	129,000
North Carolina	1	[a]	[b]	273,000
Oregon	3	[a]		14,350
Pennsylvania	2	[a]	[b]	1,002,500
Rhode Island	1	14	400	35,000
South Dakota	1	1	229	
Tennessee	1	11,878	[b]	280,000
Virginia	1	[a]	435,000	15,000
Wisconsin	1	[a]	40,000	25,000
Total	**25**	**42,129**	**$1,693,208**	**$1,843,350**

[a]The number of customers affected was not provided in at least one of the reported actions.

[b]Restitution was ordered to be paid in at least one of the reported actions, but the specific amount was not provided.

[c]A penalty was ordered to be paid in at least one of the reported actions, but the specific amount was not provided.

Sources: State public utilities commissions' responses to GAO's survey and responses of state attorneys general to a survey from the National Association of Attorneys General.

In addition to these completed cases, three state public utilities commissions and five state attorneys general reported initiating 22 other enforcement actions against entities engaged in cramming. These actions had not been finalized when we conducted our survey in early 1999.[13] This month we learned that, since the beginning of 1999, 13 state attorneys general reported completing an additional 22 enforcement actions, none of

[13]The state public utilities commissions in Florida, Maine, and West Virginia, and the attorneys general in Illinois, Missouri, New Jersey, Ohio, and Wisconsin reported the pending cramming enforcement actions.

which were included in our July 1999 report.[14] These actions resulted in at least $460,000 in penalties and customer restitution. Four of the 38 public utilities commissions we contacted this month also reported five more pending enforcement actions for telephone cramming.[15]

Federal Enforcement Actions Against Cramming

At the federal level, both FCC and FTC have taken enforcement actions against entities engaged in cramming. FCC and FTC, however, operate under different statutory schemes and generally have different remedies available.[16] As a regulatory agency, FCC has several tools for achieving its enforcement goals. These include administrative remedies, such as revoking a company's operating authority, issuing a cease and desist order, and assessing civil monetary penalties (forfeitures). As a law enforcement agency, FTC pursues cramming in federal district courts, seeking temporary and permanent injunctive relief and, ultimately, restitution for affected customers. FTC can also take administrative enforcement action, such as convening a trial before an administrative law judge.

FCC has brought an enforcement action against one common carrier, Long Distance Direct, Inc. (LDDI) for violations related to both cramming and slamming. (Slamming involves switching a consumer's telephone service provider without the consumer's authorization.) LDDI allegedly changed consumers' long distance service providers to LDDI and billed consumers for "membership fees" simply on the basis of the consumers' calls to a "psychic hotline" service. In some cases, there was no evidence of contact with the affected consumer.

[14]The attorneys general in Arkansas, Florida, Idaho, Illinois, Kansas, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, and Texas reported these completed enforcement actions.

[15]The state public utilities commissions in Florida, Mississippi, North Carolina, and Tennessee reported the most recently pending cramming enforcement actions.

[16]Under the Communications Act of 1934, as amended, FCC has general authority to prohibit carriers that provide interstate services (telephone companies) from engaging in unjust and unreasonable practices, such as cramming. 47 U.S.C. 201(b). FTC, under the Federal Trade Commission Act, as amended, has the authority to pursue law enforcement actions against unfair and deceptive acts or practices. 15 U.S.C. 45(a). Common carriers (i.e., telephone companies) subject to the Communications Act of 1934, as amended, are exempt from FTC's statutory mandate under the Federal Trade Commission Act. 15 U.S.C. 45(a)(2). FTC has taken the position that the statutory common carrier exemption does not shield the non-common-carrier activities of an entity that may otherwise engage in some common-carrier activities under another statute.

FTC has brought nine cramming cases to court since April 1998 that have resulted in at least $52 million in consumer credits and restitution.[17] These cases involve 22 companies, including billing aggregators and vendors. In eight cases, FTC has sought and successfully obtained preliminary or permanent injunctions, or temporary restraining orders, to stop these companies' cramming activities. In addition, FTC is seeking restitution for the unauthorized charges that these companies collected from consumers. According to FTC officials, these unauthorized charges range from $4.7 million in one case to almost $40 million in another case. Of the nine cases brought to district court, four cases have been settled with substantial redress. The case involving Interactive Audiotext Services, Inc., resulted in approximately $11 million in consumer restitution and compliance provisions, including a 3-year record-keeping requirement for the company. In the second case, involving American Telnet, Inc., the parties have agreed to $39.7 million in consumer restitution and changes in their business practices. In the third case, Hold Billing Services, Ltd., agreed to $1.6 million in consumer redress. The fourth case, which involved unauthorized charges to small businesses for Web site services that were purportedly free for a trial period, was just settled earlier this month with the company, U.S. Republic Communications, Inc. The other five cases were still in various stages of discovery and negotiation as of October 1999. Additional details on these cases are found in appendix II.

Officials at both FCC and FTC told us that they have several additional investigations in progress, including one joint investigation. They expect to take more enforcement actions against cramming before the end of this year. They also told us that they are working with their state counterparts to efficiently combat cramming. For example, the two federal agencies share complaint data with each other and the states. FCC and the National Association of Regulatory Utility Commissioners are also working to coordinate their enforcement actions and jointly disseminate educational materials on telecommunications issues affecting consumers. Both FCC and FTC officials told us that they regularly participate in conference calls with representatives from the state public utilities commissions and attorneys general, respectively, to discuss telecommunications issues, including cramming.

[17] FTC's Fighting Consumer Fraud: The Case Against Cramming, June 1999, discusses its actions against cramming.

Industry Actions to Curb Cramming

FCC and FTC officials also noted that that they are working with members of the telecommunications industry to curb cramming. For example, in May 1998, FCC sponsored a workshop, attended by representatives of the telephone industry, to develop a set of voluntary guidelines on "best practices" in combating cramming that individual companies could consider implementing. These best practices cover issues such as screening products and service providers to identify programs that may be deceptive or misleading, establishing procedures for verifying that charges have been authorized by the consumer, and establishing a dispute resolution process. In addition, FTC has sponsored public workshops with industry representatives, consumer groups, FCC officials, the National Association of Attorneys General, and others to address cramming and provide additional consumer education.

Earlier this year, several major local and long-distance telephone companies provided us with information on initiatives they have undertaken to deal with cramming. Among them are the following:

- Using brochures, press releases, and Web sites to educate customers on what constitutes cramming, what their rights are, and what steps they can take if they have been victims of cramming.
- Limiting billing to vendors engaged in telecommunications-related services.
- Eliminating billing for certain products and services susceptible to abuse by third-party service providers, such as prepaid calling cards and debit cards.
- Eliminating billing for recurring monthly service charges associated with pay-per-call 900 number services or charges for services accessed via 800 and 888 numbers, which are widely associated in the public's mind with toll-free calling.
- Refusing to bill on behalf of programs that use sweepstakes or "check box" methods to sign up customers.
- Requiring information providers to provide clearer billing descriptions, toll-free numbers for complaints, and procedures for handling complaints.
- Requiring information providers to provide a notarized affidavit attesting to the validity of their descriptions and billings; requiring billing aggregators to sign an affidavit certifying that the third-party charges they are submitting are authorized by the consumer.

The companies maintain that measures such as these (which reflect several of the FCC workshop's "best practices") have been effective in combating cramming, as evidenced by the generally declining volume of cramming complaints that they reported receiving during 1999.

Mr. Chairman, this concludes my prepared remarks. We would be pleased to respond to questions that you and Members of the Committee may have at this time.

Contact and Acknowledgements

For information about this testimony, please contact Stan Czerwinski at (202) 512-7631. Individuals making key contributions to this testimony include John Finedore, Mindi Weisenbloom, Mike Volpe, Terri Russell, Martha Chow, Faye Morrison, Ed Warner, and James Sweetman.

Objective, Scope, and Methodology

Our objective for this testimony was to provide general background information on cramming and efforts to combat it. We based our testimony largely on the work we did for our recent report, Telecommunications: State and Federal Actions to Curb Slamming and Cramming (GAO/RCED-99-193, July 27, 1999). The objectives of that report were to describe the (1) number of complaints about slamming and cramming received by state and federal authorities, (2) types of protections implemented by state and federal authorities to increase consumers' ability to protect themselves against slamming and cramming, and (3) state and federal enforcement actions taken against slamming and cramming violations from 1996 through 1998.

To determine the states' actions to combat cramming, we administered a survey to the public utilities commissions in the 50 states and the District of Columbia early in 1999. This survey collected information on the types of consumer protections offered by the states, the number of cramming complaints received, and details on each of the formal enforcement actions taken by the commissions from 1996 through 1998. The National Association of Attorneys General collected similar information about formal enforcement actions taken by each state's attorney general. We assisted in collecting this information. In addition, we reviewed relevant FCC and FTC documents and met with officials of these agencies to discuss their efforts in developing regulations to combat cramming and their enforcement actions against those engaging in this abuse. We also contacted regional Bell operating companies and major long-distance companies for data on cramming complaints and descriptions of their initiatives to curb cramming.

During October 1999, we obtained updated information on cramming complaints and enforcement actions from FCC, FTC, and 38 state public utilities commissions. We also obtained an update on cramming enforcement actions reported by some state attorneys general to the Illinois Office of Attorney General. To update cramming complaint data from major regional telephone companies, we relied on their responses to a July 1999 request by FCC for information on their anticramming initiatives and current complaint levels.

Our initial review, performed from December 1998 through June 1999, and our October 1999 update were conducted in accordance with generally accepted government auditing standards.

Appendix II

FTC's Enforcement Actions Against Cramming

The Federal Trade Commission (FTC) protects consumers by taking law enforcement actions against unfair or deceptive acts or practices.[1] According to FTC officials, the Telephone Disclosure and Dispute Resolution Act (TDDRA) of 1992, as amended, gives FTC the authority to regulate all "telephone-billed purchases" that are distinct from charges for the transmission of local or long-distance telephone calls.[2] FTC seeks and obtains temporary restraining orders, preliminary injunctions, permanent injunctions, and other equitable relief, such as the appointment of receivers, to halt unfair or deceptive practices and to reserve the offending companies' assets for consumer restitution.

Between April 1998 and October 1999, FTC filed nine cases against 22 companies for cramming violations. In some instances, FTC entered into court-approved settlements with the companies. Table II.1 provides details on the publicly filed enforcement actions that FTC took during this period.

[1]Common carriers (i.e., telephone companies) subject to the Communications Act of 1934, as amended, are exempt from FTC's statutory mandate under the Federal Trade Commission Act. 15 U.S.C. 45(a)(2). FTC has taken the position that the statutory common carrier exemption does not shield the non-common-carrier activities of an entity that may otherwise engage in some common-carrier activities under another statute.

[2]Under TDDRA, the term "telephone-billed purchase" includes any purchase that is completed solely as a consequence of the completion of a telephone call, or the subsequent dialing or comparable action of the caller. The term specifically excludes all "local exchange" or interexchange telephone service.

Table II.1: FTC's Publicly Filed Cramming Cases, as of October 1999

Company	Date of action	Amount of suspect billing	Status	Comments and additional information
Interactive Audiotext Services, Inc. Includes American Billing and Collection Services, U.S. Interstate Distributing, Inc.; and Allstate Communications (parent company).	4/22/98, in U.S. District Court for the Central District of California; amended filing on 5/28/98.	$11 million	Permanent injunction; about $11 million in restitution to consumers.	Settlement entered as final order; redress phase under way and changes required in business practices.
International Telemedia Associates, Inc. (ITA); and Online Consulting Group (vendor for ITA).	7/10/98, in U.S. District Court for the Northern District of Georgia.	$17,100,000	Temporary restraining order with freezing of Online's assets and preliminary injunction; receiver appointed to manage Online.	Bankruptcy court has appointed a trustee for ITA; ITA is closed down and trustee is winding up its business affairs. Receiver is closing down Online after deciding that it could not be run as a lawful business.
Hold Billing Services, Ltd.; HBS Inc.; Avery Communications (all closely related companies that are aggregators); and Veterans of America Association, Ltd. (VOAA) (vendor).	7/16/98, in U.S. District Court for the Western District of Texas.	$4.7 million	Permanent injunction on 9/22/99; $1.6 million in consumer redress.	Settlement entered as final order.
Communications Concepts and Investments, Inc. d/b/a Crown Communications and Crown Communications Two, Inc.; and Global Collections, Inc. (Crown's in-house collection agency).	12/22/98, in U.S. District Court for the Southern District of Florida.	Not yet determined; formal discovery is under way.	Not yet determined.	Formal discovery and negotiations are under way.
Shared Network Services, LLC, d/b/a Shared Network Services and 1st Page	6/7/99, in U.S. District Court for the Eastern District of California.	Not yet determined.	Stipulated preliminary injunction; discovery is under way.	Resolution not yet determined.
Wazzu Corporation	6/7/99, in U.S. District Court for the Central District of California.	Not yet determined.	Temporary restraining order; discovery is under way.	Resolution not yet determined.
American Telnet, Inc.	6/8/99, in U.S. District Court for the Southern District of Florida.	$39.7 million	Permanent injunction; complaint and consent filed together.	The parties have agreed to $39.7 million in forgiven charges and redress to consumers, and changes required in business practices.

(continued)

Company	Date of action	Amount of suspect billing	Status	Comments and additional information
Web Valley, Inc.; Profile National Business Directory, Inc.; National Business Directory, Inc.; Protel Advantage, Inc.; U.S. Protel	7/4/99, in U.S. District Court for Minnesota.	$9 million	Preliminary injunction.	Resolution not yet determined.
U.S. Republic Communications, Inc.; T. Gary Remy	10/14/99, in U.S. District Court for the Southern District of Texas.	To be determined.	Complaint and final consent filed together.	Up to 124,000 consumers may receive redress as a result of this settlement; changes required in business practices.

Source: FTC

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Phone bill 'cramming' spikes again

Phantom charges sneaked onto statements across the U.S.

By Bob Sullivan

msnbc.com

Jan. 30— They call and offer a "free" service, such as a no-cost Web site or Internet yellow pages listing. They trick you into saying "yes" — to just about anything. Sometimes, they don't even bother calling. And suddenly, there' s an extra $30 charge on your phone bill. It's an old scam, known as "cramming," but there appears to be a fresh epidemic of it. The company at the center of the accusations, ILD Teleservices, says it's an innocent third-party billing firm. But either way, scores of consumers are hopping mad about $30, $50, even $80 charges that are peppering phone bills all around the country.

CRAMMING IS ONE byproduct of the deregulation of the telephone industry. To open the system to increased competition, local phone companies have to lease their phone lines to outside firms who want to sell competitive services. It's perfectly legal for a third-party company to sell a home voice mail service to you, billed through your home phone bill.

But shady telecommunications companies are taking advantage of the fact that local phone companies have no stake in verifying that consumers agreed to pay for such services, so they "cram" charges on phone bills, hoping consumers won't notice.

That's what happened to Barbara Williams, of Milton, Pa. She found an $32.65 that was tacked onto her bill during several months last year.

"I have a gift shop. I got a phone call from a man asking if I would like to have my shop listed in their yellow pages," she said. "I said, 'Not if it costs me anything,' and he said, "Oh no, no, it's free.' Then they said they wanted to tape me. I forgot about it. Then all of a sudden, on the 7th page of my Verizon bill, I notice the charge."

Next to the charge are two company names: "Liberty Online" and "ILD Teleservices." The 800 telephone number listed with the charges connects consumers with ILD, which told Williams it was only a third-party billing company, doing work for Liberty Online.

Williams eventually got the charges reversed, but only after several irate phone calls and e-mails.

450 COMPLAINTS TO FCC

Williams is just one of over 100 complainers who found their way to a consumer advocate Web site called RipOffReport.com in recent weeks. And while she has gotten her money back by peppering ILD and Liberty with phone calls, others complain they are still getting billed for services they don't want.

The complaints stem from a variety of phantom tack-on telecommunications services, such as voice mail or Web hosting, from companies with names like Liberty Online, Venus Voicemail, National Online Services, Horizon and ILAB INET. But they all have one thing in common: ILD Teleservices does their billing.

Complaints about ILD aren't just appearing on consumer Web sites. The Federal Communications Commission said it received 457 cramming complaints against ILD Telecommunications between January and December of last year, including 170 in the last three months of the year. ILD Telecommunications is ILD Teleservices' parent firm.

Fred Lloyd, vice president of strategic planning and corporate development for ILD, said his company is merely a go-between that arranges billing for third-party companies that want to provide residential or business telecommunications services. ILD helps companies like Liberty Online construct billing arrangements with home phone carries like Quest and Verizon. Lloyd admits there have been complaints from consumers who say they've being charged for services they never ordered, but said the blame should fall on the third-party firm, not his company.

He added that ILD generates hundreds of thousands of bills each month, and complaints are a tiny fraction of their transactions.

"From time to time, we have some billing questions," he said. "We always work with (customers) on a case by case basis."

Lloyd said he warns third-party companies when there are numerous complaints, and will cancel their billing services if the complaints don't stop. He wouldn't say how many companies have been censured, other than to say "There have been a handful I've had to kick off."

Customers who think they're being crammed can call ILD's 800 number, he said, and the firm will "work on resolving the issue for them."

It wasn't quite that easy for Janie Carstens, who helps run Joe and Mimma's Italian Restaurant and Pizzeria in Yorktown, Va. Her company was charged $29 for Web services, and another $50 set-up fee, by ILAB INET and ILD.

"I called up (ILD) to cancel it. They said I had to call INET, at a different number," Carstens said. She was then told to call a third number, w here she argued with an operator about whether or not she had consented to the service. Finally, two hours later, the firm agreed to cancel the charge. "I had to spend two hours of my own time straightening it out. That was the part that got me. I could have been doing so many other things, and I'm chasing down $80. I ended up working until 9 or 10 that night to catch up for the lost time."

SMALL BUSINESSES TARGETED

Mike Kaill of Washington state had a similar experience when ILD-related charges were tacked onto his small business phone line. He spent three months trying get get monthly $30 charges removed. He finally did, but not before he was threatened by an operator at "Mercury Internet," who said Kaill's credit history would be blemished if he didn't pay.

In fact, Kaill said, several area businesses were hit by the same scheme, suggesting to him that scam artists are attacking whole communities at a time, targeting small businesses.

"One guy had been paying the $30 since last August," he said.

But Kathy McQuide, vice president of billing services for ILD, said she regularly reviews tape-recorded sales pitches, and "in 99 percent of the cases, they are valid with proper procedures followed." She said that often consumers and small business are to blame for misunderstandings that lead to erroneous sign-ups.

"What I have found in a lot of cases is that a wife will authorize a service without the husband's knowledge and vice versa," she said. "In the case of businesses, the employee authorizing the service is not always the same person that receives and reviews the bills." She reiterated that consumers can call ILD with complaints, and "if there is any room for doubt, ILD or the client will issue full credit."

WHAT CONSUMERS SHOULD DO

Consumers are responsible for discovering cramming charges on their own; so that means the only safeguard against unwanted fees is detailed examination of the monthly phone bill. But consumers can decrease their chances of getting crammed by carefully reading sweepstakes entries or other junk mail solicitations before filling them out — often they are ruses that serve as permission to switch telephone providers or add services. It also helps to avoid speaking at length with telemarketers.

But the single best defense is to call your local phone company and ask it to shut off "third-party billing." That prevents companies from adding charges onto local phone bills.

msnbc.com

Consumers who have been crammed should carefully save all paperwork and immediately call their local phone provider to dispute the charge. Next, call the provider listed on the bill, and don't back down if the company claims you authorized the charge.

Don't pay the charge, either — phone service cannot be disconnected for non-payment of the third-party portion of a phone bill. However, the third-party provider can put their bill into collections, with the possibility that non-payment could end up on a credit report, so it's important to follow-up with the billing company to be sure the charge is permanently removed.

Federal Trade Commission
Protecting America's Consumers

Facts for Consumers Email PDF Format

Cramming: Mystery Phone Charges

You're looking at your phone bill thinking someone must have made a mistake. How can you be charged for web hosting when you don't know what web hosting is? Why does your bill list a couple of international calls when all your friends and business contacts are stateside?

Chances are you've been crammed.

Cramming happens when a company adds a charge to your phone bill for a service you didn't order, agree to, or use. Cramming charges can be small, say $2 or $3, and easy to overlook. But even when the phony charges aren't small, they may sound like fees you do owe. That makes them tough to pick out, especially if your phone bill varies month to month.

What can you do?

Read Your Bill

Catching cramming charges means taking time to read your phone bill each month — that is, once you get to know your bill a little better.

- *If your telephone bill changes from month to month...* Make it a habit to check the charges on your bill each month for services you haven't ordered or calls you haven't made.
- *If your telephone bill usually is the same...* If your bill goes up one month, even by just a few dollars, take a closer look.

There's no one type of cramming charge. Some charges appear just once; others are "subscription" charges that show up every month. Keep an eye out for generic-sounding services and fees like *Min. Use Fee, Activation, Member Fee, Voice Mail, or Web Hosting*; they may be services you haven't ordered. Are there calls you didn't make? Charges for Internet services from a company you don't know? Area codes you've never heard of, like 011 or 500? The charges could be for anything, including:

- long distance service
- subscriptions for Internet-related services, like web hosting
- access to restricted websites
- entertainment services with a 900 area code
- collect calls
- club memberships

Check out each section of your bill, but note that crammers tend to target some "hot spots." Pay special attention to sections labeled "Miscellaneous," and the long-distance, 900-number, and "third-party" charge sections on your bill. Third-party charges are charges from anyone other than your phone company. Some phone companies send their customers shorter bills with little detail, but may offer more detailed bills online or upon request. To check out a sample phone bill with various charges explained, visit the Federal Communications Commission website at www.fcc.gov/cgb/phonebills/samplePhonebill.html.

If You Suspect Cramming

Not sure about a charge on your bill? Ask your phone company about it. If the charge isn't from your phone company, the name of the company charging you should be printed nearby. Your phone company should be able to tell you more about the charge, and your statement should tell you how to dispute errors on your bill. It's a good idea to follow-up with an email or letter sent by certified mail; ask for a return receipt. It's your proof that the company received your letter. Keep a copy of your bill and any other documentation for your files.

Then, take the final step in fighting a cramming charge: file a complaint. Even if you get a refund, if you suspect you've been a victim of cramming, notify the FTC at ftc.gov, or by calling 1-877-FTC-HELP (1-877-382-4357). You also can file a complaint with your state Attorney General's office (visit naag.org or check the government section of your phone book for the number) or the state agency that regulates phone service in your state — often the state public service commission or public utilities commission, which you can look up on the National Association of Regulatory Utility Commissioners website at naruc.org/commissions.cfm. Try to include the names of all the companies involved, not just your telephone company.

Reduce Your Risk of Cramming

Sometimes, there's nothing you can do to prevent a determined crammer from adding fake charges to your phone bill. However, you can avoid giving would-be scammers the opportunity by being wise to some common ploys:

Enter to win. You think you're entering a contest, but you're actually giving your information to strangers who might be up to no good. Before you fill out a contest entry form, consider whether you know the company, and be sure to read the fine print. Shady promoters sometimes use an entry form as "permission" to enroll you in a service. You find out you're enrolled only if you notice the fee on your phone bill.

Join the club. The ad says it's free, and in fact, the number you call to join may be toll-free. All you have to do is say your name and "I want the service." But you may end up enrolled in a club or service program that comes with a monthly charge on your phone bill.

"Free" calls. You may be calling to claim a "free prize," but 900 numbers aren't free. "Free minutes" offers may not be free, either: you're put on hold and the hold time counts toward your free minutes, which results in a charge to you. In some cases, you should have some warning — every 900 number that costs more than $2 has to have a brief introductory message about the service, the service provider, and the cost of the call. After that, you have three seconds to hang up without incurring any charge.

Another option to help stop cramming is to block some services. A 900-number block stops calls to 900 numbers from going through. Blocks also are available for international, long distance, and local toll calls, as well as to third-party services. Check with your phone company about the costs of different blocking options, and make sure you understand the range of calls or services that will be included in a block. With a mobile phone, 900-number calls are automatically blocked, but you may be allowed to block other services like Internet access or text messaging.

If you use a telephone modem for Internet access, you can prevent a specific type of cramming by making sure you're using up-to-date security software. Otherwise, you're leaving the door open to scammers who use malicious software programs to download "dialer programs" to susceptible computers. The program redirects your modem, causing it to dial an international or 900-number. You find out when you see the charge on your phone bill.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a video, How to File a Complaint, at ftc.gov/video to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

February 2009

Last Modified: Thursday, July 2, 2009

Examining
Phone Bill
CRAMMING
a discussion

Agenda

May 11, 2011

8:30 **Registration**

9:00 **Welcome**

Shameka Gainey
Staff Attorney
FTC Division of Marketing Practices

Introductory Remarks

David C. Vladeck
Director
Bureau of Consumer Protection, FTC

9:30 **Session 1: Cramming — How Does It Happen and What Is the Injury?**

This panel will describe the nature of landline telephone bill cramming that law enforcers have investigated and prosecuted. This panel will discuss the ways in which unauthorized charges are placed on the landline telephone bills of consumers and small businesses, the kinds of goods and services that are being billed, and the resulting injury.

MODERATOR

Russell Deitch
Staff Attorney
FTC Division of Marketing Practices

PANELISTS

Beth Blackston
Assistant Attorney General
State of Illinois

Dianne E. Dusman
Senior Assistant Consumer Advocate
Pennsylvania Office of Consumer Advocate

Craig Graziano
Staff Attorney
Office of Consumer Advocate
Iowa Department of Justice

Jennifer Arbittier Williams
Assistant U.S. Attorney
Eastern District of Pennsylvania

10:30 Break

10:45 Session 2: What Steps Does the Telephone Billing Industry Take to Detect, Monitor, and Prevent Cramming?

This session will examine the steps that industry currently takes to prevent, detect, and halt telephone bill cramming. The discussion will address the steps taken to keep crammers from accessing the billing platform, to monitor billing data and complaints to detect ongoing cramming, and to take action to expel crammers from the billing platform and ensure that they do not return. The panel will discuss how effective these steps have been in identifying and preventing cramming.

MODERATOR

Larissa Bungo
Assistant Regional Director
FTC East Central Regional Office

PANELISTS

Richard Goldberg
Assistant Director
Office of Consumer Protection Litigation
U.S. Department of Justice

Laura Kim
Assistant Director
FTC Division of Marketing Practices

John McGlamery
Deputy Attorney General
State of Nevada

Don Teague
President
MORE International

Kent Wardin
Assistant Vice President
AT&T

12:00 **Break for Lunch — on your own**

1:30 **Session 3: Approaches to Cramming Prevention: How Are the Mobile and Landline Billing Platforms Different?**

This session will examine the different approaches to third-party billing and cramming prevention between the mobile and landline telephone billing platforms. Do the two platforms differ in procedures for screening third-party billers, monitoring cramming activity, and taking action against billers who submit unauthorized charges? Are the mechanisms used to ensure customer authorization different? What cramming prevention mechanisms and best practices could translate from one platform to the other? What cramming prevention mechanisms and best practices would be difficult or impossible to adopt due to technological or other differences between the platforms?

MODERATOR

Robert Schoshinski
Staff Attorney
FTC Division of Marketing Practices

PANELISTS

Michael F. Altschul
Senior Vice President and General Counsel
CTIA–The Wireless Association

Jim Manis
Chairman and CEO
Mobile Giving Foundation

Glenn T. Reynolds
Vice President for Policy
U.S. Telecom Association

2:30 **Break**

2:45 Session 4: Potential Solutions to the Cramming Problem

This session will discuss potential solutions to enable industry, consumers, and law enforcers to better prevent, detect, and reduce telephone bill cramming. Panelists will discuss specific ideas such as allowing consumers to request a block on all third-party billing, requiring third parties to get written approval from consumers before placing charges on their phone bills, improving disclosure of third-party charges to consumers, and creation of a registry of telephone numbers of consumers who do not want any third party billing. This panel also will address how to implement these potential solutions to the cramming problem.

MODERATOR

Lois Greisman
Associate Director
FTC Division of Marketing Practices

PANELISTS

John Breyault
Vice President of Public Policy
Telecommunications and Fraud
National Consumers League

Elliot Burg *(invited)*
Assistant Attorney General
Office of the Vermont Attorney General

Joel Gurin
Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission

Erik Jones
Counsel to the Senate Committee on Commerce, Science, and Transportation

Keith Vanden Dooren
Special Counsel
Florida Office of the Attorney General

4:00 Closing Remarks

Chuck Harwood
Deputy Director
Bureau of Consumer Protection, FTC

THOMAS J. MILLER
ATTORNEY GENERAL

MARK R. SCHULING
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May 5, 2011

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Cramming Forum

Dear Commissioners:

These comments are submitted on behalf of the Office of Consumer Advocate, Iowa Department of Justice. Our office represents utility consumers, including telecommunications consumers, and the public generally, before the Iowa Utilities Board and in the courts.

We appreciate the convening of this forum and more especially the Commission's body of work combating the problem known as "cramming."[1] That includes the Commission's pioneer work in *FTC v. Inc21.com,* 688 F.Supp.2d 927 and 745 F.Supp.2d 975 (N.D. Cal. 2010). The *Inc21.com* case has highlighted both the failure of third-party verifications to stop the telemarketing fraud and the widespread problems with third-party billing.

Although federal actions, including those at the Commission, have at times proven instrumental in the effort to stop cramming, the Federal Government lacks sufficient resources to pursue all known bad actors. State efforts to combat the problem are also needed. In that regard, one of the most notorious apparent slammers and crammers of the past decade was Buzz Telecom. The company plagued a distressingly large number of consumers, particularly seniors, with reportedly fraudulent sales calls and unauthorized billings. Its operations were effectively halted in early 2007 by the efforts of a large number of states. See Iowa OAG press release,

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[1]See *Office of Consumer Advocate v. Iowa Util. Bd.*, 770 N.W.2d 334, 336 (Iowa 2009) ("Cramming refers to charging a consumer for services that were not ordered, authorized or received"); *Micronet, Inc. v. Indiana Utility Regulatory Comm'n,* 866 N.E.2d 278, 282 (Ind. App. 2007) ("[c]ramming is . . . '[a] practice in which customers are billed for unexpected and unauthorized telephone charges or telephone services, which the [customer] didn't order, authorize or use'"); *Brittan Communications Internat'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 n. 2 (5th Cir. 2002) ("'[c]ramming' refers to charging a customer for services that were not ordered, authorized or received"); U.S. General Accounting Office, "*Telecommunications: State and Federal Actions to Curb Slamming and Cramming,*" Report No. GAO/RCED-99-193 (July 1999), http://www.gao.gov/archive/1999/rc99193.pdf, p. 1 ("'cramming,' involves placing unauthorized charges on a consumer's telephone bill for services and products").

"Consumer Advocate: Beware of Long Distance Charges by 'Buzz Telecom'" (Dec. 13, 2006), online at http://www.state.ia.us/government/ag/latest_news/releases/dec_2006/buzz.html.

Iowa law prohibits "unauthorized changes in service," including "cramming." Iowa Code § 476.103 (2011); 199 Iowa Admin. Code 22.23. Pursuant to this authority, our office has had an active enforcement program since 2002. Because the statute excludes wireless services, our work has addressed primarily wireline services.[2] We have seen a great many allegations of fraudulent, deceptive, abusive and unfair practices resulting in the placement of allegedly unauthorized charges on consumer phone bills, among them allegations of the following:

- Defective third-party verification recordings, including doctored recordings purporting to show an authorization from the consumer when in fact none was given, recordings from persons other than the consumer to whom services were billed, recordings in which the words voiced by the verifier are spoken too quickly to be understood or are otherwise inaudible, recordings from verifiers that are not independent from the billing company (as required by FCC rules), recordings in which telemarketers remain on the line during the alleged verification (contrary to FCC rules);

- Missing third-party verification recordings;

- Misrepresentations during the unrecorded solicitation portion of a telemarketing call, including misrepresentations that the telemarketer was calling on behalf of the consumer's local telephone company and that, for example, the local telephone company owed the consumer a refund, necessitating a verification of information;

- Bogus Internet signups, including signups that did not result from any action of the consumer to whom they were billed and signups that resulted from statements on the company's website asking the consumer to complete a survey or to sign up for a free gift;[3]

- Free trial offers stating that billing will not commence unless and until the consumer has had an opportunity to review a service and make a decision whether the consumer wishes to continue the service on a billable basis, followed by billings despite the absence of any consumer ability to review the service and

[2]Wireless complaints are addressed by the Consumer Protection Division of the Iowa Department of Justice through the use of the Consumer Fraud Act.

[3]There is rarely evidence explaining what happened. Occasionally, there are telling clues. In one case, it appeared the phone number the company claimed the consumer supplied as part of the alleged order had not been the consumer's telephone number for seventeen months. See Iowa Utilities Board file no. FCU-04-65. From a preventive standpoint, it appears that allegedly offending companies have commonly failed to institute any reasonable processes or procedures or security checks to verify or validate the genuineness of alleged Internet orders billed to the local phone bill. An Iowa complainant laments: "I had to answer five questions to verify my identity in order to even ask about my [phone] bill, but someone else can sign me up and bill me for a service I've never heard of without any verification at all?" See Iowa Utilities Board file no. FCU-05-54.

make or communicate a decision regarding continuance of the service on a billable basis; and

- Continued billing after the consumer has terminated services.

The types of services involved have commonly included long distance services, collect calls, directly assistance calls, voicemail services, web hosting services, and online yellow page services. Both individual consumers and small businesses have been victimized.

When consumers complain, they frequently report being placed on hold for lengthy periods of time, cut off and otherwise given the runaround. Their correspondence goes unanswered. They are wrongly told the charges complained of are legitimate and must be paid. In one case, the company sent the consumer a form letter advising that it had conducted a thorough investigation and determined the charges were valid, when in fact the charges were invalid. Consumers fear loss of essential phone service and damage to credit scores. If relief is provided, it commonly takes two or three billing cycles for credits to appear.

The Iowa statute authorizes the Iowa Utilities Board to assess civil monetary penalties for violations. Civil penalties are needed because credits alone do not provide an adequate incentive to stop the violations. *In re Canales Complaint*, 637 N.W.2d 236, 245 (Mich. App. 2001) ("without . . . fines there would be insufficient incentive for . . . providers to stop slamming because they would simply reimburse those customers who complain. . . , but continue to collect fees from the other slammed customers"); see *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 174, 185-86 (2000).[4]

The Iowa statute contains no requirement that the violations be either intentional or numerous. The omission of an intent requirement has helped us advance the statutory goal. Because direct proof of a company's state of mind is rarely available, requiring proof of intent to violate means that intentional violations easily escape sanction. Even when a violation is caused by unintentional conduct, moreover, such conduct is often the result of negligent and inattentive behavior. Civil penalties are designed to remedy such sloppy business practices, so that such behavior will be policed and cleaned up. *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990); see *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999).

The omission of a pattern requirement has similarly helped advance the statutory goal. Experience shows that complaints represent but a fraction of violations.[5] Waiting for proof of a

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[4]Small claims court is "not an effective remedy because the amounts at issue [are] too small to be worth the time and energy, let alone the nominal filing fee." *McKee v. AT&T Corp.*, 191 P.3d 845, 858 (Wash. 2008).

[5]In 2005, for example, a relatively small number of Iowans, each disputing a bill between $5.00 and $8.00 for a single domestic collect call, lodged complaints against two billing companies. A Commission press release later revealed a "massive" fraudulent billing scheme that collected more than $30 million in bogus charges from millions of consumers. "Phone Bill 'Cramming' Defendant Settles FTC Charges," online at http://www.ftc.gov/opa/2007/10/nationwide.shtm (FTC 2007). More recently, the *Inc2.com* court, in what it described as the "most compelling proof" before it, cited an expert survey offered by the Commission showing that only five percent of billed consumers were even aware that they had been billed, also noting a company document

series of violations routinely delays enforcement. Worse, when enforcement is thus delayed, most of the time there is no enforcement at all. Artful operators are free to use multiple corporate entities in order to mask the scope of their operations. They are free to move from one corporate shell to another, or to other types of violations, once complaints start to gain the attention of regulatory officials. Practical limitations inhibit the development of pattern cases.

The vast majority of our cases have been settled. The penalties appear to have assisted in decreasing the number of complaints.

State and federal officials should continue to work together to develop and implement solutions. At the state level, pursuing consumer complaints will reduce existing abuses and assist in preventing the development of new abuses. Companies that benefit from contractual relationships should be held accountable when they have an ability to prevent abuses but fail to do so.[6] Third-party verification processes, Internet signup processes and third-party billing processes all merit attention and action. Together we can reduce mistreatment of consumers.

We look forward to participating in the forum. Thank you for the invitation to do so.

Respectfully submitted,

Craig F. Graziano

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found on execution of a search warrant stating: "Never bill more than $29.95 per month. The average small business sees this as phone charges and does not review for five months." See 745 F.Supp.2d at 982 and 986.

[6]See *Doty v. Frontier Communications Inc.*, 36 P.3d 250, 258 (Kan. 2001) ("[t]o allow Frontier to participate and profit through its contractual agreements . . . – yet insulate itself from any responsibility – flies in the face of the intent of the Kansas Legislature when it enacted [the slamming statute]").

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CX-6

RADICAL PERSSON, INC.,
d/b/a EChurch Network and ILab Technologies,

LARS G. PERSSON; and

ILD TELECOMMUNICATIONS, INC.,

Defendants.

JUDGMENT AGAINST ILD TELECOMMUNICATIONS, INC.

Upon the annexed stipulation of the parties, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The stipulation is approved and its terms are made a part of this Judgment.

2. This court has jurisdiction over ILD Telecommunications, Inc. ("ILD") and over the subject matter of this action.

3. ILD is a Delaware corporation with its headquarters located at 5000 Sawgrass Village Circle, Suite 30, Ponte Vedra Beach, Florida 32802-5017.

4. ILD shall institute and maintain the following practices, the purpose of which is to prevent the placement of unauthorized charges on consumers' telephone bills on behalf of ILD's merchant-customers:

a. ILD shall thoroughly screen prospective new merchant-customers seeking to use ILD's bill forwarding and collection services. In addition to detailed information regarding the types of transactions for which ILD would be providing bill forwarding services and any scripts and marketing materials to be used to solicit sales by the merchant-customers, ILD shall require prospective new merchant-customers, among other things, to provide the following information for at least the previous three years: the number and disposition of any enforcement actions, investigations, or complaints initiated by state or federal enforcement agencies against the business or any of its directors, principals, owners, or affiliates that were filed or pending; any previous names utilized by the business; and any affiliated business entities. In addition, ILD shall also conduct its own reasonable inquiry—including Internet searching—into the background of proposed merchant-customers and their directors, principals, owners, and affiliates, including taking reasonable steps to ascertain consumer complaints about the business practices of such persons or entities.

b. ILD shall also require its merchant-customers to notify ILD of any subsequent enforcement actions, other lawsuits, or investigations related to its business activities. Whenever ILD shall have reasonable grounds for concern about a merchant-customer's operations, ILD shall be obligated to undertake its own reasonable inquiry—including Internet searching—into the existence of relevant complaints, investigations, enforcement actions or other litigation.

c. When accepting a new merchant-customer who, in ILD's reasonable estimation, had previous year's gross revenues of less than $10,000,000, ILD shall institute a probation period of at least six months beginning with the month following the first billings, during which ILD shall be the primary inquiry source, i.e., ILD customer service representatives will handle all customer inquiries.

d. ILD shall at all times maintain full authority on behalf of all of its merchant-customers to issue credits or make refunds for cramming complaints and shall do so upon receipt of a cramming complaint. ILD shall use its best efforts to maintain such reserves as it reasonably calculates are necessary to resolve such complaints.

e. ILD shall implement a record-keeping system where it is the source of primary inquiry, with the capability of logging and compiling cramming complaints on a merchant-customer specific basis. As part of this system, ILD shall add "cramming" as one of the "reason codes" its customer service personnel have available to them for characterizing the subject matter of customer calls, and its customer service personnel shall be trained to recognize and categorize cramming complaints. A customer shall be considered to make a cramming complaint if the customer asserts that the customer did not authorize the charge or receive the good or service for which the charge was made, or that the transaction on which the charge is based involved deceptive or misleading conduct on the part of the merchant or any person soliciting on behalf of the merchant, unless the merchant provides to ILD evidence establishing that the customer authorized the transaction and, if the customer has claimed deceptive or misleading conduct, that no such conduct occurred. ILD's record-keeping system shall also be capable of logging the number of customer calls routed to the merchant-customer or a third-party customer service number without any interaction with an ILD employee.

f. ILD shall require its merchant-customers to notify it of all cramming complaints received by the merchant-customer related to bill forwarding services performed by ILD, and shall take reasonable steps to ascertain the number and nature of all cramming complaints from any local exchange carrier which transmits bills to consumers based on billing data from one of ILD's merchant-customers forwarded by ILD, provided that such information is available from the local exchange carrier.

g. ILD supervisors shall regularly review reports generated by the record-keeping system, together with reports of complaints made either to the merchant-customer or to the local exchange carrier, to identify and address any problem accounts. ILD supervisors shall also monitor ILD customer service representatives to ensure that customer inquiries and customer complaints are being properly recorded in ILD's database.

h. If, during any calendar month, more than one percent of the customers being billed through ILD's bill forwarding service on behalf of a merchant-customer complain of cramming (regardless of the entity to whom the complaint is made), ILD shall take reasonable and appropriate measures to address the problem, which shall include the following:

1) promptly communicating with the merchant-customer to obtain an explanation for the complaints level;

2) requiring the merchant-customer to institute an action plan involving immediate measures to reduce the complaint level. Such plans may include modifications of telemarketing scripts or other marketing materials; enhanced monitoring of solicitations and verifications; disciplinary actions; use of mailed written notices to consumers prior to the initiation of billing notifying them of the charges that will be placed on their telephone bill and the means of cancelling any service subscription; the assumption by ILD of the role of primary inquiry service for customer service contacts involving that merchant-customer; and the institution of other appropriate measures to ensure that the consumer has authorized the charge; and

3) enhanced scrutiny by ILD managers of the merchant-customer's billing activity for at least the next two months following each month in which the one percent threshold was exceeded.

i. ILD shall cease providing bill forwarding services on behalf of a merchant-customer if the level of cramming complaints remains above one percent for any three months (whether consecutive or non-consecutive) during any six-month (rolling) period. Nothing in this stipulation limits ILD's ability to terminate a contract with a merchant-customer immediately if the merchant-customer's billings generate a high level of cramming complaints and ILD concludes either that the merchant-customer has engaged in fraudulent or deceptive practices or that there is no satisfactory assurance that the practices that resulted in such complaints will be promptly corrected.

j. To the extent that any of the foregoing obligations require modifications to ILD's standard Bill Forwarding and Collections Agreement ("B&C Agreement"), such modifications shall be implemented in new B&C Agreements entered into after the effective date of the injunction and in existing B&C Agreements at the time of the next renewal.

5. ILD shall promptly provide full refunds to Wisconsin consumers who have filed complaints about RPI with the State, using the funds ILD is holding that were

generated by payments collected from RPI customers. Except for the payment of its reasonable attorney's fees incurred in defense of this litigation and other deductions to which ILD is entitled pursuant to the terms of the B&C Agreement entered into between ILD and RPI, ILD shall hold the remainder of such funds pending resolution of this lawsuit, stipulation of the parties as to the proper disposition of the funds, or order of the court.

6. The terms of this Judgment shall apply to ILD as well as its officers, employees, agents, assigns, successors and affiliates.

7. The terms of this injunction shall expire after four years from entry of this Judgment, unless during this period ILD no longer provides billing and collection services for Wisconsin consumers doing business with ILD's merchant-customers. During any period in which ILD is not engaged in any billing and collection services involving Wisconsin consumers, it shall not be bound to comply with the terms of this injunction.

Dated this 4th day of December, 2007.

BY THE COURT:

THE HONORABLE DAVID T. FLANAGAN
Circuit Court Judge

FTC WORKSHOP

EXAMINING PHONE BILL CRAMMING:

A DISCUSSION

SESSION 2:

STEPS TO DETECT, MONITOR AND PREVENT CRAMMING

COMMENTS BY AT&T

May 11, 2011

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AT&T is pleased to submit the following comments to the Federal Trade Commission (FTC) in connection with AT&T's participation in the FTC workshop examining phone bill cramming to be held on May 11, 2011.

INTRODUCTION

When the Federal Communications Commission (FCC) detariffed billing and collection services provided by Local Exchange Carriers (LECs) 25 years ago it expected consumers to benefit from the ability to use their LEC telephone bill as a means to pay for products or services unrelated to their phone service. For some consumers this billing option substitutes for a credit card; for most, it is simply a convenient method to pay for a variety of services and products.

History has shown the FCC to be correct and AT&T agrees that third-party billing is a benefit for many of its customers. However, AT&T also takes allegations of unauthorized third-party charges very seriously. "Bill quality" is a major driver of overall customer satisfaction and it is not in AT&T's best interests for its long-term and valued ILEC customers to have unauthorized third-party charges placed on their AT&T bills. As a result, AT&T has devoted significant time and effort to be sure its bills are accurate and recognizes the importance of minimizing opportunities for cramming. Over the years, AT&T has taken a number of steps to address cramming issues. As the problems have evolved, so have the solutions.

As a result of these ongoing efforts and it's established commitment to address new issues as they arise, AT&T has developed a very effective anti-cramming program it would like to now share with this FTC workshop.

HISTORY OF CHANGES IN THIRD PARTY BILLING

"If you want to understand today, you have to search yesterday." -- Pearl S. Buck

It is important to understand the history of LEC third-party billing to understand the "how and why" of AT&T's current third-party billing process. Third party billing services was not a "business" created by AT&T to develop another source of revenue; rather in connection with the AT&T divestiture of the Bell Operating Companies in 1984 the FCC required that any Bell Operating Company (BOC) that continued to provide billing and collection service to AT&T (as all of the BOCs did, since the Bell System's billing capabilities remained with the BOCs) must also provide those services to other interexchange carriers (as well as enhanced service providers). In re Detariffing of Billing and Collection Services, 102 FCC 2d 1150, 1152-53, ¶¶ 2-5 (1986).

In 1986, the FCC detariffed billing and collection services. In doing so, its stated purpose was to encourage competition in the billing services market. Id. at 1170. The Commission also expected consumers would be the beneficiaries of the greater flexibility accorded to billing service providers. 1998 FCC Workshop Opening Letter, April 22, 1998, FCC Chairman, William E. Kennard. In 2007, the federal obligation to bill and collect for third-party interexchange carriers and information service providers was effectively eliminated for AT&T, along with most other divestiture-related equal access obligations, when the FCC granted AT&T relief from the relevant provisions of Section 272 of the Communications Act. Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 ¶ 113 (2007) (Section 272 Sunset Order).

Notwithstanding these changes, AT&T continues to provide billing and collection services for unaffiliated third parties as a benefit to all AT&T customers.

AT&T's ILECs provide third-party billing services to certain Service Providers (including interexchange carriers, which provide products or services directly to the ILEC's customers) and to companies referred to as "Billing Aggregators" or "Clearinghouses" (which do not provide services directly to ILEC customers, but instead perform billing functions for third-party service providers which lack direct relationships with the ILECs). Each of AT&T's Incumbent Local Exchange Carriers (ILECs) provides third-party billing services pursuant to a mostly standardized billing and collection services agreement. When an ILEC provides billing services on behalf of Billing Aggregators, its relationship is exclusively with the Billing Aggregator; it does not have any direct contractual relationship with third-party service providers for whom the Billing Aggregator is acting on behalf. Third-party service providers who bill through Billing Aggregators are often referred to as "subCICs."

ILEC third-party billing as it exists today could not be offered to the consumer without the involvement of Billing Aggregators. AT&T's billing system is not designed to manage the thousands of different accounts that would otherwise be required if it had direct relationships with each individual service provider. Billing Aggregators provide the accounting, record formatting and other services required for billing through AT&T. Billing Aggregators are able to uniformly submit charges on behalf of these multiple billers to AT&T electronically, using industry standard Exchange Message Interface (EMI) billing records. Active involvement of Billing Aggregators is critical to the success of any cramming prevention program.

AT&T'S ANTI-CRAMMING PROGRAM

There is no one simple solution to the cramming phenomenon and nothing short of terminating third-party billing will eliminate cramming completely. Cramming is a complex problem, the causes of which change constantly as methods of sales and marketing evolve and as consumers respond to new opportunities, such as the growing use of the Internet to purchase goods and services. As new problems have developed, AT&T has responded with new solutions.

Considering the evolution of third-party billing services, it is not surprising that an anti-cramming program must employ multiple strategies to be effective. Over time AT&T has developed such a program. Last year alone, as a result of AT&T's responsive actions, cramming complaints by AT&T customers were reduced by 70% over the prior year.

Set forth below are the key elements of this successful anti-cramming program:

I. <u>Approval of Third Party Service Providers (subCICs)</u>

- Only approved and authorized subCICs are allowed to have billings placed on AT&T ILEC bills. The Billing Aggregator is responsible for complying with AT&T's subCIC application process, which requires submission of a multi-page application form, affidavits from both the proposed subCIC and Billing Aggregator, information on the officers and/or principals of the proposed subCIC, description of the services/product to be provided, associated marketing materials, and any required regulatory filings, among other information.

- The application review process includes an investigation to determine prior billing violations by the proposed subCIC or its officers or principals and an analysis of the proposed subCIC's product or service to confirm compliance with all AT&T rules and policies.
- The Billing Aggregator is responsible for ensuring the accuracy of all submissions by the subCIC and to conduct its own review of the proposed subCIC's qualifications. An annual audit of Billing Aggregators (described below) includes a review of the Billing Aggregators' compliance with all processes for initiating billing services for new subCICs.

II. Restrictions Against Deceptive Marketing

- Marketing by any unlawful, unfair, fraudulent, misleading or deceptive means is strictly prohibited.
- The subCIC must comply with all FCC truth-in-billing and similar state provisions.
- Certain types of sales or marketing products that can lead to cramming complaints are strictly prohibited, such as sweepstakes, give-aways or programs relying on coupons, certificates or rebates for the purchase of any product or service other than the one billed for, etc. This prohibition applies even for programs that would otherwise be entirely lawful.

III. Mandatory Authorization Requirements At Time of Purchase

- The AT&T customer must be informed of the nature of the service to be provided, the pricing of the service, and that the service will be billed through the customer's telephone bill.

- The customer must provide explicit consent to the purchase and to have the service billed to the customer's telephone bill.
- The customer's authorization must be documented by either (a) a written document signed and dated by the customer (or an electronic confirmation that is valid under the law of the state in which the customer resides); or (b) a recorded verbal authorization by the customer, which must be obtained by an independent third-party.
- For Internet-based transactions, in addition to the above, the following information must be obtained from the customer:

  a. First and last name;

  b. Billing Telephone Number ("BTN");

  c. Address, including street, city, state and zip code;

  d. Confirmation of legal age and authority to bill to telephone account; and

  e. Some form of "non-public" information, such as date of birth or last four digits of Social Security Number.

  f. The clearinghouse or an independent provider must then verify the accuracy of the customer's information using "an established and reputable database provider" (e.g., LEXIS, Experian).
- A "double opt-in" process is also required for Internet-based transactions. This process requires the customer to confirm each purchase for a second time, after completing the initial purchase process. In the double opt-in process:

a. The customer is sent confirmation of product, price and any term commitment;

b. The customer is asked to confirm purchase; and

c. The customer must affirmatively confirm purchase before billing is allowed.

IV. Required Oversight and Independent Audit of Compliance

- Billing Aggregators are required to actively oversee all sales, marketing, verification, fulfillment and inquiry processes of their subCICs.
- Billing Aggregators are subject to annual independent audits by a major audit firm with relevant experience and expertise, chosen by AT&T, with the focus of the audit primarily on compliance with anti-cramming measures, truth-in-billing, and Billing Aggregator's oversight of subCICs' sales practices, as outlined above.

V. Additional Information Provided to Consumer

- Third party charges are highlighted in a separate page of the customer's telephone bill, and are clearly labeled with the name of the Billing Aggregator and subCIC, as well as a description of the service being billed. In addition, this bill page contains contact information for any billing inquires related to the third-party charges, including both an 800 number and a Web address.
- Customers may contact AT&T directly with any billing questions or concerns or to contact the Billing Aggregator or subCIC with their concerns.

- Self-service Web sites must be provided by Billing Aggregators, through which customers can submit and resolve inquiries or disputes. Minimum requirements of the websites are:
  a. The websites must allow the customer to block billing, either by Clearinghouse or subCIC level.
  b. Resolution of any dispute is required within four (4) business days with confirmation to customer.
  c. The website URLs must be provided by text phrase on the customer bills.

VI. Bill Blocking

- AT&T offers third-party bill blocking to its customers. Bill blocking is offered proactively to any AT&T customer that calls AT&T with a cramming complaint, and it is also provided upon request by any AT&T customer. Upon receiving such a request, AT&T's billing and collection customers can no longer submit charges to be billed to those AT&T customers.

VII. AT&T's Response to Individual Consumer's Allegations of Cramming

- When an AT&T customer contacts AT&T to dispute the customer's authorization of a third-party charge, AT&T's policy is to adjust the disputed charge, including associated late fees, while the customer is still on the telephone with the AT&T service representative, regardless of the merits of the customer's complaint. AT&T also offers a third-party bill block, as described above, at no charge to the customer.

VIII. Monitoring of Alleged Cramming and Remedial Actions

- The billing and collection agreements with the Billing Aggregator impose a $150 fee for every cramming complaint AT&T receives, regardless of the validity of the complaint.
- AT&T monitors monthly cramming complaint data for all Billing Aggregators and subCICs. The data includes cramming complaints reported by AT&T customers to AT&T's own customer service centers as well as complaints received by Billing Aggregators or subCICs. AT&T reviews this monthly cramming complaint data, by region, for all Billing Aggregators and all subCICs, both by total complaints and by percentage of complaints from bills rendered.
- The contracts also impose cramming complaint thresholds applicable to both Billing Aggregators and sub-CICs. If a Billing Aggregator or sub-CIC exceeds those thresholds, AT&T can impose remedial action or, if necessary, terminate the billing relationship.
- Billing Aggregators are required to self-report cramming complaints they or their sub-CICs receive, so that AT&T can also consider those complaints in evaluating the third-party billers' performance.
- All cramming complaints must be reported – even those that the Billing Aggregator or subCIC believes to be invalid.
- AT&T reports its monthly cramming complaint data to the Billing Aggregators. In addition, if any Billing Aggregator or subCIC exceeds AT&T's cramming complaint thresholds, AT&T also sends a letter to the

appropriate Billing Aggregator, notifying the Billing Aggregator that it must take immediate corrective action to reduce the level of cramming complaints, including any necessary investigation or remedial measures. The Billing Aggregator is then responsible for taking such actions and for reporting any relevant information to AT&T, such as remedial measures or explanations for the reasons for the cramming complaints.

- In subsequent monthly reviews, if the cramming complaint data do not show adequate improvement, AT&T will take additional action which, at AT&T's discretion, may include suspension of new subCIC applications (for Billing Aggregators), suspension of new sales, termination of sales for specific product types, or termination of billing services.

IX. Additional Anti-Cramming Activities by AT&T

- When AT&T investigates individual cramming complaints, such as executive appeals or referrals from state commissions, it frequently reviews the verification materials obtained by the subCIC or other relevant materials (such as subCIC web sites). If those materials reveal potential issues with sales, marketing or verification processes, AT&T addresses those issues with the relevant Billing Aggregator(s).
- In 2010, AT&T suspended billing for new AT&T customer accounts for several types of third-party services (voice mail, e-mail, Web hosting and Internet-based directory assistance) for which cramming complaint rates were notably high relative to total transaction volume.

- AT&T also notified the Billing Aggregators that they may not submit charges for services marketed through so-called "open affiliate networks" -- in which a subCIC permits its services to be marketed by entities with which the subCIC does not have a close relationship and cannot effectively supervise.

CONCLUSION

With the multifaceted program outlined above, last month's reports show that AT&T has now limited cramming complaints by its ILEC customers to less then 0.2% of all bills that include a third-party charge. AT&T's commitment to fight against cramming is real and the effectiveness of its anti-cramming program is proven by the results.

FILED 03/18/2010 09:17AM
CLERK DISTRICT COURT
POLK COUNTY IOWA

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, v. VERTRUE, INCORPORATED, (formerly known as MEMBERWORKS, INC.), a Delaware corporation; ADAPTIVE MARKETING, LLC, a Delaware limited liability company; IDAPTIVE MARKETING, LLC, a Delaware limited liability company, Defendants.	)	Equity No. EQ 53486 **RULING AS TO LIABILITY**

On this 18th day of March, 2010, the Court enters this ruling as to liability in the above-captioned case. By way of background, this matter was commenced by the filing of the Attorney General's petition in equity on May 12, 2006, which named Vertrue, Incorporated (f/k/a MemberWorks, Inc.) as the sole defendant. An amended and substituted petition in equity was filed on October 23, 2007, adding as parties Adaptive Marketing, LLC; Idaptive Marketing, LLC; West Direct, Inc.; West Telemarketing, Inc.; and West Corporation. The latter three entities, the West Defendants, were subsequently dismissed from the litigation by Plaintiff on September 9, 2009, leaving the three Vertrue Defendants.[1] A bench trial commenced on October 26, 2009 and continued through November 5, 2009; however, the record remained open until January 8, 2010, when additional exhibits were submitted to complete the evidentiary record for the liability phase of this matter. The attorneys were then given until February 8, 2010 to submit

[1] Unless the context otherwise requires, the three Vertrue Defendants will be referred to herein as "Defendants," the "Vertrue Defendants," or "Vertrue."

any other desired post-trial briefs and filings. The parties and the Court have determined that these proceedings should be bifurcated, with the understanding that the Court would separately address issues relating to relief only after liability determinations have been made. Other aspects of the procedural history of this matter will be set forth below, as they relate to substantive findings and rulings.

OVERVIEW OF THE EVIDENCE

At trial, the Attorney General presented the testimony of 25 Iowans affected by Vertrue's practices; 15 testified at trial, and Plaintiff offered the deposition testimony of 10 others. Plaintiff also presented the expert testimony of Dr. Robert Meyer, Professor of Marketing and Co-Director of the Risk Management and Decision Processes Center of The Wharton School. The Attorney General also offered the deposition testimony of: Better Business Bureau representative Carolyn Sheets; President of Adaptive Marketing Jay Sung; Vice President of Product for Adaptive Jeff Paradise; Vice President of West Direct, Inc. Robert Heeks; former Consumer Protection Division (CPD) Investigator Barbara Blake; and Iowa Department of Justice Information Technology Specialist John Hugg. The Attorney General also submitted numerous exhibits, including solicitation exemplars, emails and other documents produced by Vertrue in discovery; survey responses from Iowa consumers; complaints lodged by consumers with the Consumer Protection Division and the Better Business Bureau; and data showing the extent to which Iowans used the memberships in which they were enrolled. Such data was derived from a customer database produced by Vertrue in discovery, which included transaction data for some 863,970 Iowa memberships, beginning in 1989.

Defendants presented the testimony of seven consumers; three testified at trial, and Defendants offered the deposition testimony of four others. Defendants also presented the expert testimony of Dr. Thomas Maronick and Barry Cutler, both former employees of the Federal Trade Commission. Defendants also called as witnesses Adaptive Vice Presidents Bruce Douglas and Jeff Paradise, and submitted the deposition testimony of CPD Investigator Marc Wallin. Defendants also submitted numerous exhibits, including solicitation exemplars, settlement agreements with other attorneys general, and statements of company policy.

Pursuant to Iowa Code § 714.16(7), this is a case in equity. In equity proceedings, evidence is ordinarily allowed to come in subject to objection without rulings by the court so that the entire record is before the reviewing court for de novo appeal. *In re Marriage of Erickson*, 228 N.W.2d 57, 59 (Iowa 1975). Accordingly, in the next section, the Court will address and resolve specific evidentiary disputes to the extent that the evidence in question was relied upon in the Court's final ruling. The subsequent section will review and evaluate the consumer testimony presented. The Court will then address each of the three counts of Plaintiff's amended petition.

EVIDENTIARY RULINGS

Prior to trial, Vertrue filed six motions in limine, seeking to exclude several categories of evidence. The Attorney General responded by filing a resistance to each motion in limine. Thereafter, additional objections were made to evidence as it was offered at trial. All evidence was received, with the understanding that the Court would later rule on specific evidentiary objections as needed, consistent with the Iowa authority regarding equity proceedings (noted above). In this section, the Court will address several of the most prominent evidentiary disputes. However, to the extent the Court relies on particular evidence to which an objection was posed, without explicitly ruling on the objection, the objection is overruled.

unreasonable. The purposes of the rules of evidence and the interests of justice would best be served by allowing such age information to be admitted under the residual exception.[15] Additionally, the age information derived from the Iowa Motor Vehicles Division database is admissible under Rule 5.803(8) (public records); the age information derived from the Westlaw database is admissible under Rule 5.803(17) (commercial publications); and the information derived from the Social Security Death Index is admissible under Rule 5.803(9) (vital statistics).

Plaintiff's Exhibit 227 consisted of data on the State Data Center Website which provided the age profile of the Iowa population and thus served as the point of comparison for the ages of Vertrue members. This data falls within the hearsay exception relating to public records, Iowa Rule of Evidence 5.803, and is therefore admissible.

TESTIMONY OF IOWA CONSUMERS

Plaintiff presented the testimony of 24 Iowa consumers whose testimony exhibited most or all of the following traits: they had no idea how they became members; they had never intended to become members; they had never used any membership benefits (trackable or otherwise); and their accounts had been repeatedly charged for unwanted memberships.[16] This testimony is corroborated by evidence from other sources, including consumer complaints,

[15] It might also be noted that because Defendants were provided the identities of the consumers for whom Plaintiff presented age data, they had the opportunity to discover and correct inaccuracies, if any.

[16] Fourteen testified at trial, and Plaintiff submitted the deposition testimony of ten others. In addition, Plaintiff presented the trial testimony of Laura Mitchell regarding the membership in which her grandfather, Lee Mitchell, had become enrolled through a telemarketing solicitation in 2003. Ms. Mitchell testified regarding the diminished capacity of her elderly grandfather, who died in 2005, and regarding the difficulties encountered in trying to cancel the membership and avoid unwanted charges. 10/29/09 Trial Tr. at 184; Pl.'s Ex. 143.

internal company memos and reports, and membership usage data drawn from Vertrue's own transaction records.

In contrast, Vertrue presented the testimony of four Iowa consumers who were knowing and active members, at least for some period of time.[17] The testimony of the four Iowa consumers presented by Vertrue does little to counter the abundant evidence of consumer dissatisfaction; rather, Vertrue's consumer witnesses highlight just how atypical their circumstances were compared to the great majority of Iowa members.[18]

The three consumer witnesses Vertrue produced at trial had each made heavy use of the benefits of membership, at least at one time. The benefits used by these consumers were predominantly $10 or $25 gift cards, which they would order through the membership website. In placing such orders, the consumers would charge the full face value of each gift card to their credit cards. Vertrue would then credit back 20%, so that the consumer would ultimately pay $8 to obtain a $10 gift card, or $20 to obtain a $25 gift card.

Only two of these three consumers were program members at the time they testified at trial; one of the three (James Greazel) had decided prior to trial that the benefits were not worth continuing his membership, and had decided not to reactivate when his membership was cancelled by the company. *See* 11/4/2009 Trial Tr. at 132-33. Of the two who were still members, one consumer (Sharon Hicok) was considering cancelling at least one of her current

[17] Three testified at trial (Greazel, Hicok and Witt), and Vertrue submitted the deposition of the fourth (Rink).

[18] *See FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (stating that the existence of some satisfied customers does not constitute a defense under the Federal Trade Commission Act).

memberships, as she too had become uncertain that the costs justified the benefits.[19] *See* 11/5/2009 Trial Tr. at 150.

Vertrue also offered the deposition testimony of a fourth multiple user of benefits (gift cards), Merriam Rink. Ms. Rink had cancelled one or two other Vertrue programs, but was still a member of Simple Escapes at the time of her deposition. She maintained that she carefully weighed the cost of membership against the benefits; however, she estimated her annual savings to be in the vicinity of $160, and her annual cost had risen to almost $200. Court Ex. 20 (Rink Depo. at 15-17).

In any event, it appears that the benefit usage of these four consumers was not representative of that of most Iowans.[20] Vertrue's transaction database indicates that only a fraction of 1% of the 863,970 Iowa memberships reflected in the database involved the use of program benefits at the level of these four consumer witnesses.[21] Indeed, 731,575 Iowa memberships or 84.676% of Iowa memberships involved *no* benefit use. *See* Pl.'s Ex. 266b.

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[19] Ms. Hicok also testified, in regard to one of the memberships in which she was enrolled by cashing a promotional check, that she would not have read the membership disclosures on the back of the check because the print was so small. 11/5/2009 Trial Tr. at 158. Ms. Hicok further testified that after purchasing gift cards from Vertrue's member-only website, Deal Pass, she is offered post-transaction consumer surveys, which she completes in order to receive a free gift card. *Id.* at 144-45. It appears that Ms. Hicok may not understand that completing such post-transaction surveys has the effect of enrolling her in additional memberships.

[20] These consumers were representative of the experiences of most Iowans in one regard, however. Three of the four (Witt, Hicok, and Rink) were either uncertain, or had no idea, how they had become enrolled as members.

[21] The number of orders for gift cards or other trackable benefits (each order typically involving multiple cards) placed by these four consumers ranged from a low of 73 orders (by Mr. Greazel) to a high of 378 orders (by Ms. Hicok, who testified that she had $4000 or $5000 worth of gift cards in a bag at home). The percentage of Iowa memberships that involved usage at or above Mr. Greazel's volume of orders was .001 %. Of the 99.999 % of memberships that involved less benefit usage than these four Vertrue witnesses, a strong majority involved no benefit usage whatsoever. *See* Pl.'s Exs. 266b, 545, 548, 552; Defs.' Ex. HH.

Although these four consumers do show that there were individuals – very rare individuals – who actually made robust use of Vertrue's program benefits, these exceptions tend to prove the rule, namely, that for most Iowa consumers membership in a Vertrue program had nothing to do with program benefits. Consistent with the testimony of Plaintiff's numerous consumer witnesses, the great majority of Iowa memberships involved no benefit usage whatsoever.[22]

Vertrue also presented the deposition testimony of three other Iowa consumers: Linda Ackermann, her husband Allen Ackermann, and Sharolyn Anderson. Linda and Allen Ackermann each accepted a trial membership in a Vertrue program as a result of separate "outbound" (that is, telemarketer initiated) telemarketing calls. Although each of them testified to difficulty in understanding their respective telemarketers, they each managed to cancel the two unused memberships without sustaining any losses. However, Mr. Ackermann was emphatic that he never received the $100 Wal-Mart gift card held out to him. Court Ex. 17 (Allen Ackerman Depo. at 21-23), and Mrs. Ackermann did not recall ever having received the Wal-Mart gift card held out to her, either. *See* Court Ex. 18 (Linda Ackermann Depo. at 34-35). These Vertrue witnesses do the Defendants little good. At best, they show that not everyone who was drawn into an unused trial membership by the lure of a gift card offer suffered out-of-pocket losses.

Sharolyn Anderson, Vertrue's other consumer witness, was also of little benefit to Defendants. She was not certain how she became enrolled in Simple Escapes. But she believed that if she had done so by signing the back of a check, she would have read the small print on the

[22] As noted above, the consumer witnesses produced by Vertrue also provide strong evidence against Defendants' suggestion that consumers who had little or no usage of trackable benefits may in fact have made ample use of <u>non</u>-trackable benefits. Ms. Witt made no use whatsoever of non-trackable benefits; Mr. Greazel used a non-trackable benefit only once; and there is no indication of record that Ms. Hicok or Ms. Rink used any non-trackable benefits.

organized as follows: First, the analysis will address the "common architecture" (to use the phrase of Plaintiff's expert) of the deceptive and unfair membership marketing efforts in different channels. Second, the Court will address certain deceptive and unfair practices unique to particular marketing channels.

Overview of Vertrue's Claimed Deceptive and Unfair Marketing Through All Marketing Channels

Some features of Vertrue's overall sales operation create special hazards for consumers. Unlike Vertrue's memberships, most consumer goods are tangible. Thus, for example, if a membership arrangement involves the periodic review of books or CDs on a negative option basis, the receipt of the items themselves serves as unequivocal notice to the consumer of the fact of membership and its attendant obligations.

By contrast, a membership that provides "access" to benefits may be all but invisible and may have little concrete presence in a consumer's life, especially in instances where the consumer is not even aware of purchasing the "access" in the first instance. Here Vertrue fosters invisibility by utilizing a marketing structure that obscures effective notice to the consumer of the membership enrollment and places numerous burdens on the consumer: the burden to cancel in order to avoid the onset of charges; the burden to differentiate a membership notice from the junk mail or spam that it resembles; and the burden to detect an ambiguous charge on one's account statement and act on it..[37] Vertrue's own records show that 84% of the more than 860,000 Iowa memberships involved no discernible use whatsoever of any membership benefits by the consumers

[37] While each element of Vertrue's marketing program may only escape notice by a certain percentage of consumers, the cumulative effect of the elements leads to a practical non-transparency to the majority of Vertrue's customers.

who were subject to membership charges.[38] Thus, the Defendants' overall marketing scheme has netted more than $35 million[39] in membership charges from Iowans, and has provided remarkably little in return. *See* Pl.'s Ex. 266c. Indeed, Vertrue's own benefit usage data for memberships that began after 1989 and were active as of May of 2009 shows that 91.5% of memberships involved no benefit usage whatsoever. *See* Pl.'s Ex. 266d-1.

Most of Plaintiff's consumer witnesses generally recalled nothing about the transactions at issue. (See Appendix to Def. Post-Trial Reply Memo.) Their testimony was not probative of what they actually understood about enrollment at the time they accepted Adaptive's offers. (Id.) Nor was their testimony probative of what a reasonable consumer would have understood when presented with the Adaptive Program offer.

Plaintiff presented little evidence that consumers who read or listen to the offers would not understand, at the very least, that they were agreeing to try an Adaptive Program. Few of Plaintiff's consumer witnesses testified they read or listened to the disclosures at the time they accepted the offers but were unable to understand them. When presented with exemplars of the marketing materials at trial, the consumers acknowledged that if they had read the materials, they would have understood them. (10/26 Tr. 63:1-21; 10/29 Tr. 18:14-25, 21:19-22:1, 40:25-41:19, 43:13-15, 76:15-25, 83:3-10, 176:8-20.)

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[38] The Ninth Circuit Court of Appeals emphasized the high rate of non-use of benefits in finding that a check mailer scheme similar to Vertrue's was deceptive. *See Cyberspace*, 453 F.3d at 1201.

[39] Vertrue's internal data shows that the Iowa membership revenues were $56,251,860.67 for the 20 year period from 1989 to 2009, with net revenue after refunds at $35,663,678.90. *See* Pl.'s Ex. 266c.

The law charges consumers with knowledge they would glean from reading or listening to the offer, whether or not they actually read or listened to it, and regardless of whether they remember. The law does not provide relief for consumers who accept offers without reading or listening to the details of the offer. The requirement that parties "read before signing" is so engrained in the law that it is applied even to lengthy and detailed license agreements full of legalese that individuals routinely "accept" by clicking an icon on the landing page without even opening the document, much less reading it. *See, e.g., Barnett v. Network Systems*, 38 S.W.3d 200, 204 (Tex. Ct. App. 2001) (holding that parties to a contract in electronic format are obligated to read what they sign; and, absent actual or constructive fraud, they are not excused from the consequences attendant upon a failure to read the contract) (citing *Cadapult Graphic Systems, Inc. v. Tektronix, Inc.*, 98 F. Supp. 2d 560 (D.N.J. 2000); *iLan Systems v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) ("The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds they are. In short, i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating 'I agree.'"). Here the offer details are in plain English, with no legalese, on a single web page (there is no need to click on a link to access the offer details), and are understandable. (See, e.g., Ex. HG at p. 18.)

The only court that has considered a claim that any of the Internet web pages involved in this case are deceptive is the United States District Court for the Southern District of Texas, in *In re VistaPrint Sales and Marketing Practices Litigation*, No. 4:08-md-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009), on appeal Docket No. 09-20648.

It held, as a matter of law, the web page was not deceptive because the disclosures were clear and easily understandable if read by the consumer:

> A consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive. *See, e.g., Pacholec v. Home Depot USA, Inc.,* 2007 WL 4893481, *5 (D.N.J. July 31,2007); *Tarallo-Brennan v. Smith Barney,* 1999 WL 294873, *3 (S.D.N.Y. May 10, 1999) (rejecting Plaintiffs' attempt to avoid terms of a contract as "deceptive" where the relevant information was provided in "a clear and legible manner" but Plaintiff did not read the full agreement). The *VistaPrint Rewards* webpage contains adequate disclosures which, if read by the consumer, prevent the webpage -- as a matter of law – from being deceptive.

Id. at *6.

The State asserts that Vertrue's marketing practices, when taken as whole, constitute deceptive and unfair membership marketing, and apply to all marketing channels and are a violation of the CFA. Based upon the authorities cited above, the Court cannot reach such a blanket conclusion. As discussed herein, the lack of transparency in Vertrue's marketing practices does constitute an additional reason to conclude that the BCL does apply to all of Vertrue's efforts. In addition, the Court finds that some of Vertrue's marketing practices do violate the CFA directly, and those must be discussed in detail. Because marketing channels differ in some important respects, the Court will address the issue of CFA compliance separately for each channel, and the Court's further determinations should be read in light of the foregoing.

Before addressing each marketing channel separately, however, two other facets of Vertrue's marketing practices can be seen as cutting across all modes of solicitation, and therefore deserve separate treatment. These include the employment of practices that maximize "breakage," and the representation that a consumer's acceptance of a trial membership is "risk free."

Breakage

Within Vertrue's marketing operation, "breakage" refers to the extent to which obstacles are created for consumers to claim the "free premiums" (e.g., $25 Wal-Mart gift card) that are used to lure consumers into trial memberships. In resolving a discovery dispute in which Plaintiff sought documents from Defendants relating to breakage, Judge Artis Reis ruled on November 20, 2008 that "[t]he use of 'breakage' ... could be shown to be ... in violation of section 714.16(2)(a)." Judge Reis continued: "When a 'free' premium is offered in connection with a solicitation, use of breakage could cause customers to purchase unused items and to continue as subscribers to the services in question for longer periods of time. Also, this 'breakage' could be shown to be an item of damages to consumers...."

The record shows that breakage has been at the heart of Vertrue's sales and profitability.[40] Indeed, Vertrue has characterized its business model as a "double breakage model," referring to the practice of requiring consumers to jump two sets of unnecessary hurdles in order to obtain the promised premiums. This "breakage model" is utilized intentionally by Defendants for the sole purposes of making it difficult for consumers to redeem the promised premium, and to ensure that Vertrue will receive more in revenue from members than the cost of the promised premium. For example, in an

[40] Because Defendants' sales efforts have relied heavily on gift cards and other premiums, breakage affects all marketing channels. *See* Pl.'s Ex. 553 as an instance of the use of a gift card premium in the direct mail channel.

internal e-mail exchange regarding premium fulfillment, a Pamela Cohen from Adaptive states:

> Questions:
>
> 1. **Ken**: What is bargain's current process for premium fulfillment? Do you require the user to print out the premium page and mail in or is it all through the link on your welcome email?
>
> 2. **Team**: If we were to make this a little bit more "difficult" for the user to redeem by requiring the user to physically print something out (really could be anything) and physically mail it back to us, how could we fit that in the process.
>
> My concern here is making it a little too easy to redeem the premium. While I don't have an issue with the single breakage, this process while simple for us may be too simple for the user!

Pl.'s Ex. 10. Even a single set of artificial hurdles, when employed solely as a breakage device to keep consumers from getting what they were explicitly led to expect, is deceptive and unfair; double breakage is even more egregious. In another e-mail exchange, a Linda Springer, Senior Manager of Market Research, Vertrue Inc., states:

> Duane indicated that a Continuous Marketing customer must mail back two forms to get a premium (for breakage). His second form typically includes survey questions – in order to provide a rationale for the customer to send in the second form – but this data is always discarded.

Pl.'s Ex. 28; *see* Pl.'s Ex. 183 (referring to "bogus survey"); *see also* Pl.'s Ex. 153 at p. 10 (stating in written discovery that the surveys were never tallied or put to any use whatsoever). The President of Adaptive, Jay Sung, when asked about the purpose of the second form in a double breakage model stated, "The second form – well, the second form oftentimes will be a survey. But, you know, it brings down the number of people who do redeem." Court's Ex. 3 (Sung Dep. at 109). Thus, consumers were asked to complete and return a fake, make-work survey form for the sole purpose of burdening the consumer to the point of abandoning the redemption effort. This survey ruse is itself unfair and deceptive, in addition to being a component of the unfair and deceptive breakage scheme.

Vertrue contends that its breakage hurdles are disclosed to would-be members when consumers are told that they may "claim" (rather than obtain or receive) a premium, but that slender reed will not bear so much weight. Consumers are attracted by a premium (as Vertrue intends), and any limitations placed on the consumer's receipt of the premium would, at minimum, need to be unequivocally conveyed to the consumer from the outset. The failure to do so, as part of a business scheme involving systematic efforts to erect unnecessary barriers, is unfair and deceptive.

The abuse of consumers represented by these breakage efforts is amplified by the fact that Vertrue typically required a consumer to be an active member *at the time* he or she clears the last hurdle to receive the premium.[41] This means that the consumer might have to pay more to remain an active member than the premium is worth. Vertrue is well aware that "breakage extends the time it takes to redeem these kinds of premiums [gift cards or rebate]," *see* Ex. 8 at VTRU 69997, and notes that the "optimal" timing of processing each step of the 5 steps for double breakage is an average of 10 days: "1. Time to get mailer; 2. Customer to mail in BRC; 3. Customer to receive form; 4. Form to reach Vertrue; 5. Gift card to reach customer." Pl.'s Ex. 13. Here, it would take a consumer approximately 50 days to receive the premium, which is consistent with another Vertrue employee's estimate: "This means that members usually receive a single break premium in less than a month and a double break premium in less than 2 months." Pl.'s Ex. 190. Indeed, the President of Adaptive even acknowledged:

[41] Vertrue has four levels of premium redemption requirements: single breakage (one artificial hurdle), single active breakage (one artificial hurdle and must have active membership at time of premium redemption), double breakage (two artificial hurdles), and double active breakage (two artificial hurdles and must have active membership at time of premium redemption). *See* Court's Ex. 3 (Sung Dep. At 109-10; 113-14).

Q: Breakage also increases, in addition to the steps, it increases the time to get the premium or to claim the premium; correct?

A: By definition.

Court's Ex. 3 (Sung Dep. at 140). Like the breakage hurdles themselves, this "active member" requirement was not adequately disclosed.[42] What makes the Vertrue breakage program particularly egregious is the fact that Defendant designed the process with built-in delays to ensure that it would collect more monthly dues than the value of the premiums to its customers—let alone the cost of the premiums to Vertrue. Vertrue never disclosed to consumers the length of time it would take for the premiums to be earned, a time period guaranteed to exceed the free trial period by the delays built into the process by Defendant. The reality is that in most cases the so-called premiums were neither risk free nor of greater value to the consumers that successfully redeemed them than the inherent costs.

The Court finds that the above-described breakage practices have the tendency or capacity to deceive a substantial number of consumers as to material facts, and are therefore deceptive under the CFA. The Court also finds that such breakage practices involve the unlawful omission of material facts within the meaning of the CFA. Moreover, the breakage practices in question are likely to mislead consumers acting reasonably under the circumstances in a way that is material, and therefore constitute deception for purposes of the FTC Act.

The Court further finds that these breakage practices constitute an unfair practice, under both the Consumer Fraud Act and the FTC Act. Substantial consumer injury is

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[42] Indeed, the "active member" requirement appears to have been deliberately obscured in some instances. When consumer Tracy Cahill asked the telemarketer: "Now is the Walmart card mine to keep regardless?" the telemarketer responded : "Uh-huh. Yeah ..." *See* Defs. Ex. 448(t) at 35; Pl's Ex. 448.

clear, particularly since about 90% of members never get their premium; the injury is not reasonably avoidable by consumers, who have no reason to anticipate the unnecessary, artificial barriers they will encounter in obtaining the promised premiums; and there are no countervailing benefits that might justify the practices.

"Risk Free"

Vertrue has often assured consumers that accepting the proffered trial membership was "risk free." This assurance appeared in telemarketing scripts and recorded pitches, in online presentations, and in direct mail pieces. However, it is clear from the record that assenting to a trial membership was anything but risk free. In fact, Vertrue's scheme for selling its memberships imposes a number of serious risks on consumers, from the very outset of the transaction. The evidence shows that the vast majority of consumers were billed for memberships that they did not knowingly enroll in, and were charged for memberships that they never wanted or used. Numerous consumers have had to expend considerable time and effort to cancel memberships, dispute charges, and (sometimes) obtain refunds.

Each trial member was subjected to the overarching risk that he or she would end up paying substantial sums over the course of months or years for a membership program that the consumer did not want and did not realize he or she was being charged for. The record is replete with testimony and complaints from consumers who found themselves in this situation, and Vertrue has long been aware that trial members bore this considerable risk. *See* Pl.'s Exs. 459-462.

This overarching risk to consumers involves numerous separate elements of risk. Vertrue has been well aware (even though consumers were not) that accepting a trial membership subjects a consumer to the following risks, among others:

> a) the risk that the terms and conditions were not adequately conveyed, and that foreseeable gaps in the consumer's understanding would result in financial loss;
>
> b) the risk that subsequent communications regarding the membership would be ineffective, because they appeared to be junk mail or spam;[43]
>
> c) the risk that periodic charges for memberships would escape notice, because they were obscure[44] or misinterpreted;[45]
>
> d) the risk that membership charges would rise over time, well beyond whatever costs were cited in initial solicitations;
>
> e) the risk that a program that appeared to be the subject of a sales presentation would be automatically accompanied by an additional membership, and that cancelling one would not halt charges for the other;[46]
>
> f) the risk that efforts to cancel would be difficult, or that charges for a given program would continue even after cancellation;[47]
>
> g) the risk that a consumer calling to cancel would succumb to "save" efforts, and would suffer additional financial loss even after attempting to cancel;[48] and
>
> h) the risk that Vertrue would retain most of the consumer's money even if the consumer cancelled and requested a refund, because restrictive refund policies trigger a full refund only in certain narrow circumstances.[49]

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[43] Defendants' expert Barry Cutler was twice unable to recall the name of a membership program a short time after focusing on a solicitation for the program. Mr. Cutler acknowledged that consumers would have to perform the same feat after the lapse of days, not minutes. *See* 11/4/2009 Trial Tr. At 216-18.

[44] For example, JUane Hrabak's membership charge appeared with a toll-free number on her statement as "MVQ*CNNECTNS" (Pl.'s Ex. 543), and Christopher Scarpellino's charges appeared on his mortgage statement with "Optional Products" as the sole descriptor (Pl.'s Ex. 473).

[45] Various consumers testified that they noticed the charge, but thought it was something else, such as insurance (Hrabak; 10/30/2009 Trial Tr. At 6), credit card protection (Pope; 10/29/1009 Trial Tr. At 49), or Internet protection (Iossi; 10/29/2009 Trial Tr. At 100).

[46] *See* 11.4/2009 Trial Tr. At 81, 85, 87-88.

[47] *See* Pl.'s Ex. 143.

[48] Verture Vice President Jeff Paradise testified that Vertrue does not engage in efforts to "save" memberships by dissuading consumers who call to cancel, but on cross examination acknowledged that policy of trying to "save" memberships was in fact in place until August 2008. 11/2/2009 Trial Tr. At 96-97; Pl.'s Ex. 359.

Vertrue has responded to the State's claims that its "risk free" promotions are unfair and misleading in the same fashion as it has to all of the State's other claims, namely that its promotions meet the strict requirements of the law and that consumers must bear responsibility for failing to read the fine print and boilerplate language contained in their promotional materials. For the reasons set forth above, and due to the same authorities, the Court cannot conclude that all of Vertrue's promotions constitute violations of the CFA.

Consumers do bear responsibility to read and understand the terms of the offers they are accepting. By the same token, it is clear that Vertrue has set out upon a course to sail as close to the wind as possible. It regards unhappy customers and requests for refunds to be simply a cost of doing business, to be minimized if at all possible, but to be borne in any event. Responding to complaints by regulatory authorities is viewed in exactly the same manner. To the extent consumer losses cannot be blamed on the consumers themselves, Vertrue will alter its practices to the minimum extent possible and make restitution as required. Vertrue has continually stressed to the Court the competitiveness of its industry, and argues that any restrictions ordered by the Court will cause it to lose business to its competitors. In reality, defendant's argument is that the more information about its products and prices that it is required to disclose to consumers, the more likely it is that those consumers will not subscribe to its services and products.

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[49] To obtain a full refund, a consumer must say that the charge was "unauthorized," using that exact word and not similar terms, or must raise the specter of a complaint to the authorities. *See* Pl.'s Exs. 27, 223 and 359.

While the Court does not conclude that all of Vertrue's materials using the term "risk free" are necessarily violations of the CFA, they do constitute violations in those circumstances where Vertrue has affirmatively taken actions to deceive consumers. Those circumstances include instances where consumers have been told they may claim premiums whether or not they are members when they receive their reward, and where Vertrue has created a breakage model designed to ensure that more members' dues will be received than the value of the premium. By definition, such a model is not "risk free." Other instances are discussed below.

Separate Marketing Channels

Having addressed various features of Vertrue's deceptive and unfair membership marketing that are shared across marketing channels, the Court will now focus on deceptive or unfair marketing that occurs within, or through, particular channels.

Direct Mail

Vertrue used a device called a "check mailer" to solicit and enroll Iowans in membership programs through the direct mail channel, and (evidently to a much more limited extent) "gift-card mailers" for consumers to enroll Iowans who accept an invitation ostensibly from their credit card issuers to "Claim Your $25 Gift Card!" (Pl.'s Ex. 553).[50] Charles Pope, a 63-year-old military veteran from Marshalltown, testified at trial regarding his experience with a check mailer. Mr. Pope's experience appears to be representative, and well illustrates the objectionable features of Vertrue's method of marketing in the direct mail channel.

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[50] Vertrue has indicated that no check mailers were sent out after January 2007. However, it appears that Vertrue has never stopped billing consumers who were enrolled through check mailers before their use was discontinued. *See* Hr'g Tr. at 49; Pl.'s Ex. 266.

Mr. Pope received a mailing in the form of a "snap-pack," a check-sized envelope that is to be opened by tearing off a perforated stub at the end.[51] The outside of the snap-pack bore the name and the logo of the consumer's credit card issuer ("Union Plus" in Mr. Pope's case), and also bore the words "CHECK ENCLOSED" above Pope's name and address.[52] The envelope contained a $10 check made out to Mr. Pope. The envelope also contained a check-sized slip of paper, which explained in small print that by cashing or depositing the check the consumer would be enrolling in a trial membership, which would lead to charges on the consumer's bank (or credit) account unless the consumer affirmatively cancelled.[53] A similar explanation appeared above the signature line on the back of the check, below instructions to "Cash or Deposit This Check Before Void Date Shown On Other Side," formatted as follows:

Cash or Deposit This Check Before
Void Date Shown On Other Side

Please enroll and send me an *essentials* Membership Card and Kit as soon as possible. I understand that cashing this check activates a risk-free trial membership in *essentials*. After the 30-day trial, the membership fee of $12.95 a month will be automatically charged to my Union Plus Credit Card each month, unless I call to cancel. I may call at any time to cancel for any reason. The $10.00 is mine to keep regardless.

Signature ______________________________

Vertrue's billing records showed that Mr. Pope's Union Plus credit card was charged $12.95 a month beginning in October of 2004, and the monthly charges continued through September of 2008, by which time the charge had risen to $14.95. Mr. Pope testified that he was not aware that he was a member of any Vertrue program until

[51] *See* Pl.'s Exs. 56-58. Mr. Pope's mailing appears in the record as a photocopy, but an original snap-pack appears in the record as Def.'s Exhibit FO.

[52] The form mailer used to entice consumers to "Claim Your $25 Gift Card!" also bore the name of the consumer's bank or credit card name. *See* Pl.'s Ex. 553.

[53] Plaintiff's second motion for summary judgment focused on the direct mail channel, and the record includes several examples of check mailers that were submitted as part of that effort. Additional examples were received at trial. *See, e.g.*, Def.'s Ex. D' Pl.'s Exs. 68 and 72.

he was contacted by the Attorney General's office in about September of 2008, at which time he cancelled the membership. He recalled receiving the check in the mail, but had assumed that he was being reimbursed for overpaying his credit card account. Mr. Pope testified that he never intentionally enrolled, and never made any use of whatever benefits the membership involved. Mr. Pope testified that he had seen the charges on his statement, but mistakenly believed that they related to insurance. By the time he cancelled after four years, Mr. Pope had unwittingly paid $695.60 in membership fees. Upon cancellation, he was refunded only one payment of $14.95.

The trial record contains the testimony of several other consumers who, like Mr. Pope, unknowingly paid membership charges to their credit cards, sometimes for several years, after negotiating the check they received in a check mailer.[54] Although details vary, clear themes emerge. Consumers receiving a low-dollar check ostensibly from their credit card issuer believed it to be a rebate or reimbursement. They deposited it without suspecting that doing so would enroll them in a program that would be charged to their credit cards. They were never asked to provide their credit card numbers or other means of payment, which would have alerted them to the fact that they were making a purchase and would be charged. They did not (in some instances could not) read the block of small print above the signature line, and were not made aware by the slip of paper that accompanied the check that they were agreeing to anything by endorsing the check. The membership charges on their credit card statements, typically in modest amounts unlikely to draw close scrutiny, either went unnoticed or were misinterpreted. Consumers testified

[54] *See* the trial testimony of Helen Adam, Pamela Oviatt, Rosalie Doyle, and Lloyd Jarrett, and the deposition testimony of Craig Mateer, Edwin Altekruse, Rick Lamparek, Betty Sudmeier and Jan Sudmeier.

met the same profile as the consumers in the categories in question, that is, long-time members with no record of benefit usage. In all instances, the consumers testified that they did not intentionally enroll in the programs, were not aware that they were members, and were charged for memberships over an extended period without realizing that they were paying for memberships.

The third form of proof adduced by Plaintiff regarding violations of the Older Iowans Law consisted of documents produced by Vertrue to the Attorney General. Contradicting the trial testimony of Jeff Paradise, Adaptive's Vice President of Product, who stated that age was not discussed at Adaptive, internal company documents include demographic studies that examine age data extensively. For example, one such study indicated that almost half of all visitors to a membership privacy website were age 55 or older, and that, among persons who made no use whatsoever of any trackable membership benefits, 19.4% were age 65 or older. *See* 11/2/2009 Trial Tr. at 107-107, 113; Pl.'s Ex. 263b.

Iowa Code § 714.16A(2) lists factors that are to be considered in determining whether to impose the enhanced penalty for each violation, and the amount of any such penalty. Based on the evidence identified above, the Court concludes that the State has failed to carry its burden of proof that the Vertrue defendants have targeted older Iowans. While Verture has certainly made efforts to understand the results of its programs, the Court concludes that Vertrue has attempted to take advantage of all consumers equally, and not directed its efforts against any one age group.

ORDER AND JUDGMENT

IT IS THEREFORE ORDERED AND ADJUDGED that Defendants Vertrue Incorporated, Adaptive Marketing, LLC, and Idaptive Marketing, LLC are jointly and severally liable for all violations of law described herein, and that a hearing should be held for the purpose of determining appropriate remedies. The Court will schedule such a hearing, and notify the parties.

SO ORDERED this 18th day of March, 2010.

ROBERT A. HUTCHISON, JUDGE
Fifth Judicial District of Iowa

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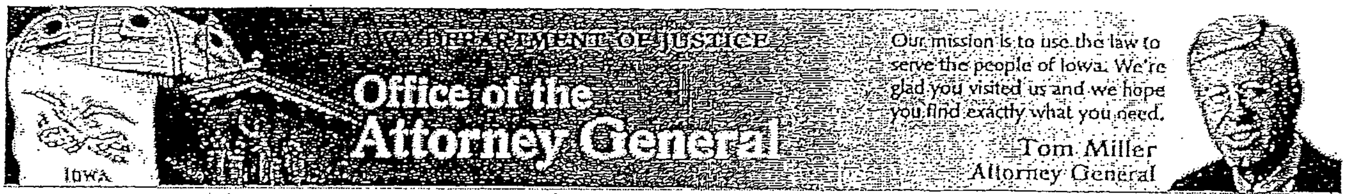

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FOR IMMEDIATE RELEASE, March 8, 2011

Judge Orders Vertrue to Pay Nearly $33 Million

Hundreds of thousands of Iowans could receive restitution

(DES MOINES, Iowa) A Polk County Judge has ordered Connecticut-based Vertrue, Inc. to pay more than $30 million dollars in restitution, penalties and costs after ruling the corporation violated Iowa's buying club law and used deceptive and unfair practices to market so-called buying club memberships to nearly a half-million Iowans over the last twenty years.

The $32.6 million ruling includes $29.8 million in consumer restitution, $2.8 million in civil penalties, and $725,000 in costs and fees.

In a ruling filed Tuesday in Polk County District Court, District Judge Robert A. Hutchison ruled that, since 1993, Vertrue unlawfully marketed 639,721 "memberships" in discount programs to Iowans. These buying club "memberships" typically cost $9.95 to $19.95 per month, with charges usually made to consumers' credit card or bank accounts. The memberships purport to provide discounts or savings on books, music, clothing, home improvement items, entertainment activities, dining out, and fashion and fitness products.

"It is certain that Iowans relied on the concealment and omission by Vertrue, and were damaged by the concealment and omission," Hutchison wrote in his 45-page ruling. "The Court finds that 90% of the consumers who purchased Vertrue membership discount programs would have cancelled those programs within the statutory three-day period had they been properly and conspicuously advised of their right to cancel..."

"This is an outstanding outcome for the hundreds of thousands of Iowans who were duped by this company and its deceptive practices," said Attorney General Tom Miller. "I am elated at this decision that will grant Iowans the restitution they deserve." Miller noted that the decision is the largest consumer protection verdict ever awarded in Iowa in a case filed by the Attorney General, and one of the largest of its kind in the nation.

Miller also noted that Vertrue has the option to appeal the judgment, so it is premature to determine how restitution will be distributed to Iowans who suffered losses.

On March 18, 2010, Hutchison ruled Vertrue (formerly known as MemberWorks, Inc.) and its subsidiaries, Adaptive Marketing, LLC and Idaptive Marketing, LLC, violated Iowa's Consumer Fraud Act and Iowa's Buying Club Law., The liability ruling followed Miller's consumer fraud lawsuit filed against the company in May of 2006.

The court found numerous violations of Iowa law. Among them, the court ruled that it was unfair and deceptive to lure consumers into trial memberships by holding out $25 gift cards or other premiums, and then set up obstacles designed to frustrate and delay efforts to redeem the premiums – a practice the company referred to as "breakage." The court ruled that one form of this practice, called "double breakage" because it involved two separate hurdles, was especially "egregious."

After Iowa's lawsuit against Vertrue the U.S. Senate Commerce Committee condemned many of the tactics identified in the Iowa litigation. In a November 2009 report that focused on sharp practices in Internet marketing, the Committee charged that Vertrue used "aggressive sales tactics intentionally designed to mislead online shoppers." In a follow-up report in May 2010, the Committee concluded that after charging for services that consumers "did not use and did not understand they had purchased," Vertrue "made it as difficult as possible for consumers to get their money back."

Here are tips to avoid unwanted charges:

- **Examine your credit card bill, checking account and phone bills.** Unwanted membership charges have even appeared on mortgage statements and invoices from mail order retailers. Watch for unauthorized charges – and dispute them at once. (Statements often include a toll-free number to call in order to cancel.)

- **Remember that even "risk free" trial offers may lead to unwanted charges.** Get the details: How do you cancel, and how soon must you cancel to avoid being billed? And remember that they may already have your bank or credit card number to charge you.

- **Beware of checks that appear to be refunds or rebates.** Fine print on the back of the check or elsewhere in the mailing may try to authorize future charges if you cash or deposit the check.

- **Actively monitor your mail.** Some mailings warning you that you will be billed unless you cancel may look like the sort of "junk mail" consumers toss without reading.

For more information or to file a complaint, contact the Attorney General's Consumer Protection Division, Des Moines, Iowa 50319. Call 515-281-5926, or outside the Des Moines area, call 1-888-777-4590, toll-free. The Attorney General's web site is: www.IowaAttorneyGeneral.gov.

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UNITED STATES SENATE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

OFFICE OF OVERSIGHT AND INVESTIGATIONS
MAJORITY STAFF

AGGRESSIVE SALES TACTICS ON THE INTERNET AND THEIR IMPACT ON AMERICAN CONSUMERS

Staff Report for Chairman Rockefeller
November 16, 2009

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Executive Summary

In May 2009, Chairman Rockefeller launched an investigation into a set of controversial e-commerce business practices that have generated high volumes of consumer complaints. Since that time, Commerce Committee staff has been investigating three Connecticut-based direct marketing companies – Affinion, Vertrue, and Webloyalty – as well as the hundreds of online websites and retailers that partner with these three companies to sell club memberships to online shoppers. Although this investigation is not yet complete, it is clear at this point that these three companies use highly aggressive sales tactics to charge millions of American consumers for services the consumers do not want and do not understand they have purchased.

Controversial Sales Practices Migrate to the Internet

Over the past fifteen years, the Internet has grown into an important commercial channel for American consumers and businesses. More than half of all American adults have either made an online purchase or an online travel reservation, and in the first half of 2009, e-commerce revenue accounted for more than $60 billion of U.S. retail sales.

The rapid growth of e-commerce has promoted business innovation, but it has also attracted direct marketing businesses that use aggressive sales tactics against online shoppers. These tactics involve selling unfamiliar membership programs to consumers who are in the process of purchasing familiar products offered by trusted websites. Many of these controversial practices are new to e-commerce, but are well-known in other commercial channels, especially in direct mail and telemarketing, and have been the subject of numerous legal actions. The three direct marketing companies that are the subject of this investigation – Affinion, Vertrue, and Webloyalty – are all operated by management teams that have years of experience in employing these aggressive sales tactics against consumers.

The three companies gain access to online consumers by entering into financial agreements with reputable online websites and retailers. In exchange for "bounties" and other payments, reputable on-line retailers agree to let Affinion, Vertrue, and Webloyalty sell club memberships to consumers as they are in the process of buying movie tickets, plane tickets, or other online goods and services. The sales tactics used by these three companies exploit consumers' expectations about the online "checkout" process.

With the cooperation of their online "partners," the three companies insert their sales offers into the "post-transaction" phase of an online purchase, after consumers have made a purchase but before they have completed the sale confirmation process. These offers generally promise cash back rewards and appear to be related to the transaction the consumer is in the process of completing. Misleading "Yes" and "Continue" buttons cause consumers to reasonably think they are completing the original transaction, rather than entering into a new, ongoing financial relationship with a membership club operated by Affinion, Vertrue, or Webloyalty.

Even more misleading and confusing is the "data pass" process Affinion, Vertrue, Webloyalty, and their partners use to automatically transfer consumers' credit or debit card information from the familiar web seller to the third-party membership club. Passing consumers' billing information directly to Affinion, Vertrue, or Webloyalty, without requiring consumers to re-enter it, deprives consumers of notice that they are entering a new, ongoing financial relationship with an unfamiliar company. After a 30-day "free trial" period, Affinion, Vertrue, or Webloyalty begin charging the consumer a monthly fee of $10-$20 dollars until the consumer cancels the membership.

The Senate Commerce Committee Investigation

The Committee opened this investigation because thousands of online consumers have complained to state attorneys general, the Better Business Bureau, and other consumer advocates that the enrollment process described above is misleading and deceptive. These consumers complain that they did not consent to sharing their billing information with a third party membership club. They also say they only learned they had been enrolled in one of these membership clubs after seeing a "mystery charge" on their monthly credit card or checking account statement months after the purchase.

These complaints suggest that the aggressive sales tactics of Affinion, Vertrue, Webloyalty, and their partners are harming large numbers of American consumers. They also suggest that these companies' tactics may be negatively affecting consumers' overall attitude towards online commerce.

Since opening this investigation, Committee staff has collected and reviewed thousands of pages of documents produced by Affinion, Vertrue, and Webloyalty; interviewed dozens of Internet consumers who have complained about unknowingly and inadvertently enrolling in the programs offered by the three companies; interviewed employees of e-retailers currently and formerly in partnerships with the three companies; and met with numerous e-commerce experts.

Although it is not yet complete, the key findings of the Committee staff's investigation thus far are the following:

- **Using aggressive sales tactics to enroll consumers in unwanted membership clubs is a billion-dollar business.** Affinion, Vertrue, Webloyalty and their e-commerce partners have earned over $1.4 billion in revenue by using aggressive tactics to charge Internet shoppers for club membership programs. Since 1999, Internet consumers have been enrolled more than 35 million times in Affinion, Vertrue, and Webloyalty's membership clubs. In June 2009, there were 4 million Internet consumers currently enrolled in these three companies' membership programs.

- **Hundreds of well-known websites and online retailers have earned hundreds of millions of dollars employing aggressive online sales tactics.** More than 450 e-commerce websites and retailers have partnered with Affinion, Vertrue, and Webloyalty to employ aggressive sales tactics against their online customers. Of the $1.4 billion in total revenue earned through using these tactics, $792 million of this total was earned by Affinion, Vertrue, and Webloyalty's e-commerce partners. Eighty-eight e-commerce companies have earned more than $1 million through using these tactics, including 19 that have made more than $10 million. Classmates.com has made more than $70 million using these controversial practices.

- **Affinion, Vertrue, and Webloyalty have knowingly charged millions of consumers for services the consumers do not use and are unaware they have purchased.** Internal documents reviewed by Committee staff show that Affinion, Vertrue, and Webloyalty know that most of the "members" they acquire through their aggressive online sales tactics do not understand they have been enrolled in a program that charges their credit or debit card on a recurring basis. Most consumers enrolled in the clubs cancel their memberships when they discover the monthly charge and never receive any benefit from their club membership. One Webloyalty employee candidly commented in an e-mail that, "at least 90% of our members don't know anything about the membership."

- **Affinion, Vertrue, and Webloyalty's customer service centers are almost entirely dedicated to handling the large volume of calls from angry and confused consumers requesting cancellations.** Affinion, Vertrue, and Webloyalty receive millions of calls every year from angry, frustrated consumers cancelling their membership or asking questions about the charge on their credit or debit card. One Webloyalty employee acknowledged in an e-mail that most of its calls were "from members who are questioning charges or want to cancel their membership," while a Vertrue employee had estimated that "cancellation calls represent approximately 98% of call volume." The companies' internal manuals train their call center representatives to answer questions such as, "what is this charge?" or "who are you?"

- **E-Commerce companies know that their customers are being harmed by the aggressive sales tactics of Affinion, Vertrue, and Webloyalty.** The e-commerce companies partnered with Affinion, Vertrue, and Webloyalty understand that more aggressive sales tactics lead to higher revenue. In the words of one company official, "to generate more revenue through Webloyalty, it seems we must be more aggressive (and deceptive) in our marketing techniques." Thousands of customers have contacted the companies using words like "fraud," "tricked," "deceptive," "misleading," "scam," "deceitful," "dishonest," "betrayed," and "robbed" to describe their experiences. This "customer noise" has led a number of e-commerce partners to request a more "conservative" approach or to end their relationships with Affinion, Vertrue, or Webloyalty.

I. Background on Aggressive Online Sales Tactics

In the past fifteen years, the Internet has rapidly grown from an entertaining diversion to an integral part of the daily life of hundreds of millions of Americans. By 2008, more than seventy percent of Americans were using the Internet on a regular basis for a variety of purposes, including online banking and shopping, and over half of all American adults had either made an online purchase or an online travel reservation.[1] For the first two quarters of 2009, e-commerce revenue accounted for more than $60 billion of U.S. retail sales.[2]

While these figures show that American consumers are increasingly taking advantage of the convenience and efficiency of Internet shopping, they continue to express concerns about the security of their personal information when they are shopping online. Large percentages of online consumers also report that they sometimes feel frustrated, overwhelmed, or confused by online shopping.[3]

One of the factors contributing to consumers' lingering unease about online shopping is the aggressive sales tactics that many companies are using against their customers. The tactics the Committee has focused on involve offering consumers unfamiliar services from unfamiliar third party companies as consumers are in the process of purchasing familiar products offered by trusted websites. The unfamiliar services offered are typically discount club memberships which charge a monthly fee between $9 and $20. A prominent feature of the post-transaction offers is up-front gifts, such as "$10 Cash Back on Your Next Purchase!" which is presented to consumers as if it is related to the websites where they have just made purchases.

While these club membership offers are presented to online consumers in different ways, they all share the following elements:

> ***Post-Transaction Marketing: The third party offer comes as online consumers are completing their purchases on familiar retailers' websites.*** After consumers have completed inputting their billing information into a "check out" purchase page on familiar e-retailers' sites, but before they have completed confirmation of the transaction, unfamiliar third party companies will attempt to enroll consumers in membership clubs offering discounts or other services. Due to the positioning of these offers in the purchase process, they are commonly referred to as "post-transaction" offers.

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[1] Pew Internet & American Life Project, *Online Shopping: Internet Users Like the Convenience but Worry about the Security of Their Financial Information* (Feb. 2008). In a 2009 survey, 59% of adult Americans said they had purchased products online and 52% had used the Internet to book travel reservations. Pew Internet & American Life Project, *The Internet and the Recession* (July 2009).

[2] U.S. Census Bureau, *Estimated Quarterly U.S. Retail Sales (Adjusted): Total and E-Commerce* (Aug. 17, 2009) (available at http://www.census.gov/retail/mrts/www/data/pdf/09Q2.pdf).

[3] Pew Internet & American Life Project, *Online Shopping: Internet Users Like the Convenience but Worry about the Security of Their Financial Information* (Feb. 2008).

*Data Pass: **Consumers do not have to enter their billing information again to be enrolled in the clubs offered by the third party.*** Internet consumers can usually accept the third party post-transaction membership club offer without having to type in their credit or debit card numbers again. As a result of so-called "data pass" or "card-on-file" arrangements between retailers and the third party companies, online consumers' credit card or debit card account numbers can be automatically transferred from the websites where the consumers are shopping to the third party companies.

*Free-to-Pay Conversions: **Consumers enrolled in the clubs are automatically charged a monthly fee after a free trial period.*** The membership programs offered by the third parties are generally free for the first 30 days. This practice is also known as "free-to-pay conversion." Online consumers will be charged on a monthly basis after the 30-day period unless they actively opt out of the program, commonly referred to as a "negative option."

The combination of these aggressive online sales practices has caused thousands of consumers to complain to state attorneys general, the Better Business Bureau, and other consumer advocates that unfamiliar companies have charged them monthly fees for services they did not want and were unaware they had purchased.

A. Post-Transaction Marketing

Online consumers shopping at websites that do not use the controversial tactics described above typically progress through several standard pages as they make a purchase. Once consumers select their merchandise and click the "Buy" or "Add to Shopping Cart" button, they typically have four remaining steps: (1) proceeding to checkout by clicking another link usually labeled "Proceed to Checkout"; (2) entering their shipping, billing, and credit card information in data fields on the checkout page; (3) clicking a button labeled, "Accept" or "Confirm" to finish the transaction; and (4) obtaining a receipt or order number confirming the purchase on the confirmation page.[4]

In a manual for Internet users, the confirmation process was summarized for novice users in the following manner:

> Once you submit your credit card billing and shipping information, the site processes the transaction just like the clerk at Macy's who swipes your MasterCard at the register. In a few seconds, you should see a receipt, complete with order number and purchase summary. You can print this out for your records.[5]

E-commerce companies engaged in aggressive third party post-transaction marketing add additional steps to this process, making it much less like "the clerk at Macy's" referenced in the manual. They make it less akin to a "brick and mortar" purchase by using: "interstitial" sales

[4] David Pogue and J.D. Biersdorfer, *The Internet: The Missing Manual* (2006).

[5] *Id.*

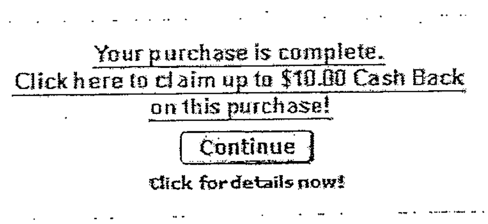
offer pages, which appear between the checkout page and the confirmation page; "pop up" windows which appear on top of the confirmation page; and hyperlinks or "banners" that are included directly on the confirmation page itself.

On the "interstitial" page, third party e-commerce companies offer "$10 Cash Back on This Purchase" or "$10 Cash Back on Your Next Purchase" combined with an offer to purchase a club membership. The offer to purchase a discount club membership is secondary in placement to the "$10 Cash Back on this Purchase" and is typically located in the page's fine print. This "interstitial" page presents consumers with an offer they must accept or reject before they can reach the page that provides confirmation and the order number for the original purchase. (See Exhibits 1 & 2).

For customers to reach the confirmation page, they must either accept the offer to join a membership club offered by the third party sellers (by clicking a large, colorful "Yes" button) or click a much less conspicuous "No Thank You" hyperlink. In general, the name of the familiar website with which the consumer has just completed a transaction is displayed on this page, making it more difficult for the consumer to discern that this "interstitial" page is actually owned and operated by the third party company, not the website on which the consumer has been shopping.

E-commerce companies also use "pop up" windows that appear on top of, but do not totally conceal, the consumer's confirmation page. These pages look very similar to the enrollment offers presented via "interstitial" pages, but they do not require the customer to accept or reject the offer in order to proceed to the confirmation page.

A less intrusive post-transaction marketing technique also used by e-commerce companies is placing a hyperlink to an enrollment offer ("banner") on the confirmation page, which can be accessed via clicking a button labeled, "Continue." A "Continue" button is used despite the fact that the customer has completed the transaction at this point. An example of a "Continue" button displayed on a confirmation page is provided here.



B. Data Pass and "Preacquired Account" Marketing

A central element of the aggressive online tactics the Committee staff has been investigating is that a consumer can be signed up for a third party membership program without entering his or her credit card information. Instead of requiring the consumer to enter this billing information a second time to confirm acceptance of the new offer, the retailer will pass the consumer's credit card and billing information to the third party once the consumer has provided information the third party company regards as "proof of enrollment," such as an e-mail address.[6]

[6] In August 2009, Webloyalty's attorney informed the Committee that "in response to its own analysis and testing over time, as well as in connection with resolution of class action litigation and concerns

This "data pass" or "card on file" process – where a third party company obtains a consumer's billing information not directly from the consumer, but from a website where the consumer has just made a purchase – is a well-known and controversial practice in the direct mail and telemarketing industries. In these retail channels, it is generally known as "preacquired account" marketing.

In the telemarketing setting, "preacquired account information" has been defined by the Federal Trade Commission (FTC) as "any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged."[7]

Preacquired account marketing conducted over the telephone, like "data pass" on the Internet, has caused consumers to complain that they unknowingly and inadvertently enrolled in membership programs. Due to the problems inherent in preacquired account telemarketing, the FTC chose to regulate the practice in 2003 after concluding that:

> The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction...[T]he Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer's account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted.[8]

In recommending regulations for preacquired account telemarketing to the FTC in 2000, the National Association of Attorneys General told the FTC that the use of preacquired account

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raised by the Committee's inquiry and state regulators, [that]...as of August 1, 2009...current Webloyalty enrollment pages require that consumers re-enter the last four digits of their credit card or debit card before they are enrolled." Letter from Jane Sherburne to Senator John D. Rockefeller IV (Aug. 31, 2009). On November 13, 2009, Affinion announced that, in "responding to concerns raised by the Senate Commerce Committee", it would now be "[r]equring that the consumer gives—at a minimum—the last four digits of their account or credit card number for every online transaction involving pre-acquired account information and a free to pay conversion." Affinion Group, *Affinion Unveils Enhanced Online Marketing Standards* (Nov. 13, 2009). On November 16, 2009, Vertrue also announced it "will obtain from the consumer the last four digits (at a minimum) of their payment account as further acknowledgement of the offer" to address "concerns specifically identified by the U.S. Senate Committee on Commerce, Science and Transportation with regard to certain post-transaction marketing practices on the Internet." Adaptive Marketing LLC, *Adaptive Marketing LLC Calls for Industry-Wide Internet Marketing Standards* (Nov. 16, 2009).

[7] Federal Trade Commission, *Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4595 (Jan. 29, 2003) (final amended rule).

[8] *Id.* at 4619.

information presents "inherent opportunities for abuse and deception."[9] Requiring a consumer to re-enter his or her account information "is a readily recognizable means for a consumer to signal assent to a deal" and gives a consumer final control over purchase decisions. The Attorneys General noted:

> The telemarketer with a pre-acquired account turns this process on its head. The pre-acquired account telemarketer not only establishes the method by which the consumer will provide consent, but also decides whether the consumer actually consented.[10]

The online data pass process that is the subject of the Committee's investigation presents exactly the same informational problems that concerned state and federal officials examining the telemarketing industry. As Harvard Business School Professor Benjamin Edelman recently told the Committee:

> Consumers rely on the process of providing a credit card number as a barrier to unexpected charges. Users rightly expect that by clicking from site to site, button to button, they do not incur financial obligations. This expectation is part of what makes the web fun, flexible, and low-risk: Users believe they cannot incur financial obligations except by typing their credit card numbers, and users expect to be able to cancel an unwanted transaction if a site requests a credit card number that a user does not care to provide.[11]

C. "Free-to-Pay Conversions"

The e-commerce marketing practices being examined by the Committee also employ a marketing technique known as "free-to-pay" conversion, which enrolls consumers in a membership program for free for a period of time (usually 30 days) before their credit card or checking account is charged. In the course of proposing amendments to the Telemarketing Sales Rule, the FTC explained that consumers are often "confused about their obligations when a product or services is offered to them for a trial period at no cost."[12]

Citing testimony submitted by state attorneys general, the FTC explained that free trial offers are presented to consumers as "low involvement marketing decisions." Because consumers often do not understand that the marketers already have their billing information, consumers "mistakenly believe they must take some action before they will be charged." At the end of the free trial period, the marketer starts billing the consumer, "even when consumers have

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[9] Letter and Comments from the National Associations of Attorney Generals (NAAG) to Donald Clark, Secretary Federal Trade Commission, FTC File No. P994414 (May 30, 2000).

[10] *Id.*

[11] Prepared Statement of Professor Benjamin Edelman to the U.S. Senate Committee on Commerce, Science, and Transportation (Nov. 2009).

[12] Federal Trade Commission, *Telemarketing Sales Rule*, 67 Fed. Reg. 4494, 4501 (Jan. 30, 2002) (proposed amended rule).

taken no additional steps to assent to a purchase or authorize the charge, and have never provided any billing information themselves."[13]

Based upon this evidence, the FTC concluded that, "in any transaction involving both preacquired account information and a 'free to pay conversion,' the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted."[14]

D. Consumers' Experience of Aggressive Online Sales Tactics

Over the past few months, Committee staff has reviewed thousands of complaints written by consumers who claim they were unknowingly enrolled in membership clubs while they were shopping online. Committee staff has spoken with many of these consumers about their experiences. These consumers regularly cite the placement of the third party offers, the data pass process, and delayed charges as the sources of their confusion and dissatisfaction.

Committee staff believes that these consumer experiences are typical. Most consumers, even very web savvy consumers, do not clearly understand the third party companies' membership club offers and do not understand that they can be enrolled without entering their credit card numbers. The cases discussed below provide several representative examples of how consumers experience this process.

Kari Glennon In May 2009, Kari Glennon, a resident of Bellingham, Washington, realized that she had been signed up for a membership club called "Shopping Essentials" while buying a gift certificate on the Restaurants.com website in October 2008. She wrote Vertrue, the operator of the "Shopping Essentials" club, to ask for a refund and to let them know that "I am being charged a monthly fee of $14.95 for a membership that I was unaware of." In her letter, she describes how she called Vertrue and discovered she was a Shopping Essentials club member.

> When I called into your organization on 5/26/09 to inquire about the charges to my credit card, I spoke with Sherry…and her supervisor Jamie…I was told by Jamie during my conversation that there was a banner on that site and that if I clicked it and entered my e-mail address, I was automatically a member. Becoming an on-line member to an organization seems obvious when entering an e-mail address, but paying for it is another matter. I did not give my credit information for the purpose of signing up for a membership. I gave my credit card information to Restaurants.com for a purchase of a gift certificate only. If my credit card information was used for more than that purpose, it was done so without my knowledge or authorization.[15]

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[13] *Id.*

[14] Federal Trade Commission, *Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4621 (Jan. 29, 2003) (final amended rule).

[15] Letter from Kari Glennon to Shopping Essentials (May 26, 2009) (Vertrue Doc. 18957).

Ms. Glennon concluded her letter with the following comment:

> As someone who has been in the professional marketing field for over 16 years, I find it unfortunate that situations like this still arise. Whenever you have a product to market, intangible or otherwise, it should be made clear to the consumer what the process is and what they are purchasing. Anything else creates confusion and situations like the one I am writing in about.[16]

Chris Steffen In April 2007, a frustrated consumer from Los Angeles, California, named Chris Steffen wrote the following complaint to Movietickets.com.

> I'm not sure how or when this happened and I'm sure part of it is oversight or my own fault. But somehow through the purchasing of movie tickets through your site I was signed up for Reservation Rewards and charged 10 dollars a month membership for multiple months. This means that when I ordered tickets through your service, the cost to me was not only the price of the tickets, but the inadvertent cost of being enrolled in a service plan I was not aware of.[17]

Mr. Steffen also wrote a complaint to Webloyalty, the operator of the Reservation Rewards club. Addressing his complaint to "Joni," the Webloyalty representative he had communicated with, Mr. Steffen expressed his frustration.

> Imagine yourself, Joni, getting on a computer to book movie tickets for the next big show and you're in a hurry because you and your friends decided to go at the last minute. You want to make sure you order your seats in time so you can go have dinner before the show. Then, at first glance you get what looks like a coupon for 10 bucks off your next purchase of tickets. You don't read the fine print because you're in a hurry and next thing you know you're signed up for some worthless service.[18]

David Murray In February 2008, a Massachusetts hospital executive named David Murray realized he had been enrolled in Affinion's "LiveWell" membership club while shopping at 1-800-Flowers.com several months earlier. Mr. Murray wrote an e-mail to 1-800-Flowers.com expressing his concerns about the LiveWell enrollment process and asking the company, "Do you really think what you did was morally right?" One of his criticisms focused on the confusion surrounding the origin of the discount offer. He wrote:

> The Order Confirmation states the following: "Your purchase is complete. Click here to claim $15.00 Cash Back on this purchase!" This is not true and is deceitful. You aren't offering $15.00 back unless the client signs up to this company called "LiveWell." And even then, you're not offering it – LiveWell is.

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[16] *Id.*

[17] E-mail from Chris Steffen to Movietickets.com employee (Apr. 11, 2007) (Webloyalty Doc. 50825-26).

[18] E-mail from Chris Steffen to Webloyalty employee (Apr. 12, 2007) (Webloyalty Doc. 50827).

> Who in the hell is LiveWell? It doesn't say on the email. So there is no $15.00 to be had from 1800Flowers at all.[19]

Mr. Murray also complained that the data pass process made it unclear that he was actually making a purchase.

> At no time, during this process, is there an opportunity to keep this from happening. There is no warning, no interim message telling me what I'm actually about to do. Had there been that opportunity, I readily concede that it was my fault for clicking. But there wasn't that opportunity. As you can see, the consumer (in this case, me) is automatically enrolled and you have to call to cancel within a month of the "free membership" to keep from getting charged $11.99 per month.[20]

Finally, Mr. Murray expressed his anger that 1-800-Flowers.com, a company with which his earlier experiences were "nothing but positive," would allow him to be enrolled in the LiveWell club.

> What I feel terrible about is that your Customer Service is doing this to unsophisticated consumers who don't know what steps they should take when a corporation does that to them, and how many people are signed up to this company and are going to get charged for something they didn't want? Worse, is this really something 1800Flowers wanted to be associated with? It was just a mean thing to do to someone. I have an old saying. It may be legal, but is it moral? Well, I don't think it's legal. And I know it wasn't moral. Don't be immoral.[21]

II. Background on Affinion, Vertrue, and Webloyalty

Affinion, Vertrue, and Webloyalty – the three leading companies engaged in the aggressive online sales tactics described above – are all located in or around Norwalk, Connecticut. All three companies are managed by executives who started their careers at Comp-U-Card (CUC), a Connecticut company that pioneered the marketing of discount membership clubs.

All three companies have also been the targets of law enforcement investigations and private lawsuits stemming from their use of aggressive marketing practices. Affinion and Vertrue have used direct mail, telemarketing, and e-commerce channels, while Webloyalty has used only the e-commerce channel, to enroll members and charge their credit cards or checking accounts. Committee staff has compiled a list of nearly 100 different clubs and services these three companies sell or have sold to consumers (See Exhibit 3).

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19 E-mail from David Murray to 1-800-Flowers employee (Feb. 4, 2008) (Affinion Doc. AFSE-4-5078-79).

20 *Id.*

21 *Id.*

A. *Affinion/Trilegiant/Cendant/CUC*

Affinion is a successor corporation to CUC which was started in 1973 and sold memberships to various auto, dining, shopping and travel discount clubs. In 1997, CUC merged with HFS Incorporated and the new company rebranded itself as Cendant.[22]

Shortly after the merger, Cendant announced that CUC had falsely inflated the number of club memberships it had sold, thereby overstating its 1995-97 earnings by at least half a billion dollars.[23] A later investigation by the Securities and Exchange Commission determined that CUC had been filing false financial statements since 1985, and that the company's misstatement of its income "was of historic proportions."[24] CUC's founder and former chief executive, Walter A. Forbes, was criminally prosecuted and sentenced to more than 12 years in federal prison. CUC's former Vice Chairman, E. Kirk Shelton, was also prosecuted and sentenced to 10 years in federal prison. Both CUC executives were ordered to pay $3.2 billion in restitution.[25]

In 2001, Cendant rebranded its membership club unit as "Trilegiant" and, in 2005, sold it to Apollo Management, a New York-based private-equity group, which in turn renamed the company Affinion.[26] Trilegiant/Affinion has been the subject of numerous law enforcement actions and private lawsuits in connection with its aggressive marketing practices.

On March 18, 2005, for example, Florida Attorney General Charlie Crist announced that his office had reached a settlement with Trilegiant under which Trilegiant "agreed to provide compensation to consumers wronged by the company's tactics in marketing various club memberships." Trilegiant also agreed to pay the State of Florida an additional $400,000.[27]

A few months later, California Attorney General Bill Lockyer filed suit against Trilegiant and Chase Bank charging that the companies "mislead consumers into becoming members of various membership programs without the consumers' knowledge or consent."[28] According to the Attorney General, Trilegiant and Chase sent "reward" checks to consumers and did not adequately disclose that if consumers cashed the checks the defendants would automatically and

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[22] Affinion Group, Inc., *Form 10-K Annual Report for Period Ending Dec. 31, 2008* (Feb. 27, 2009).

[23] *How Two Whistle-Blowers Sparked Fraud Probe That Crushed Cendant*, Wall Street Journal (Aug. 13, 1998).

[24] Securities and Exchange Commission, Order Instituting Public Administrative Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *In the Matter of Cendant Corporation, Respondent* (File No. 3-10225) (June 14, 2000).

[25] U.S. Department of Justice, U.S. Attorney, District of New Jersey, *Former Cendant Chairman Walter Forbes Sentenced to 151 Months in Federal Prison for Lead Role in Massive Accounting Fraud* (Jan. 17, 2007).

[26] *Cendant Scions Navigate Credit Crunch*, Wall Street Journal (Sept. 16, 2009).

[27] State of Florida, Office of the Attorney General, *Attorney General Reaches Settlement Over Club Memberships* (Mar. 18, 2005).

[28] State of California, Department of Justice, Office of the Attorney General, *Attorney General Lockyer Files Consumer Lawsuit Against Chase, Trilegiant in Membership Club Scheme* (July 12, 2005).

repeatedly charge the consumers' bank accounts. In December 2006, California and 15 other state attorneys general reached a $14.5 million settlement with the two companies.[29]

In July 2008, Trilegiant settled a number of class action lawsuits. The suits alleged that Trilegiant enrolled consumers in membership clubs through deceptive or unfair means. Trilegiant agreed to pay up to $25 million in refunds to settle the lawsuits.[30]

B. MemberWorks/Vertrue/Adaptive Marketing

In 1989, Gary Johnson, a former CUC vice president, founded Cardmember Publishing Company. In 1996, the company's shares began to be publicly traded under the name MemberWorks.[31] In 2004, MemberWorks changed its name to Vertrue. Three years later, in 2007, Vertrue was de-listed and sold for approximately $800 million to a group of private equity investors led by One Equity Partners, the private equity arm of J.P. Morgan.[32] Vertrue currently markets club memberships under the auspices of its subsidiary Adaptive Marketing, LLC.

The Attorneys General of Minnesota, New York, California, and Iowa have all sued MemberWorks/Vertrue alleging that it engaged in deceptive practices in connection with the aggressive sale of membership programs. In 1999, the Attorney General of Minnesota, Mike Hatch, filed suit against MemberWorks alleging that the company used deceptive and misleading practices to sell club memberships to Minnesota consumers.[33] MemberWorks paid $75,000 to settle the Minnesota action and agreed to make a number of changes to its business practices.

In 2000, New York Attorney General Eliot Spitzer announced a settlement with MemberWorks as part of a "continuing investigation of banks and credit card issuers that violated their cardholders' privacy rights by selling their personal account information to telemarketers in return for a substantial commission."[34] According to the Attorney General:

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[29] State of California, Department of Justice, Office of the Attorney General, *Attorney General Lockyer Announces $14.5 Million, Multi-State Settlement with Chase Bank and Trilegiant to Resolve Allegations of Deceptive Practices Related to Membership Plans* (Dec. 11, 2006). The other states involved in this settlement were: Alaska, Connecticut, Illinois, Iowa, Maine, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Vermont, and Washington.

[30] Order of Final Approval and Judgment, (Jul. 18, 2008), *Pederson v. Trilegiant*, IL 3rd Jud. Circuit Ct. (No. 01-L-1126). For further information on these cases, see the information collected on www.Trisettlement.com.

[31] *Fertile Sales Turf: Fee-Based Card Services; MemberWorks' Gary Johnson Counts the Ways He Can Sell to Cardholders,* The American Banker (Apr. 10, 1997).

[32] Vertrue, Inc., *Vertrue Inc. Announces Agreement to Be Acquired by an Investor Group Including Management for $48.50 Per Share or Approximately $800 Million* (Mar. 22, 2007) (available at http://investors.vertrue.com/phoenix.zhtml?c=60678&p=irol-newsArticle&ID=976542&highlight).

[33] Second Amended Complaint, (Apr. 17, 2000), *Hatch v. MemberWorks, Inc.*, Minn. Dist. Ct. 4th Jud. District (No. MC99-010056).

[34] New York State Attorney General, *National Telemarketing Firm to Reform Practices. Bank Privacy Investigations Result in Settlement on Unauthorized Credit Card Charges* (Sept. 18, 2000).

MemberWorks made wide use of negative option plans with its 'risk free' 30-day free trial membership offer. Although these plans offer consumers a free period in which to consider the advantages of the service, many who accepted the initial free trial did not understand that MemberWorks had access to their credit card numbers and would charge them if they failed to cancel during the trial period.[35]

In order to settle the matter, MemberWorks agreed to, among other stipulations, tape every consumer's consent to ensure it was knowingly given. MemberWorks also paid $75,000 to cover the cost of the investigation.

In 2001, MemberWorks and Sears, Roebuck and Co. agreed to pay $2 million to settle charges made by California Attorney General Bill Lockyer that the companies misled and confused consumers about their membership programs. The suit alleged that "consumers were not informed that defendants had the ability to charge their credit cards without the consumers providing their credit card numbers or ever signing anything."[36]

In 2004, MemberWorks paid $950,000 to settle a complaint brought by Florida Attorney General Charlie Crist, alleging that the company had placed unwanted charges on Floridians' credit cards. According to the Attorney General:

The company typically marketed its products in conjunction with infomercial products, and consumers calling to order products were told they would receive a MemberWorks membership as a bonus for their purchase. The bonus actually resulted in a credit card charge for MemberWorks' membership programs if the consumer did not actively seek to cancel the purchase.[37]

Most recently, in 2006, Iowa Attorney General Tom Miller sued MemberWorks/Vertrue and explained that:

The suit concerns a marketing scheme in which consumers' credit cards and bank accounts are charged for memberships in so-called discount buying programs – even though many consumers don't know they are members, are not aware that they are being charged yearly or monthly membership fees, and make no use whatsoever of the so-called membership benefits.[38]

[35] *Id.*

[36] State of California, Department of Justice, Office of the Attorney General, *Attorney General, District Attorneys Settle Consumer Protection Complaint Against MemberWorks, Sears Over Discount Club Memberships* (Apr. 27, 2001).

[37] State of Florida, Office of the Attorney General, *Attorney General Announces Settlement with MemberWorks*, (Jun. 29, 2004).

[38] State of Iowa, Depart of Justice, Office of the Attorney General, *Miller Sues MemberWorks, Inc.*, (May 15, 2006).

The Iowa Attorney General took the case against MemberWorks/Vertrue to trial earlier this month, and an opinion is likely early next year.

Not every case against Vertrue has resulted in a negative outcome for Vertrue. Vertrue and its subsidiary Adaptive Marketing recently won a motion to dismiss a lawsuit alleging that Vertrue and the e-retailer VistaPrint deceived consumers into joining a rewards programs by offering them cash back if they completed an online survey. The federal judge dismissed the case, finding that the defendants' web pages were not deceptive. The plaintiffs have appealed this decision to the 5th Circuit Court of Appeals.[39]

C. Webloyalty

Webloyalty was founded in 1999 by another CUC/Cendant veteran, Richard Fernandes. According to press reports, Mr. Fernandes ran CUC's Auto Service division and then its Interactive Services division, "where he launched many of the Company's major Internet programs."[40] Webloyalty is owned by the Greenwich, Connecticut private-equity group, General Atlantic, LLC.

Although Committee staff is unaware of any formal law enforcement actions against Webloyalty, according to media reports, Webloyalty is currently under investigation by Connecticut Attorney General Richard Blumenthal because of the high number of consumer complaints about the company.[41]

Earlier this year, Webloyalty agreed to settle a class action lawsuit, in which the plaintiffs alleged that they had been harmed by Webloyalty's "Coupon Click Fraud" scheme. According to the lawsuit:

> The scheme involved fraudulent and deceptive sale of its 'Reservation Rewards' discount products to unwitting consumers who make legitimate online purchases from various web retailers, including Fandango, and the unauthorized transfer of private credit and debit card account information by the web retailer to Webloyalty.[42]

In order to settle the case, Webloyalty agreed to make a number of changes to its online offers and disclosures, and it also agreed to pay out up to $10 million to consumers who had inadvertently signed up for Webloyalty's membership clubs.[43]

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[39] *In re VistaPrint Corp. Marketing and Sales Practices Litigation,* No. 4:08-md-1994 (S.D. Tex.) (Aug. 31, 2009).

[40] *eLOT Appoints New Board Member*, Business Wire (Mar. 7, 2000).

[41] *Never Heard of Reservation Rewards? Check Your Credit Card*, Wallet Pop Blog (Mar. 31, 2009) (available at http://www.walletpop.com/blog/2009/03/31/never-heard-of-reservation-rewards-check-your-credit-card/).

[42] Class Action Complaint, (Sept. 11, 2006), *Kuefler v. Webloyalty.com* (D. Mass.) (No. 06-cv-11620-JLT) (later consolidated with four similar cased by the Judicial Panel on Multidistrict Litigation and restyled *In re: Webloyalty.com, Inc. Marketing and Sales Practices Litigation,* MDL 07-01820).

[43] *Id.*

III. The Committee's Investigation

In May 2009, the Committee opened an investigation into the use of aggressive sales tactics on the Internet. On May 27, 2009, Chairman Rockefeller sent letters to Webloyalty, Inc., and Vertrue, Inc., requesting information and documents related to their online business practices.[44] On July 10, 2009, Chairman Rockefeller expanded the investigation by sending a similar information request letter to Affinion Group, Inc.[45] On July 28, 2009, Chairman Rockefeller issued a subpoena to Vertrue to obtain documents responsive to the May 27, 2009, requests, which were being withheld by the company.[46] Affinion and Webloyalty have voluntarily cooperated with the Committee's requests.

On November 6, 2009, Chairman Rockefeller sent requests for information to sixteen companies that are partnered with Affinion, Vertrue, or Webloyalty and have apparently engaged in the controversial online sales practices with the companies. The letters were sent to: 1-800-Flowers.com, Inc.; AirTran Holdings, Inc.; Classmates.com, Inc.; Continental Airlines, Inc.; FTD, Inc.; Fandango, Inc.; Hotwire, Inc.; Intelius, Inc.; MovieTickets.com, Inc.; Orbitz Worldwide, Inc.; Pizza Hut, Inc.; Priceline.com, Inc.; Redcats USA, Inc.; Shutterfly, Inc.; US Airways Group, Inc.; and VistaPrint USA, Inc.[47]

In the course of the investigation, the Committee has received over 300,000 pages of documents from the three companies: approximately 80,000 from Affinion, approximately 128,000 from Vertrue, and approximately 104,000 from Webloyalty. The documents include over 100,000 pages of documents related to complaints from the companies' former customers. The companies also produced screenshots of the enrollment offers used by the companies on the Internet, employee handbooks, contracts, correspondence between the companies and their partners, and internal e-mails and correspondence.

Committee staff has interviewed dozens of former customers who have complained to Affinion, Vertrue, and Webloyalty about their business practices, executives for the e-commerce companies and e-retailers that have partnered with the three companies, and experts in e-commerce marketing.

IV. Overview of the Online Post-Transaction Sales Industry

Documents reviewed by Committee staff show that more than 450 e-commerce companies and e-retailers have entered into "partnership" agreements with Affinion, Vertrue, and Webloyalty over the past ten years. Under the terms of these contracts, the "partners" allow

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[44] Letter from Sen. John D. Rockefeller IV to Mr. Gary A. Johnson (May 27, 2009); Letter from Sen. John D. Rockefeller IV to Mr. Richard J. Fernandes (May 27, 2009).

[45] Letter from Sen. John D. Rockefeller IV to Mr. Nathaniel Lipman (July 10, 2009).

[46] Letter from Sen. John D. Rockefeller IV to Mr. Gary A. Johnson (July 28, 2009).

[47] Senate Committee on Commerce, Science and Transportation, *Chairman Rockefeller Requests Information from Web Retailers in "Mystery Charges" Investigation* (Nov. 6, 2009).

the three companies to market membership programs to their customers, and Affinion, Vertrue, and Webloyalty agree to share a portion of their revenues with the partners.

Financial information provided to the Committee by the companies shows that Affinion, Vertrue, and Webloyalty and their e-commerce partners have generated over $1.4 billion in revenue from Internet consumers who have been charged for membership programs. Of the $1.4 billion in total revenue, $792 million went to the e-commerce companies that partnered with Affinion, Vertrue, and Webloyalty.

The websites and e-retailers that have partnered with Affinion, Vertrue, and Webloyalty include some of the most well-known and high-traffic e-commerce websites on the Internet. They include travel sites, airline sites, electronics sites, movie ticket sites, and the websites for popular "brick and mortar" companies. Eighty-eight e-retailers have made more than $1 million through partnering with Affinion, Vertrue, and Webloyalty and, of the 88, 19 companies have made more than $10 million (See Exhibit 4). Classmates.com, which has been partnered with each company at different times and has earned more than any other partner, generated approximately $70 million in revenue.

Since 1999, Internet consumers have been enrolled more than 35 million times in Affinion, Vertrue, and Webloyalty's membership clubs. In June 2009, there were 4 million Internet consumers currently enrolled in the membership programs.

A. Partnership Terms

While the specific terms and conditions between Affinion, Vertrue, and Webloyalty and their e-commerce partners differ from contract to contract, their agreements typically give partners a financial incentive to expose their shoppers to aggressive third-party offers. Generally, the more aggressively an e-commerce company is willing to market Affinion, Vertrue, or Webloyalty's membership clubs to its customers, the more money it will earn.

Affinion, Vetrue, and Webloyalty's e-commerce partners are paid based upon either the number of customers who sign up for the membership clubs ("joins"), or the number of customers who see the offer ("impressions"). In some partnerships, both payment methods are used to calculate a retailer's profits.

Payments based on the number of consumers who join an Affinion, Vertrue, or Webloyalty club are called "bounties." This payment system (also known as CPA, "Cost Per Acquisition") provides a very straightforward incentive to the retailer to use more aggressive sales tactics. Every consumer "join" means an additional bounty payment usually ranging between $10 and $30. When Webloyalty pitched its marketing program to Aloha Airlines in January 2006, it explained the method of payment and the potential partnership by stating, "Aloha Airlines wins by getting…$$$ bounty from Webloyalty for every customer who elects to accept offer."[48]

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[48] Webloyalty presentation to Aloha Airlines (Jan. 2006) (Webloyalty Doc. 29325).

Payments based on impressions are calculated using a term known as CPM (Cost Per Mil). Under this system, e-commerce partners receive a payment for every 1,000 of their customers who view the enrollment offer from Affinion, Vertrue, or Webloyalty. This method can be very profitable for e-commerce companies with high-traffic websites because the enrollment offer can be shown to millions of Internet consumers. If the e-commerce partner is willing to show the offer to each one of its customers who make a purchase on its website, this can result in millions of "impressions" and millions of dollars in profit.

Payment terms in the contracts are routinely tied to a statistic known as the "conversion rate." This statistic measures the success of the enrollment offers by comparing the total number of customers who view the offer to the subset who actually enroll in the club. This statistic is tracked very closely by Affinion, Vertrue, and Webloyalty and each company uses it as a method to determine payments to its partners.

Affinion, Vertrue, and Webloyalty typically pay higher CPMs as the conversion rate increases. The table below provides an example of a sliding scale used in a contract reviewed by Committee staff.

CPM	Net Conversion
$2,650	≥ 9.50%
$2,525	9.00%-9.49%
$2,375	8.50%-8.99%
$2,250	8.00%-8.49%
$2,100	8.00%-8.49%
$1,950	7.50%-7.99%
$1,825	7.00%-7.49%
$1,675	6.50%-6.99%
$1,550	5.50%-5.99%
$1,400	5.00%-5.49%
$1,275	4.50%-4.99%
$1,125	4.00%-4.49%
$1,000	3.50%-3.99%
$925	3.30%-3.49%
$850	≤3.29%

To illustrate how this system works, if a company displayed the enrollment offer to one million visitors on its site every year, and 2% of its customers joined an Affinion, Vertrue, or Webloyalty club, the company would receive a payment of $850,000, according to the rates listed in the table. But if its conversion rate were a higher 5%, the company would receive $1.4 million. This sliding scale payment system gives retailers a strong financial incentive to allow Affinion, Vertrue, and Webloyalty to employ aggressive sales tactics that mislead customers but increase conversion rates.

An important fact to keep in mind is that the revenue web retailers earn from their partnerships with Affinion, Vertrue, and Webloyalty has no associated costs for the web retailers and is therefore 100% profit. Revenues from these partnerships, therefore, can become very important to a company's overall profitability. For example, when the CEO of 1800Petmeds, a Webloyalty partner, requested that the "Continue" button be removed from the company's offer page because it was misleading customers, a Webloyalty employee responded:

> We can do that, but with these changes your CEO is decimating a program that delivered more than $516,000 in pure profit to you in 2008. If you operate your website on a 10% net profit margin, our payments to you represent over $5 million in sales revenue.[49]

B. The Financial Advantages of Data Pass

As discussed in Section I above, most companies automatically transfer their customers' billing information to Affinion, Vertrue, and Webloyalty once consumers have presented what the companies call "proof of enrollment," such as an e-mail address. Documents reviewed by Committee staff show that Affinion, Vertrue, and Webloyalty are well aware that this "data pass" process produces higher rates of "joins" than an enrollment process that requires consumers to re-enter their credit card information to accept a membership club offer.

For example, a Webloyalty document tracking average conversion rates in 2006 and 2007 presents the following conversion information for consumers who join membership clubs through the data pass process (referred to in this document as "card on file") versus those who join by entering their credit card information ("non-card on file"):[50]

	"Card on File" Net Conversion Rate	"Non-Card on File" Net Conversion Rate
Q3 2006	4.51%	1.26%
Q4 2006	4.54%	0.91%
Q1 2007	4.04%	0.68%
Q2 2007	3.84%	0.89%
Q3 2007	4.04%	0.94%
Q4 2007	3.91%	1.65%

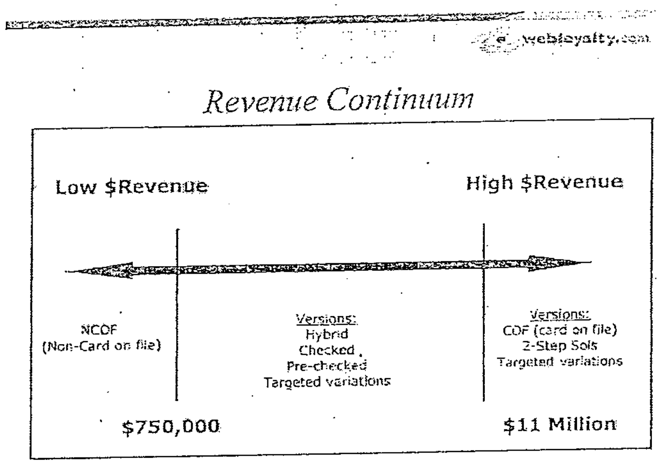
According to these figures, consumers are about four times more likely to join Webloyalty's membership clubs if their credit card data is transferred automatically from the retailer.

Not surprisingly, based upon statistics such as these, Affinion, Vertrue, and Webloyalty push their partners and potential partners to display offer pages that allow their customers to enroll in the membership programs without re-entering the credit card or debit card number they used for the original purchase. In a presentation to a potential partner, Webloyalty provided the following graphic to explain its point that "non-card on file" enrollment offers would lead to

[49] E-mail from Webloyalty employee to 1800Petmeds employee (Feb. 11, 2009) (Webloyalty Doc. 88550).

[50] Webloyalty document "Average Conversion Rates Per Quarter – All Flows" (Jan. 10, 2008) (Webloyalty Doc. 19371).

"Low $Revenue", while "card on file" would lead to "High $Revenue" for the e-commerce company.[51]



In another presentation to a partner, Webloyalty bluntly stated that requiring the consumer to re-enter credit card information would hurt conversion. It noted, "with data collection on the page [y]ou can expect at least a 70% decrease in conversion."[52] In an e-mail to a potential partner, Affinion estimated that the conversion rate would be four times higher if the partner used data pass than if the partner required its customers to re-enter their credit card number ("non-data pass").[53]

V. Evidence of Misleading Offers and Consumer Confusion

Affinion, Vertrue, and Webloyalty understand that "data pass" and other aggressive online sales tactics drive up the rate of consumer "joins" to their programs. They also know that most of the consumers who "enroll" in their membership clubs through these aggressive tactics do so unknowingly and inadvertently.

Internal documents and information produced by Affinion, Webloyalty, and Vertrue to the Committee indicate that the three companies receive an overwhelming amount of negative feedback from consumers once the consumers learn they are paying "members" of clubs they have never heard of. The three companies' "customer service" operations are almost entirely dedicated to handling the large volume of calls from confused and angry consumers requesting cancellations, and asking how the company obtained their credit card information.

Given that most "members" are unaware they were enrolled in the programs, information provided by Affinion, Vertrue, and Webloyalty not surprisingly shows that most "members" cancel their membership once they realize they are being charged on a monthly basis. It also

[51] Webloyalty presentation "Revenue Continuum" (Webloyalty Doc. 27485).

[52] Webloyalty presentation "Non-card on file" (Webloyalty Doc. 27691).

[53] Affinion document "Products Overview" (Feb. 19, 2009) (Affinion Doc. AFSE 04-736).

shows that a very large percentage of the members never utilize the benefits of the programs or even take the simple step of logging into the companies' websites to access the benefits they are paying for each month.

A. Low Levels of Member Awareness

Internal data and member surveys commissioned by Affinion, Vertrue, and Webloyalty clearly show that the three companies understand that the majority of their paying "members" have little or no awareness of their financial relationship with the companies.

One of the documents Vertrue produced to the Committee, for example, is a summary of June 22, 2009, feedback from consumers who had visited one of its membership websites. Of the "members" who completed the survey, 43% indicated they were visiting "to find about the charge on my credit card that I did not recognize" and 44% indicated they were visiting "to cancel the program." Only one member indicated he or she was there "to find out more about my membership benefits" and none of the respondents were there "to obtain my member ID."[54] In another question, 60% of the respondents indicated they were "extremely dissatisfied" with the site. In response to Vertrue's invitation to offer a comment or explain why they were satisfied or dissatisfied with the website, members provided more than 100 highly negative comments, including:

- "Don't know how I got it, I don't use it, I don't want it…you've heisted money from me for several months for something that I have no idea what it is and will never use it, so I'm cutting you off, both here and at my bank;"
- "Because I didn't authorize this service or know how my card # was gotten;"
- "Stop tricking people into your phony service;"
- "I never willingly joined, I want a reimbursement. I have never even heard of you;" and
- "I have no idea why you charged me 19.95. Where did you get my debit card information? I have no recollection of doing business with valmax."[55]

Internal data tracked by Webloyalty shows that it has known for years that the majority of its members were unknowingly enrolling in the membership clubs it offered. A "Disposition Report" run in September 1, 2003, appears to show that, of the 66,922 members who cancelled their Reservation Rewards membership in August 2003, 51,560, or 77%, had indicated "Did Not Authorize/Was Not Aware" as their reason for cancellation.[56] "Disposition Reports" run in the following years showed similar trends and, in 2008, a Webloyalty call center employee, while participating in a discussion about proposed call center script changes, acknowledged in an

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[54] Internal Vertrue e-mail (Jun. 23, 2009) (Vertrue Doc. 118778-84).

[55] *Id.*

[56] Webloyalty document "Disposition Report by Product – Last Full Month" (Sept. 1, 2003) (Webloyalty Doc. 97613).

e-mail message that "[a]t least 90% of our members don't know anything about the membership."[57]

Customer surveys commissioned by Webloyalty and its e-commerce partners in 2004 and 2006 further confirm that most of Webloyalty's members were unaware they had enrolled in the company's membership clubs. A July 2004 telephone poll commissioned by Webloyalty and conducted at the request of its partner Redcats USA, which owns brands such as Brylane and Jessica London, showed that few of Redcats' customers knew they were paying members of Reservation Rewards, a Webloyalty membership program. As part of the survey, 308 past or current members of Reservation Rewards – half of whom were described as "active" members – were asked a series of questions. Among the findings of the survey were the following:

- 234 of these members (76%) either did not recall being offered a Reservation Rewards membership or said they had declined a membership offer;
- Only 62 of the members (20%) remembered receiving an e-mail notifying them of their Reservation Rewards membership;
- Only 5 of the members (1.6%) said they had received a $10 cash back offer; and
- Only 4 of the members (1.3%) said they had used Reservation Rewards discounts.[58]

In analyzing the results for Redcats USA, a marketing research firm noted, "It is quite concerning that only half (51%) of the Active segment clearly remembered signing up for the program."[59] Customer surveys conducted for Choice Hotels International, Inc. and Classmates.com, both Webloyalty partners, produced similar results. For Choice Hotels, a marketing research firm found that "[o]ne-half of guests reached on the member list did not know for sure if they are members of Reservation Rewards" and, based upon the survey of members who enrolled through Classmates.com, Webloyalty concluded that "[a]wareness of WL services is low among respondents."[60]

Although Affinion has not provided the Committee with member surveys, it has, at different times, tracked members' reasons for complaining to the Better Business Bureaus and state attorneys general. From January 2007 through February 2009, 85%, of the 1,550 serious complaints forwarded by the Better Business Bureaus and state attorneys general were related to online customers "asserting that they never agreed to join" the membership programs.[61]

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[57] Internal Webloyalty e-mail (Oct. 21, 2008) (Webloyalty Doc. 89166).

[58] Webloyalty document, "Web Loyalty & Brylane Customer Research. A Quantitative Assessment" (Jul. 2004) (Webloyalty Doc. 84776 *et seq*).

[59] *Id.*, at 804785

[60] Webloyalty presentation "Choice Hotels International Reservations Rewards Study" (Jan. 14, 2004) (Webloyalty Doc. 80623); Webloyalty document "Webloyalty thoughts on Classmates Market Research Member Survey" (May 11, 2006) (Webloyalty Doc. 84884).

[61] Affinion letter, "Additional Information Provided by Affinion to Senate Committee on Commerce, Science, and Transportation" (Nov. 5, 2009) (Affinion Doc. ASFW 05-01).

From January through April 2009, Affinion also tracked "customer contacts with the Affinion Support Desk, which handles customer requests that are not satisfied by the Customer Service Representative (also referred to as the Front Line Agent) and are elevated to a supervisor."[62] The spreadsheet showed that thousands of "customer contacts" could not be handled by "Front Line Agents" because the customers were categorized as "Unaware of Service" or "Disputing Enrollment." While this data is limited to escalated contacts and does not include the millions of consumers who likely canceled their Affinion membership programs once they learned their credit card was being charged, it further suggests that a substantial percentage of Affinion's members are unaware they were enrolled in Affinion's membership programs.

For example, from January through April 2009, Affinion's Support Desk received 7,649 elevated "customer contacts" related to "billing" or "cancellation and suppression requests" from customers of 1-800-Flowers.com, AirTran Airways, Classmates.com, and Priceline who had been enrolled in Great Fun, an Affinion discount program.[63] Of the 7,649 customer contacts, Affinion categorized a large percentage as "Unaware of Service," "Disputing Enrollment," or "Bank Representative Cancelled." Despite placing these "contacts" in categories which suggest customer confusion and frustration, Affinion did not categorize these customer "contacts" as complaints.[64]

Escalated Customer Contacts with Affinion's "Support Desk" Regarding Its "Great Fun" Discount Club: January – April 2009

Affinion Partner	Escalated "Customer Contacts" Regarding "Billing" and "Cancellations and Suppression Requests"
1-800-Flowers.com	618
AirTran Airways	838
Classmates.com	872
Priceline	5,221

B. Employee Training on Cancellations and Member Questions

When consumers realize they are being charged for a club membership they did not intend to enroll in and do not use, they contact Affinion, Vertrue, and Webloyalty to stop the monthly charges to their credit card or debit card. As a result, the three companies' customer service centers are almost entirely dedicated to handling the large volume of calls from angry and confused consumers requesting cancellations and an explanation for the charge. As a Webloyalty employee recently acknowledged in an internal e-mail, the call center representatives spend most of their time answering calls "from members who are questioning charges or want to cancel their membership."[65] Affinion and Vertrue's internal documents show that most of their

62 Affinion letter, "Affinion Response to Committee Follow-up Questions 1-3" (Oct. 9, 2009) (Affinion Doc. ASFW 06-01).

63 Affinion spreadsheet, "Reason by Service & Client" (Aug. 21, 2009) (Affinion Doc. ASFE 04-59-82).

64 *Id.*

65 Internal Webloyalty employee e-mail (Feb. 16, 2009) (Webloyalty Doc. 88263).

calls are also related to cancellations or members questioning enrollment or the charge on their credit card or bank statement.

In a training manual, Affinion has informed its newly hired call center representatives that during an "8-hour shift" they will take "between 75-100 calls" and that "approximately 80% of these calls will be from members wishing to cancel their membership."[66] In March 2008, Vertrue employees acknowledged a similar problem in an e-mail regarding a "Call Center Optimization" meeting.[67] In discussing methods for reducing the cost associated with the call centers, Vertrue employees estimated that it received "7 million customer calls per year" and that "cancellation calls represent approximately 98% of call volume."[68]

In addition to cancellations, the employee manuals and scripts that Affinion, Vertrue, and Webloyalty provide to their call center representatives show that each company dedicates a significant amount of time training their employees on how to respond when members call to ask questions related to how they were enrolled, what the membership program is, or why there is a charge on their credit card or bank account statement.

A "Quick Reference Guide" distributed to Webloyalty employees explained that it was important to ask members why they were canceling their membership for Travel Values Plus, a membership program offered by Webloyalty. It stated, "[m]any times the reason is that they had no idea what Travel Values Plus was and you will then have the opportunity to explain."[69] Another page in a Webloyalty manual offered a list of the "Top Ten Reasons a Member Calls" and offered "Cancel my membership" and "What is this charge?" as the top two reasons.[70] Other Webloyalty manuals provided call center representatives with a process for handling members asking the questions: "what is this charge?" or "who are you?"[71]

The "Great Fun Merged Product Script" that Affinion has provided to its call center representatives also shows they are trained on how to handle members who are calling to question enrollment or the charge on their bank statement. The second heading in the manual's table of contents refers to a section entitled, "If Questioning the Charge/Enrollment," which instructs call center representatives to answer the member's question by stating, "The charge you see posted on your account is the (Monthly/Annual) membership fee for (Product). We received a positive response online that activated your membership."[72]

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[66] Affinion training manual, *Great Fun New Hire Training Manual* (Oct. 2, 2006) (Affinion Doc. AFSE 04-18772).

[67] Internal Vertrue e-mail, "Call Center optimization meeting" (Mar. 20, 2008) (Vertrue Doc. 111093).

[68] Vertrue, "Adaptive Call Center Optimization" (Mar. 18, 2008) (Vertrue Doc. 111095).

[69] Webloyalty document, *Quick Reference Guide: October 2006* (Webloyalty Doc. 26561).

[70] Webloyalty document, *Manual/Introduction – February* 2006 (Webloyalty Doc. 56370).

[71] Webloyalty training manual, "What is this Charge?/Who are you?:" (Webloyalty Doc. 26055).

[72] Affinion document, *Great Fun Merged Product Script:* (Sept. 18, 2006) (Affinion Doc. AFSE 03-1810, 1813).

A manual for Vertrue employees provides instructions remarkably similar to those provided to Affinion and Webloyalty employees. It provides a "Scripted Response" to answer the question, "How Did I Get Signed Up for this???"[73] The provided response states:

> Our records indicate that you agreed to try ***[AM PROGRAM NAME]*** while visiting the ***[Client/Partner name]*** website. For the order to be processed, you were required to enter and confirm your e-mail address. Additionally, by accepting the trial membership, you agreed to be enrolled using the billing source that you authorized and that after the 30 day trial membership, you would be billed the program fee.[74]

C. High Rates of Cancellations and Low Rates of Usage

Affinion, Vertrue, and Webloyalty's internal data on their members' rates of cancellations and their rates of usage of the programs' benefits provide further evidence that online consumers are not aware they have been enrolled in membership clubs offered by the companies. Overwhelmingly, consumers cancel their memberships once they realize they are being charged on a monthly basis and very few consumers use the benefits offered by the membership programs.

Information provided by Affinion, Vertrue, and Webloyalty shows that the majority of the consumers the companies charge for services cancel their membership within five months of receiving the first charge on their credit card or checking account statement. Exhibit 5 to this report shows the number of members who have enrolled in Affinion, Vertrue, or Webloyalty's membership programs and remained members for at least one month, six months, one year, and five years. For the three companies, about a quarter of their members (26.2%) cancel during the free 30-day period, less than a third of their members (29.5%) are still members after six months and only 13.9% remain members for more than one year.

The cancellation pattern observed for these online consumers is similar to the one observed by the Minnesota Attorney General's office during its investigation into a preacquired account marketing campaign. In that case, where hundreds of thousands of bank customers were sold membership clubs or insurance policies through preacquired account marketing, investigators observed that most of these bank customers canceled not in the 30-day free trial period, but in the following months when they started seeing their credit card charges.[75] According to Professor Prentiss Cox, who supervised the Minnesota Attorney General's investigation, this pattern is "consistent with a large majority of the cancelling customers not understanding the solicitation and cancelling only after the charge appears on their accounts."[76]

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[73] Vertrue document, *Online/Internet Marketing Main Menu* (May 31, 2007) (Vertrue Doc. 82269).

[74] *Id.*

[75] Prentiss Cox, *Invisible Hand of Preacquired Account Marketing*, forthcoming in Harvard Journal on Legislation, Vol. 47, No. 2 (2010). (Available at SSRN: http://ssrn.com/abstract=1460963. He explains, "If all consumers understood the free trial offer…the temporal pattern of cancellations should be heavily weighted toward cancellations during the free trial period.")

[76] *Id.*, at 24.

Information provided to the Committee by Affinion, Vertrue, and Webloyalty also shows that the vast majority of consumers who enroll in their programs never receive the "cash back award" or other incentive promised them in the enrollment offer. As discussed in Section I above, a prominent feature of the post-transaction offers Affinion, Vertrue, and Webloyalty make to consumers is an up-front gift offer such as "$10 Cash Back on Your Next Purchase!", which appears to be related to the website where the consumer has just made a purchase.

While the language and appearance of the offer suggests that clicking the "Yes" button automatically gives consumers a discount on their next purchase, the fine print informs consumers that they must take additional steps to receive the benefit. According to information provided by the three companies, of the 34,262,674 members who were promised automatic cash gifts or other incentives, only 3% actually received the promised enrollment benefit.

Another indication that online consumers are unaware of their Affinion, Vertrue, or Webloyalty club memberships is their failure to log on to the clubs' websites to view and use the purported benefits offered by the clubs. Evidence currently available to Committee staff suggests that the so-called member "usage rates" for Affinion, Vertrue, and Webloyalty are very low.

For example, Vertrue provided the Committee with the number of members who log in to their membership club websites. In 2006, 100,091 members logged in to the membership clubs' websites; in 2007, 215,191 members logged in to the membership clubs' websites; and in 2008, 377,428 members logged in to the membership clubs' websites. While Vertrue has not yet explained to Committee staff whether these numbers include consumers attempting to cancel their membership, how many are multiple logins by the same consumer, or how many of these consumers actually received a club service after logging in, these figures, at best, represent only a small percentage (approximately 10-20%) of the total number of Vertrue club "members" in these years.

Information Webloyalty provided to the Committee also suggests its clubs have very low member usage rates. A February 28, 2005, Webloyalty document titled, "Product Usage Statistics," appears to show that the rate of benefit usage for members enrolled through the data pass process ranged between .2% and 11.4% for a six month period between 2004 and 2005.[77] A "Site Usage" table presented to the Webloyalty Board of Directors in March 2006 reported that between 70% and 80% of Reservation Rewards club "members" enrolled through data pass had either never visited the Reservation Rewards site at all or viewed only the club's home page without ever accessing additional pages.[78]

In his statement to the Commerce Committee, Professor Benjamin Edelman cites publicly available web traffic data to reach a similar conclusion. He notes that while Webloyalty claims to have more than two million paying club members, none of the company's club web pages rank among the Internet's top 100,000 sites for web traffic. Professor Edelman concludes that,

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[77] Webloyalty document, Product Usage Statistics (Feb. 28, 2005) (Webloyalty Doc. 56115).

[78] Webloyalty document, "Reservation Rewards: Member Site Usage" (March 27, 2006) (Webloyalty Doc. 103997).

"this gap between signups and users confirms that Webloyalty's marketing failed to obtain meaningful consent from the users who purportedly 'accepted' Webloyalty's offer."[79]

At this point in the investigation, Affinion, Vertrue, and Webloyalty have not provided the Committee with comprehensive data related to their rates of usage. Committee staff has reason to believe that this information is kept by the companies as a matter of course and that it would not be difficult to provide the information to the Committee. Consumer usage of these services is a key question because a low usage rate "is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances."[80]

VI. Partner Awareness of the Problem

Committee staff has spoken to more than a dozen e-commerce partners of Affinion, Vertrue, and Webloyalty and has reviewed thousands of pages of e-mail communications between Affinion, Vertrue, and Webloyalty and their e-commerce partners. The interviews and the e-mail communications provide abundant evidence that the e-commerce partners are aware that their customers are being misled by the enrollment offers from Affinion, Vertrue, and Webloyalty. This evidence also shows that e-commerce partners have repeatedly raised concerns about customer confusion over the data pass process and the enrollment offers. Many partners terminated their relationship because they determined it was not in the best interest of their customers.

A. "Customer Noise"

When e-commerce partners enter into financial partnerships with Affinion, Vertrue, and Webloyalty, the three companies promise to handle cancellations, complaints, and other "customer service" issues. As a result of this arrangement, when consumers see a membership club charge on their credit card or bank statements, they are provided only a club name and a toll free number operated by Affinion, Vertrue, and Webloyalty.

The purpose of routing customer service issues through the three Connecticut companies is to prevent what Webloyalty promotional materials call "negative impact on partner brands." Affinion, Webloyalty, and Vertrue handle dissatisfied customers in order to insulate the partners from their own customers' criticism, which is commonly described as "customer noise" by the companies.

For example, in November 2008, 1-800-Flowers.com's Director of Third Party Marketing wrote an e-mail to her Affinion contact complaining that "we have had increasingly more frequent feedback from our own teams that your agents are telling our customers to call us...." She asked for Affinion's help "to determine...how we can reduce the negative comments

[79] Prepared Statement of Professor Benjamin Edelman to the U.S. Senate Committee on Commerce, Science, and Transportation (Nov. 2009).

[80] *FTC v. Cyberspace.com*, 453 F.3d 1196, 1201 (9th Cir. 2006).

from our customers back to our internal agents."[81] Affinion's Vice President of Relationship Management quickly responded to this e-mail. She wrote:

> I am troubled by this report. This is a STRICT no-no in our centers. We tell agents not to do it and don't give them our client's phone numbers and so on. If we hear instances [of] it in our monitoring/test calls, they will "fail" that call and get dinged on their incentive payments.[82]

In spite of the elaborate precautions Affinion, Vertrue, and Webloyalty take to prevent negative feedback about their membership clubs from getting back to their partners, most, if not all, of the e-retailers partnered with Affinion, Vertrue, and Webloyalty know that the companies' aggressive sales tactics make many of their customers dissatisfied and angry. Committee staff has reviewed thousands of pages of communications from angry consumers sent directly to the partners. Under standard procedures followed by all three companies, partners forward the complaints to Affinion, Vertrue, and Webloyalty for resolution.

For example, in April 2009, the Manager of the Customer Relations Department (CRD) for AirTran Airways sent an e-mail to one of AirTran Airways' marketing executives stating:

> We continue to receive complaints in CRD from customers regarding the Great Fun option. The complaints are mainly focused around:
>
> Customer received a charge on their credit card for the membership, however the customer claims they never authorized the charge or requested the membership.
>
> Customers attempted to cancel the membership; but continue to get charged for the monthly membership fee. They often call Great Fun several times to cancel to no avail.
>
> In CRD we explain the process for signing up for the membership. However several customers on separate occasions have been adamant that they have never signed up with Great Fun.[83]

The AirTran marketing executive forwarded this e-mail to his contact at Affinion, requesting help in addressing what he called "a growing concern about the raising [sic] complaints."[84]

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[81] E-mail from 1-800-Flowers.com Director of Third Party Marketing to Affinion Vice President, Relationship Management (Nov. 20, 2009) (Affinion Doc. ASFE 04-31).

[82] E-mail from Affinion Vice President of Relationship Management to 1-800-Flowers Director of Third Party Marketing (Nov. 20, 2008) (Affinion Doc. ASFE 04-30).

[83] Internal AirTran Airways e-mail from Manager – Customer Relations Department (Apr. 29, 2009) (Affinion Doc. AFSE 04-3803).

[84] E-mail from AirTran employee to Affinion employee (May 6, 2009) (Affinion Doc. AFSE 04-3904).

In June 2009, another Affinion partner, Priceline.com, forwarded Affinion a "tracker" document detailing serious consumer complaints the company had received in May and June of 2009.[85] The comments included in this document show that Priceline is aware that Affinion's club membership offers are making Priceline users extremely unhappy. A few examples are:

- Hi, I just noticed a recurring monthly charge of $11.99 on my VISA bill for TLG*GREATFN.... I called the 800 number referenced and canceled…I have no idea how this charge got on my VISA or what it is for. I certainly didn't get anything from it. They said it was through something I did on Priceline. Are you guys in on this? Is this part of a scam? Is Priceline an accessory to this fraud? I feel like I've been tricked and robbed.

- A few months ago, I purchased the tickets through priceline. I was not aware that in the process of purchasing tickets I was somehow enrolled in an organization called Great Fun. I feel that this happened very deceitfully. I just wanted you to know that this will be a consideration in the future.

- How do I send a message to you regarding your product of Great Fun. This company has billed me for over a year without my concent [sic] or knowledge. Priceline should be more responsible than to subject their customers to this sort of unsuspected, unwanted solicitation! I have written the company, my credit card company & the office for Consumer Protection for Connecticut.[86]

B. Concerns Raised by Partners

In response to these "customer noise" issues, Affinion, Vertrue, and Webloyalty's partners regularly raise concerns about the companies' aggressive sales tactics. In some cases, partners ask the companies to take steps to reduce consumer complaints. In other cases, partners have decided to end their relationship with Affinion, Vertrue, or Webloyalty due to negative consumer experiences. The concerns expressed by partners in these communications seem to have changed very little over the past decade.

In 2002, the Director of Business Development for an e-commerce company partnered with Webloyalty wrote directly to Rick Fernandes, the Chief Executive Officer of Webloyalty, stating:

> We have worked with webloyalty for about 5 weeks now and have had enough time and data to make a solid assessment that the execution of the program is not in our best interest. Even with what we thought might be a suitable authorization process, has turned out to have extremely negative consequences and we have been unable to correct with the flexibility that we need to address a problem of this magnitude….We feel that if the customer is interested in participate [sic] in

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[85] E-mail from Priceline call center employee to Affinion employee (June 17, 2009) (Affinion Doc. AFSE 04-1653).

[86] *Id.*

this program, your website should sell them without us passing their secure info in the process.[87]

In January 2003, a Webloyalty employee described the customer complaints that another Webloyalty partner had received:

> Let me clarify that we ARE in jeopardy with this client and these represent a small number of many more complaints their staff insiders consider 'brutal and unprecedented'...[88]

The company later terminated the partnership in 2005 and stated, "This decision comes after detailed discussions with Senior management. They understand what this program generates and that it has the potential to generate even more. However, we are going through a re-branding mobilization in 2005 and the Webloyalty banners do not fit into that plan."[89]

In August 2003, Webloyalty's Senior Vice President for Business Development and Account Management sent an e-mail summarizing partners' concerns to senior Webloyalty executives, including Rick Fernandes, the Chief Executive Officer, that stated:

> What clients tell us...
>
> 1. Pre-bill notification is buried in pre-bill e-mail. Make it more upfront.
> 2. Special reward is perceived as misleading. It's not a reward it's an obligation. Test special offer.
> 4. [sic] The segue "Congratulations, Thank you for your purchase" is misleading. Sounds like it's a thank you from client and it's not, it's an offer from WL [Webloyalty].
> 5. Continue button is misleading – customer does not have to continue.
> 6. Yes button is misleading, should say enroll, sign up, etc.
> 7. Language about data pass is buried. Customers are unaware their data is being passed.
> 8. Trial and price point is buried – it's clear you get 30 days free, but not clear you'll be automatically renewed if you don't cancel. And then the fee is buried too.[90]

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[87] E-mail from Webloyalty partner Director of Business Development to Richard Fernandes, Chief Executive Officer of Webloyalty (Sep. 10, 2002) (Webloyalty Doc. 75740).

[88] Internal Webloyalty e-mail (Jan. 07, 2003) (Webloyalty Doc. 102451).

[89] E-mail from Webloyalty partner Operational Vice President of Customer Marketing to Webloyalty employee (Nov. 5, 2004) (Webloyalty Doc. 74077).

[90] Internal Webloyalty E-mail from Senior Vice President for Business Development and Account Management to Richard Fernandes, Chief Executive Officer of Webloyalty, and other Webloyalty employees (Aug. 25, 2003) (Webloyalty Doc. 14019).

In April 2004, the employee of a Webloyalty e-commerce partner, which operated a virtual shopping cart for Internet merchants, sent an e-mail to a Webloyalty employee stating the following:

> ...I do keep hearing the same thing from our merchants who are calling up wanting the program removed. They are telling us their shoppers are saying:
>
> 1) They have been tricked into buying and or signing up for something
> 2) They did not know there was a cost involved with the program
> 3) The cost was hidden at the bottom of the page, or not very clear
> 4) They do not know who to call to get more info, so they call the merchant (who gets ticked off, calls us and wants out of the program).
> 5) They do not know who is offering the program or who to contact so again they call the merchant (who gets ticked off, calls us and wants out of the program).[91]

In January 2006, Webloyalty employees discussed concerns that an e-retailer partner had raised. The e-mail stated:

> He mentioned that they are getting a lot of noise with our program and that people are writing blogs about...what a scam WLI RR [Webloyalty Reservation Rewards] is...He's very concerned...Bottom line is he wants to test more conservative pages against the control to find a page that's more clear and see what it does to his financials.[92]

In May 2006, an employee for Avon informed Affinion that a customer complaint had "been escalated to our CEO and the customer...felt it was completely misleading."[93] The Avon employee went on to state that "[w]e need to discuss how we can modify the offer page to make it more clear to the user that their credit card info will be passed upon their approval, possibly by adding a check box."[94] An information technology specialist working with Avon.com to resolve a customer complaint later advised:

> I think the big problem was that it was pretty misleading. It wasn't clear that we were passing the customer details (cc number etc) across when they clicked on the banner. I think people often proceeded through out of curiosity, believing that if they didn't provide they [sic] billing data that they couldn't be charged, regardless of what they clicked on or accepted. What they don't realise [sic] is that Great Fun did have their billing details already.[95]

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[91] E-mail from Webloyalty partner employee to Webloyalty employee (Apr. 30, 2004) (Webloyalty Doc. 74483-84).

[92] Internal Webloyalty e-mail (Jan. 9, 2006) (Webloyalty Doc. 76770).

[93] E-mail from Avon eMarketing Manager to Affinion Associate Client Manager (May 22, 2006) (Affinion Doc. 04-16516).

[94] *Id.*

[95] E-mail from Avon employee to Affinion employee (Oct. 26, 2007) (Affinion Doc. AFSE 04-16527).

In January 2007, an e-retailer that had partnered with Webloyalty sent an e-mail to Webloyalty stating that, "...we have had regular complaints from our customers...[w]e simply cannot have complaints such as this."[96] He went on to note that, "The particularly cheerless concern is that to generate more revenue through Webloyalty, it seems we must be more aggressive (and deceptive) in our marketing techniques."[97]

In March 2007, an employee for another e-retailer partnered with Webloyalty sent an e-mail expressing concerns about complaints. He stated, "We are getting an unbelievable number of complaints on our current set-up. Customers (ours are older) are feeling tricked and many state they are not coming back to our sites because of it. Don't know if that is true, but I still want to talk about it."[98]

In November 2007, a 1-800-Flowers.com employee raised "a major red flag" about the company's partnership with Affinion. He cited a number of recent consumer complaints about the company's partnership with Affinion to sell the "LiveWell" membership club, and he noted that, "for every one who complains vociferously, there are dozens, even hundreds that do not."[99] He continued:

> I know that our relationship with Affinion is a huge boost to our revenue; on the other hand, I am gravely concerned that for every dollar we get from Live Well, we may be trading off many more dollars in angry and lost customers.[100]

In February 2008, another e-retailer expressed concerns to Webloyalty in an e-mail by stating:

> We're all still very concerned about the negative impact we are experiencing to our reputation online. And, we continue to get enough angry callers that our call center manager...has to personally field about 3 of the angriest callers a week. (we estimate that if [our call center manager] is getting 3 our call center is getting 15 and your team is probably getting 75 or more per week)...Webloyalty has been unwilling to share with us any data that would help us to understand how our customers are using the program – or whether they are...To be quite candid...we don't have a clue how our customers feel about this program. Maybe 99% of them love it and 1% complain. Maybe 99% hate it but only 1% complain.[101]

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[96] E-mail from Webloyalty partner employee to Webloyalty employee (Jan. 15, 2007) (Webloyalty Doc. 95116).

[97] *Id.*

[98] E-mail from Webloyalty partner employee to Webloyalty employees (Mar. 02, 2007) (Webloyalty Doc. 81039).

[99] Internal 1-800-Flowers.com email (Nov. 7, 2007) (Affinion Doc. AFSE 5-3452).

[100] *Id.*

[101] E-mail from Webloyalty partner employee to Webloyalty employees (Feb. 6, 2008) (Webloyalty Doc. 95894).

Two months later, the e-retailer informed Webloyalty that "we have decided to part ways because as time went by it became clear to us that our customers don't want this program."[102]

In May 2008, an Affinion employee discussed concerns raised by Hotwire, an Affinion partner, in an e-mail to a colleague. She stated, "Hotwire is claiming that they're receiving a high volume of CS [customer service] noise—approx 1 out of every 6 members calls them to complain."[103]

Also in May 2008, Vertrue supplied a "New Product Questionnaire" to one of its retailer partners, VistaPrint, in order to learn VistaPrint's thoughts about the rewards program the two companies had partnered on. One question asked, "What are the top 3 likes and dislikes with VistaPrint Rewards?" For dislikes, VistaPrint replied, "Customer Noise"; "Ability/Difficulty to redeem benefits, including $10 Cash Back"; "Clarity of the offer"; and "20% off not on purchase of gift card but later."[104]

In June 2008, the Director of Client Services for Vertrue's Adaptive Marketing acknowledged that Restaurant.com had raised concerns by stating, "we will create some mockups for ways the Restaurant.com marketing flow can be changed for the purpose of making the marketing less aggressive, in hopes of reducing customer noise and negative impact to the Restaurant.com brand."[105] This official also admitted that while more "conservative" marketing would "help to reduce consumer noise," it would also likely have "some negative impact on conversion and revenue."[106]

VII. Conclusion

Affinion, Vertrue and Webloyalty use aggressive sales tactics intentionally designed to mislead online shoppers. These three companies exploit shoppers' expectations about the online purchasing process to charge millions of consumers each year for services the consumers do not want and do not understand they have purchased. Hundreds of e-commerce merchants – including many of the best-known, respected websites and retailers on the Internet – allow these three companies to use aggressive sales tactics against their customers, and share in the revenues generated by these misleading tactics. While Congress and the Federal Trade Commission have taken steps to curb similar abusive practices in telemarketing, there has not yet been any action to protect consumers while they are shopping online.

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[102] E-mail from Webloyalty partner employee to Webloyalty employees (April 16, 2008) (Webloyalty Doc. 96060).

[103] Internal Affinion e-mail (May 20, 2008) (Affinion Doc. AFSE 06-2506).

[104] Vertrue questionnaire (May 7, 2008) (Vertrue Doc. 111917).

[105] E-mail from Vertrue Director, Client Services to Restaurant.com employee (Jun. 9, 2008) (Vertrue Doc. 105186).

[106] *Id.*

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MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC,
and THOMAS H. SCHMITT, CPA d/b/a
METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

Appeal No. 2008AP001830
(Cir. Ct. Case. No. 06-CV-008092)

WISCONSIN BELL, INC. d/b/a
AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC. d/b/a
ILD TELESERVICES, LOCAL BIZ USA, INC.,
and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

U.S. CONNECT, LLC,

Defendant.

RESPONSE OF DEFENDANT-RESPONDENT WISCONSIN BELL, INC. d/b/a AT&T WISCONSIN TO AMICUS' BRIEF

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INTRODUCTION

Because of what Amicus calls the "stealth billing phenomenon," Amicus asserts that both houses of the Wisconsin Legislature and the Governor must have intended Wisconsin Statutes section 100.207 to abrogate existing law and to bar all common law defenses including the voluntary payment doctrine. This assertion is not justified by the plain text of section 100.207 or Wisconsin's long-standing rules of statutory construction. Amicus also requests that this Court declare that all "consumer protection statutes" that create private rights of action automatically abrogate all common law defenses. Amicus would have this Court invade the province of the legislature and create chaos at both the trial and appellate court levels as every arguable "consumer protection statute" is reinterpreted under whatever new rules replace Wisconsin's existing rules of statutory construction.

ARGUMENT

I. This Appeal Is Not About "Stealth Billing."

Amicus claims that this case is about "stealth billing." (Amicus at 1.)[1] This is incorrect. Judge Sankovitz and the Court of Appeals both held that the monthly statements of account that Wisconsin Bell provided to Accountants were not stealth, deceptive,

[1] "Amicus" refers to the Amicus Curiae Brief of the State of Wisconsin.

or misleading, but rather clearly and openly displayed Wisconsin Bell's own charges and the separate charges of the independent service providers ("ISPs"). (A.12-13, 98.)[2] Accountants did not appeal those holdings, and they have not been certified for review. Moreover, Accountants admitted that they were aware of the ISPs' charges (*See* A.27), and that they nevertheless paid the charges for fourteen months without protest. (*See* Decision ¶ 4 n.4[3]; A.26). Neither Accountants nor Amicus claims that Wisconsin Bell's own charges were unauthorized or improper.

Significantly, Amicus acknowledges that "[t]here are legitimate and legal reasons for a phone company [*i.e.*, Wisconsin Bell] to add the charges of another company to its bill." (Amicus at 1, n.1.) Amicus, for example, recognizes that this creates efficiency and alleviates the disorder and cost associated with a customer having to write and mail multiple checks to settle multiple telecommunications accounts. (Amicus at 3.) Amicus' concession of legitimacy and legality with respect to the conduct of Wisconsin Bell mandates affirmance of the dismissal of the complaint against Wisconsin Bell.

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[2] "A.__" refers to the Appendix to Plaintiff-Appellants-Cross-Respondents-Petitioners' [opening] Brief.

[3] "Decision" refers to the underlying Wisconsin Court of Appeals decision from which the Accountants appealed.

Nevertheless, Amicus asserts that unscrupulous ISPs might misuse telephone statements to pass along unauthorized charges. (*Id.*) According to Amicus, a separate statement from an ISP "doubtless would arouse suspicion in the mind of a consumer required to make a separate payment to that merchant." (*Id.*) Yet, contrary to what Amicus would suggest, this concern is resolved by Wisconsin Bell's clear presentation of an ISP's charges on a ***separate page*** of the monthly itemized statement of account with the name of the ISP printed in bold at the top of the separate page along with an instruction that the customer should carefully review the ISP's independent charges and call the toll-free number provided with any questions. (*See, e.g.,* A. 15-16.)

Amicus also acknowledges that Wisconsin Bell "reasonably accepts the representation that a legitimate charge has been incurred in good faith, before adding it to a customer's bill" (Amicus at 1, n.1.) and "most phone companies instruct their customer service personnel to cancel charges when a customer complains." (Amicus at 15.) Then, as if it were a bad thing, Amicus laments that "the likelihood of actionable claims is slim." *Id.* Wisconsin Bell is puzzled that Amicus seems troubled that such problems can be resolved so simply without having to inundate Courts with needless litigation. *See Connor v. Mich. Wis. Pipeline Co.,* 15 Wis. 2d 614, 622, 113 N.W.2d 121 (1962) ("We have yet to find a court decision holding that it is not in the interest of public policy that compromise settlement of disputed claims be encouraged.").

II. Amicus' Discussion Of Section 100.195 Is A Red Herring.

While Amicus devotes substantial attention to Wisconsin Statutes section 100.195, it is not at issue here. (*See* Amicus at 8-10.) Accountants have never alleged that Wisconsin Bell violated section 100.195, nor could they because Accountants are businesses. Section 100.195 applies only to "consumer goods or services," which are "goods or services that are used or intended for use for ***personal, family, or household purposes***." Wis. Stat. § 100.195(1)(c) (emphasis added). Section 100.195, moreover, expressly excludes "[t]elecommunications services" from the definition of "consumer goods or services." Wis. Stat. § 100.195(1)(c)(2).

III. The Foreign Cases That Amicus Discusses Actually Undermine Amicus' Position That Wisconsin Bell May Be Liable Here.

Amicus discusses two foreign cases, *F.T.C. v. Inc21.com Corp.* and *Iowa v. Vertrue* on the "stealth billing phenomenon." Amicus argues that given the "stealth billing phenomenon," this Court should conclude that the Wisconsin Legislature and Governor intended for a local exchange carrier (such as Wisconsin Bell) to be liable under Wisconsin Statutes section 100.207 for any unauthorized charge that an ISP independently generated and issued. (*See* Amicus at 9-11.) The plain language of section 100.207 does not make Wisconsin Bell, as a mere intermediary, liable for the ISPs' independent charges. Moreover, the foreign cases that Amicus discusses simply do not support Amicus' position. In fact, both cases involve claims against ISPs that placed unauthorized charges on customers' monthly telephone or credit card statements. *See F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. Cal. 2010); *Iowa v. Vertrue*, No. EQ53486 (d. Polk County, Ia., March 18, 2010). Significantly, in neither case was the company analogous to Wisconsin Bell, the telephone company or credit card company, liable for the ISPs' independent charges. These cases actually support the affirmance of the dismissal of Accountants' claims against Wisconsin Bell.

In *F.T.C. v. Inc21.com Corp.*, the Federal Trade Commission ("FTC") sued a group of California ISPs that generated and issued unauthorized charges for internet services. *Inc21.com*, 745 F. Supp. 2d at 982. The ISPs in *Inc21.com Corp.* forwarded the unauthorized charges to California local exchange carriers.[4] *Id.* at 983-84. The local exchange carriers, like Wisconsin Bell here, printed the charges

[4] Here, Wisconsin Bell is the local exchange carrier.

on monthly telephone statements. *Id.* Significantly, the FTC did not sue the local exchange carriers because they did not generate or issue the allegedly unauthorized charges. *See generally id.*

In *Iowa v. Vertrue,* the State of Iowa sued Vertrue for violating Iowa's Consumer Fraud Act. Vertrue was not a telephone company. *See generally Iowa v. Vertrue.*[5] Vertrue used deceptive and misleading sales and marketing tactics to enroll individuals in bogus membership programs. (Am. App. at 166-76.) Vertrue then generated and issued unauthorized charges to the individuals' credit card accounts. (*Id.*) The unauthorized charges appeared on credit card statements. (Amicus App. at 159, 174-75.) Significantly, the State of Iowa did not sue the credit card companies, who, like Wisconsin Bell here, clearly and accurately displayed the charges on the monthly itemized statements. (*See generally id.*) Indeed, in *Vertrue*, it was the credit card companies, like Wisconsin Bell here, whose monthly statements of account put the customers on notice of the unauthorized charges. (Amicus App. at 162, 175.)

[5] A copy of the decision in *Iowa v. Vertrue* is found in Amicus' Appendix at pages 155-177, to which Wisconsin Bell will cite as "Amicus App. at __."

IV. Section 100.207 Does Not Abrogate The Voluntary Payment Doctrine As Amicus Suggests.

A Court's purpose in interpreting a statute such as section 100.207 is to ascertain the legislature's intent. *See Marshall-Wis. v. Juneau Square Corp.*, 139 Wis. 2d 112, 133, 406 N.W.2d 764 (1987). The proper method for doing so is well-established. *See Stockbridge School Dist. v. Dept. of Public Instruction School Dist. Boundary Appeal Board*, 202 Wis. 2d 214, 220, 550 N.W.2d 96 (1996). The Court starts with the text of the statute. *Id.* If the text of a statute is unambiguous, the Court looks no further to ascertain the statute's meaning and the legislature's intent. *Id.*

Amicus, along with the Accountants, concedes that the language of section 100.207 is plain and unambiguous. (Amicus at 14.) Wisconsin Bell agrees. Therefore, in determining whether section 100.207 abrogates the voluntary payment doctrine, the Court should look solely at the language of the statute itself. The unambiguous text of section 100.207, contains no language that clearly and unequivocally abrogates existing law and bars the voluntary payment doctrine as a defense to a claim under section 100.207. *See Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833 ("It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent."). Indeed, after carefully reviewing the language of section 100.207, Judge Sankovitz and the Court of Appeals both concluded that section 100.207 does not abrogate existing law or otherwise prohibit the assertion of the voluntary payment doctrine or any other common law defense. *See, e.g., Wisconsin Bridge & Iron Co. v. Industrial Comm.*, 233 Wis. 467, 474, 290 N.W. 199 (1940) ("Statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein.").

Unable to point to clear and unequivocal language in the text of section 100.207 that expressly abrogates the voluntary payment doctrine, Amicus argues that the Court should instead focus upon what Amicus believes must have been the implicit intent of the legislature in enacting the statute. (Amicus at 14.) According to Amicus, "the operative question is not whether the legislature used explicit words of abrogation – which it almost never does – but whether the intent of the legislature is inconsistent with the common law." (*Id.*) Amicus argues that by providing a private claim for relief, section 100.207 demonstrates that the legislature intended to bar defendants from being able to assert common law defenses. (Amicus at 17-18; Plaintiff-Appellants-Cross-Respondents-

Petitioners' [opening] Brief at 13.) While section 100.207 creates a private claim for relief, it does not say that defendants cannot assert defenses based on existing law. As this Court has held, "it is not to be presumed that the legislature intended to abrogate or modify the rule of the common law by the enactment of a statute . . . it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention." *Sullivan v. School District,* 179 Wis. 502, 506, 191 N.W. 1020 (1923). To simply presume that the legislature intended for section 100.207 to abrogate the existing common law and the voluntary payment doctrine because the statue includes a private claim for relief, does not satisfy this high standard. *Id.* In Wisconsin, "the rules of the common law are not to be changed by doubtful implication." *Id.*

The notion that the legislature somehow intended section 100.207 to abrogate existing common law defenses, including the voluntary payment doctrine is inconsistent with the presumption that the legislature was aware of existing law, including the voluntary payment doctrine, when it enacted the statute. *See In re D.M.M.*, 137 Wis. 2d 375, 389-90, 404 N.W.2d 530 (1987). "It is fundamental that a statute should be construed in harmony with the common law." *Klingeisen v. Dep't of Natural Res.*, 163 Wis. 2d

921, 930, 472 N.W.2d 603 (Ct. App. 1991). If the legislature believed that the voluntary payment doctrine conflicted with its intent in enacting section 100.207, the legislature would have stated that the statute abrogated the voluntary payment doctrine. *Fuchsgruber,* 244 Wis. 2d 758, ¶ 25. A statute does not abrogate a common law defense absent "clearly expressed legislative direction." *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*, 116 Wis. 2d 95, 112, 341 N.W.2d 655 (1984) (J. Abrahamson) (the enactment of Wis. Stat. § 401.207 did not abrogate common law defense of accord and satisfaction).

V. The Court Should Not Overturn Wisconsin's Long-Standing Rules of Statutory Construction As Amicus Requests.

Amicus requests that this Court declare that "consumer protection statutes" automatically abrogate the common law irrespective of the particular language of each individual statute. (Amicus at 16-17.) The Court should reject Amicus' sweeping request for at least five reasons.

First, respect for precedent precludes this Court from granting Amicus' request. To grant Amicus' request and declare that the common law does not apply to "consumer statutes" requires not only the reversal of *Putnam v. Time Warner Cable,* 255 Wis. 2d 447, 649 N.W.2d 626 (2002) where this Court held that the voluntary payment doctrine barred a similarly situated telecommunication customer's claim under a similar statute, section 100.18, but also the reversal of Wisconsin's long-standing rules of statutory construction discussed above. *See Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 13, Wis.2d 300, 697 N.W.2d 417 ("Fidelity to precedent ensures that existing law will not be abandoned lightly."). "[F]requent and careless departure from prior case precedent undermines confidence in the reliability of court decisions." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257.

Second, this Court should not declare that creation of private rights of action in "consumer protection statutes" automatically abrogates existing defenses, including common law defenses, because, among other reasons, there is no evidence that the legislature intended such a result. Indeed, in the face of this Court's decision in *Putnam,* the legislature did not amend the language of section 100.18 or any other purported "consumer protection statutes" to provide that existing common law defenses such as the voluntary payment doctrine did not apply to a private civil action brought under the statutes. "Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act." *Zimmerman v. Wisconsin Electric Power Co.,* 38 Wis.2d 626, 633-34, 157 N.W.2d 648 (1968). "The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged." *Id.* "Thus, when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct." *Id.* "This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function." *Id.*

Third, declaring that all "consumer protection statutes" automatically abrogate existing common law defenses in private actions as Amicus requests will incentivize plaintiffs' lawyers to always include a statutory claim, so they can then argue that the statute is a "consumer protection statute" and that there are no available defenses. The question of whether a given statute is a "consumer protection statute" subject to the new rule would create endless motion practice in the circuit courts. The appellate courts, and this Court in particular, would eventually have to definitively resolve such issues, many of which would be issues of first impression. The appellate dockets would swell.

Fourth, declaring that all "consumer protection statutes" automatically abrogate existing common law defenses in private actions would produce chaos. Defendants, for example, would not be able to resolve a claim involving a "consumer protection statute" without court intervention because the plaintiff could simply file suit knowing that the defendant could not avail itself of the existing common law defenses of "settlement" or "release." Other common law affirmative defenses such as "accord and satisfaction" and "payment," which encourage the resolution of disputes without court intervention, would also be extinguished by Amicus' proposed rule thereby further inundating the courts with "consumer protection statute" lawsuits. It is also questionable how a "consumer protection statute" lawsuit could ever be brought to conclusion considering that if Amicus' rule were adopted, a litigant would not be able to raise the existing common law defenses of issue or claim preclusion. A plaintiff asserting a claim under a "consumer protection statute," would also have little incentive to resolve a matter and limit its damages since a defendant could not raise "failure to mitigate damages" as an affirmative defense anyway. Plaintiffs in an action involving a "consumer statute" would also not have to conform their conduct so as to avoid common law defenses such as unclean hands, fraud, illegality, waiver, or estoppel. This would undermine obvious important societal objectives.

Finally, the legislature and governor did not clearly express an intent that section 100.207 abrogate the existing common law defenses in private right actions. Instead, the Court must presume that the legislature decided, and governor in signing agreed, that defendants should be able to assert common law defenses such as the voluntary payment doctrine to private civil claims under section 100.207. "Under our tripartite system of government, it is the duty of this court to apply the policy the legislature has codified in the statutes, not impose our own policy choices— to do otherwise would render this court little more than a super-legislature." *Columbus Park House Corp. v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633. "Thus, we must apply the statute as written, not interpret it as we think it should have been written." *Id.* If the legislature desires in private civil actions to have all "consumer protection statutes" abrogate existing common law defenses, it has the ability to pass a law clearly and expressly so providing, and if the governor agrees, he can sign it without line item veto.

CONCLUSION

For the forgoing reasons, this Court should reject Amicus' arguments to overturn Wisconsin's long-standing rules of statutory construction.

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CERTIFICATION AS TO FORM AND LENGTH

I, Ted A. Wisnefski, certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportion serif font, minimum printing resolution of 220 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum 60 characters per line of body text. The length of the brief is 2,909 words.

Dated this 30th day of June, 2011.

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CERTIFICATION OF THIRD-PARTY DELIVERY

I certify that on July 6th, 2011, the Response of Wisconsin Bell, Inc. d/b/a AT&T Wisconsin to Amicus' Brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I certify that on July 6th, 2011, I caused to be served by First Class Mail three copies of the Response of Wisconsin Bell, Inc. d/b/a AT&T Wisconsin to Amicus' Brief upon all parties and upon Amicus Curiae State of Wisconsin. I further certify that the brief was correctly addressed.

Dated this 6th day of July, 2011.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of section 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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STATE OF WISCONSIN
SUPREME COURT

MBS-CERTIFIED PUBLIC ACCOUNTANTS, LLC and THOMAS H. SCHMITT, CPA, d/b/a METROPOLITAN BUSINESS SERVICES,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

WISCONSIN BELL INC., d/b/a AT&T WISCONSIN,

Defendant-Respondent,

ILD TELECOMMUNICATIONS, INC., d/b/a ILD TELESERVICES, LOCAL BIZ USA, INC. and AMERICATEL CORPORATION,

Defendants-Respondents-Cross-Appellants,

-and-

US CONNECT, LLC,

Defendant.

Appeal No. 2008AP001830
(Milwaukee County Circuit Court Case No. 06-CV-008092)

DEFENDANT-RESPONDENT-CROSS-APPELLANT ILD TELECOMMUNICATIONS, INC'S. RESPONSE TO THE STATE OF WISCONSIN'S AMICUS BRIEF

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COMES NOW ILD Telecommunications, Inc., d/b/a ILD Teleservices, and files this Response to the Amicus Curiae Brief of State of Wisconsin (the "State").

ARGUMENT

I. THIS CASE DOES NOT INVOLVE "STEALTH BILLING."

The State leads its Brief with the following remarkable assertion:

> This case spotlights a practice known as 'stealth billing.' Stealth billing involves the use of phone and credit card bills, or electronic bank account debits, to sneak unauthorized charges past unsuspecting customers.

(State's Brief, p. 1). The problem with the State's position is that the only two courts that have reviewed the record to date have reached the opposite conclusion. Indeed, the charges at issue were set forth so conspicuously that the Circuit Court held:

> Given the rather specific and explicit nature of the charges, I do not believe a reasonable trier of fact could infer that a reasonable customer would have been deceived into believing that he or she or it had somehow authorized those services. To the contrary, the charges were stated with sufficient particularity that a reasonable customer would be startled to find such a charge on the bill . . . At the very least, I think a reasonable customer would have been put on notice that something was fishy and it would be unreasonable to pay the bill on the assumption that such service had been authorized.

(A.98-99).[1]

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[1] Citations referring to the Appendix of Plaintiffs-Appellants-Cross-Respondents-Petitioners are denoted as "(A.__)."

The Court of Appeals conducted their own independent review and concluded:

> Having independently reviewed [the Accountants] claims and the charges involved, we agree with the trial court's assessment that the clarity of the statement on the bills calls into question MBS' ability to form the basis for a fraud claim.

Id. at ¶ 20.

The reason that the Circuit Court and Court of Appeals implicitly held that this case <u>does not</u> involve stealth billing is that the charges at issue were prominently displayed in two separate places on the Accountants' phone bills. On the very first page, underneath the "Billing Summary" header, the charges forwarded by ILD were one of four conspicuously listed items. (A.15). More importantly, however, the charges forwarded by ILD were also always separately set forth on a stand alone page of the bill. (A.16). The stand alone page of the bill clearly set forth, *inter alia*, the amount of the charges, a description of the services, and the date they were incurred. (*Id.*) Finally, in at least three separate places on the bill, the Accountants were provided with a toll free number to call in the event that they disputed the charges. (*Id.*) Thus, this case is not about "stealth billing." It is about an accounting business that apparently did not read its phone bill for over one year and then decided its remedy for allegedly unauthorized charges was a class action lawsuit.

II. THE STATE'S REFERENCES TO OTHER UNRELATED CASES INVOLVING DIFFERENT PARTIES AND DIFFERENT FACTS ARE UNAVAILING.

The State spends a great deal of time attempting to lump the current defendants in with rogue businesses that have been held responsible for unlawful marketing schemes in other states. For instance, the State devotes several pages of its brief to discussing an action by the State of Iowa against Vertrue, a company that sold discount memberships and billed customers via credit card.[2] (State's Brief, pp. 6-8), discussing *Iowa v. Vertrue*, No. EQ 53486 (d. Polk County, IA., March 18, 2010)). *Vertrue* and the other cases cited by the State have one thing in common. They are not relevant to the instant dispute as they do not involve the application of the voluntary payment doctrine to statutory claims.

The State's reliance upon information not relevant to this case or in the record is not limited to out of state cases. The State also pontificates about the evils of internet marketing and "pop up" ads. (State's Brief,

[2] Notably, the credit card company was not a defendant in *Vertrue*. Likewise, in *F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. Cal. 2010), cited by the State, the F.T.C. did not pursue claims against either the phone company or any billing clearinghouse.

pp. 5-6). This is also for afield from the matter at hand. The charges at issue in the instant case were not generated by marketing via internet pop-up ads, but were the result of a telephone solicitation confirmed by a recorded conversation with the Accountants. This Court should not decide this case based on facts not in the record, theories not asserted below or cases: (1) involving non-Wisconsin defendants; (2) engaged in activity outside of Wisconsin which did not concern statutory claims; and (3) did not involve the voluntary payment doctrine. *See Pension Management, Inc. v. DuRose*, 58 Wis. 2d 122, 128, 205 N.W.2d 553, 555-556 (1973) (court will not decide hypothetical issues based on hypothetical facts); *State v. Verhagen*, 198 Wis. 2d 177, 194 n.3, 542 N.W.2d 189 (Ct. App. 1995) (appellate court will not decide issues which are not ripe for appellate review).

Moreover, the cases cited by the State all revolved around the issue of fraud, whereas the present issue before the Court is application of the voluntary payment doctrine. A fraud exception to the voluntary payment doctrine already exists, and the Circuit Court correctly found that, as a matter of law, the exception did not apply here. The Accountants have not pursued reversal of that ruling in this appeal, but have instead advocated a dramatic revision to the way Wisconsin courts apply the voluntary payment doctrine.

The State also conveys a number of factual assertions that are not part of the record and should be disregarded. Nevertheless, to the extent these assertions are considered, were the record to be developed ILD would demonstrate that the State's attempt to lump it with other rogue businesses is futile. In contrast to the out of state fraudsters highlighted by the State, ILD has been in existence for almost twenty years. ILD, which is subject to regulatory oversight in some states, routinely processes over 100,000,000 billing records per year for reputable, nationally known companies such as EarthLink, NetZero, Verizon Select and others. Indeed, one of ILD's primary billing clearinghouse customers is Intellicall Operator Services, a leading provider of inmate telecommunications that partners with state and local governments across the country.

The State's anecdotal citations aside, third party billing does not generate the level of complaints portrayed by the State. AT&T reports that less than 0.2% of its bills that include a third party charge generate a cramming complaint. (Am. App. p. 154).[3] This is probably because of the

[3] Citations to the Amicus Appendix are denoted as "(Am. App. ___)."

great lengths ILD goes to reduce alleged cramming complaints arising out of the bill records that it forwards to Local Exchange Carriers ("LECs"). For example, ILD thoroughly screens prospective new merchant customers, reviewing their product offerings, marketing material, and verification sources, and investigating whether the prospective customer or its principals have been the subject of any regulatory enforcement actions. (*See generally* Am. App. pp. 138, 148). If a potential customer has previously been cited, suspended or sanctioned for cramming, ILD will not provide billing clearinghouse services for that customer. Potential customers are also required to submit affidavits/applications certifying that they will only submit authorized records and comply with state and federal law, including applicable FCC Truth in Billing provisions. (*See generally* Am. App. pp. 147-148).

Most importantly, for every single billing record that is forwarded by ILD, ILD's service provider customers are required to have evidence of customer authorization.[4] (*See generally* Am. App. pp. 148-149). Such

[4] For instance, in this case, there is a recorded post-sale conversation in which the Accountants' representative either provides or confirms: (1) her name; (2) date of birth; (3) business mailing address; (4) business telephone number; (5) that she is authorized to incur charges on the account; and (6) the terms and conditions of service, including the monthly price and means of cancellation. This stands in stark contrast to the situations referenced by the State in its Brief.

authorization normally takes the form of a recorded telephone conversation between the service provider's third-party verification company and the end user customer in which sale terms are confirmed and during which the customer must explicitly consent to having the service billed to the customer's telephone bill. (*See generally* Am. App. p. 148). For internet authorizations, the service provider must obtain the customer's first and last name, full address, confirmation of legal age and authority to bill account, some non-public information such as date of birth and/or last four digits of Social Security Number. (Am. App. 149). If ILD receives a complaint alleging cramming (regardless of merit), it will refund the customer's money. (Am. App. p. 138).

ILD primarily forwards the Wisconsin-related billing records to Wisconsin Bell. Wisconsin Bell also goes to great lengths to reduce and eliminate alleged cramming complaints. (Am. App. pp. 142-154). For instance, Wisconsin Bell complies with FCC truth in billing requirements, puts third party charges on a summary page and a separate page of the customer's telephone bill and clearly identifies the third party merchant and a billing aggregator forwarding the charges. (Am. App. 148, 150). Further, consumers are given toll free numbers for the aggregator and merchant, but also may contact Wisconsin Bell directly. (Am. App. 150). If a customer contacts Wisconsin Bell, its policy is to resolve any disputes over third party charges to the customer's satisfaction regardless of merit. (Am. App. p. 151). For customers who do not want third party charges appearing on their phone bill, Wisconsin Bell offers third party bill blocking. (Am. App. 151).

Wisconsin Bell will also take action toward billing aggregators, like ILD, if records forwarded by the clearinghouse generate cramming complaints. (Am. App. p. 152). For instance, Wisconsin Bell currently imposes a $150 fee on ILD for every cramming complaint (regardless of merit) Wisconsin Bell receives on a bill record forwarded by ILD. (*Id.*). Wisconsin Bell will suspend or terminate billing for billing clearinghouses or merchants they represent if cramming complaints exceed threshold levels. (*Id.*). Finally, Wisconsin Bell refuses to allow third party billing for products marketed in a potentially deceptive manner or involving certain services that have generated higher levels of customer disputes. (Am. App. p. 152).

III. THE STATE'S ARGUMENTS REGARDING WIS. STAT. § 100.195 HAVE NO BEARING ON THE ISSUES AT HAND.

The State devotes three pages of its Brief to arguing that it would be unjust to apply the voluntary payment doctrine to Wis. Stat. 100.195. (State's Brief, pp. 8-10). Again, this is irrelevant to what is before the Court because the Complaint did not assert a claim for violation of that statute, probably because Wis. Stat. § 100.195 only applies to consumer transactions and MBS is in the accounting business. Thus, the Circuit Court did not even consider whether under *Fuchsburger v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833, the voluntary payment doctrine would have barred claims asserted under § 100.195.

Indeed, the fact that the Accountants are not "consumers" shows the fallacy of the State's argument that the voluntary payment doctrine should not apply because "consumer protection 'must be liberally construed . . . .'" (State's Brief, p. 10). That argument was never raised by the Accountants. This Court should not decide issues which were never part of this case and are therefore not part of any appeal. *Schill v. Wisconsin Rapids School Dist.*, 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 786 N.W.2d 177 (amici should not be permitted to raise issues not previously raised by the parties).

Likewise, the State argues that the statutes at issue should apply to billing agents. (State's Brief, p. 9). That question was also not presented by the Accountants to this Court. As set forth in ILD's original Opposition Brief, whether the statute applies to an entity like ILD that simply transmits service provider charges to the applicable LEC was the subject of appeals and cross-appeals in this case. The Court of Appeals correctly affirmed based upon the voluntary payment doctrine. If this Court changes course on the voluntary payment doctrine, resolution of those issues should be for the courts below.

IV. IN *PUTNAM*, THIS COURT APPLIED THE VOLUNTARY PAYMENT DOCTRINE TO DISMISS STATUTORY CLAIMS.

The State disputes that the voluntary payment doctrine was applied to bar a statutory claim in the seminal case of *Putnam v. Time Warner Cable*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626. (State's Brief, p. 11). While the State is certainly free to argue that the voluntary payment doctrine *should* not apply to statutory claims, it is impossible to argue that the voluntary payment doctrine was not applied to preclude a statutory claim in *Putnam*. The bottom line is that in *Putnam* this Court: (1) expressly acknowledged that the Plaintiff had asserted a statutory claim;

and (2) held that the voluntary payment doctrine precluded all of the claims in the case.

Indeed, the Court of Appeals has twice cited *Putnam* for the proposition that the voluntary payment doctrine applies to statutory claims. In *Butcher v. Ameritech Corp.*, 2007 WI App. 5, 298 Wis. 2d 468, 727 N.W.2d 546, a case involving disputed charges on a telephone bill, the Court of Appeals cited *Putnam* in applying the voluntary payment doctrine to bar statutory claims. Notably, this Court declined plaintiff's petition for certiorari in *Butcher*. Likewise, in affirming the Circuit Court in this case, the Court of Appeals cited this Court's decision in *Putnam*.

V. THE STATE IS ADVOCATING A RADICAL CHANGE IN WISCONSIN LAW.

The State seemingly asserts that common law principles should never apply to statutory claims unless the Legislature expressly states that they do. (State's Brief, pp. 12-13). The Court should carefully consider the ramifications of the policy the State suggests. The following are just a few examples of problems that would be created by the State's position:

<u>Release</u>. The concept of release is a common law doctrine. Under the State's theory a party could execute a release for all prior misdeeds, but

then sue the releasee on the grounds that the release cannot be used to bar statutory claims.

Mitigation of damages. Under the State's theory the common law principle of mitigation of damages would never apply to statutory claims. Thus, a party fully aware of another party's alleged statutory violation could sit on its hands for years and simply allow statutory damages and penalties to accrue. This is not, and should not be, the law of Wisconsin.

Accord and satisfaction. This is another common law principle giving legal effect to settlements. However, under the State's theory, a party could conceivably accept money for an alleged violation and then turn around and sue the alleged wrongdoer.

Lack of mental capacity, duress, consent, necessity. These common law defenses frequently apply to statutory claims under penal statutes. The State seemingly would hold that they are inapplicable unless the Legislature expressly states they are applicable.

VI. THE STATE ACKNOWLEDGES THAT VICTIMS OF CRAMMING ARE NOT WITHOUT A REMEDY.

The Accountants argued in their original brief that the voluntary payment doctrine would allow alleged crammers to violate Wisconsin law with impunity. We know this is not the case because of the fraud exception to the voluntary payment doctrine. But, more fundamentally, the State acknowledges that "it has brought enforcement actions to curtail cramming. . . ." (State's Brief, p. 4). Thus, remedies still exist under Wisconsin law even if the voluntary payment doctrine applies to bar the claims of businesses that pay clearly disclosed charges for several months without protest.

Once again going outside of this case's record, the State even cites an action it filed against ILD based on the fact that one of its service provider clients allegedly charged Wisconsin consumers for unauthorized services. (State's Brief, p. 4). Again, this citation to information outside of the record should be disregarded.

Further, a complete record would demonstrate that ILD did not admit liability but instead agreed to incorporate certain best practices into a Consent Judgment for injunctive relief requested by the State. To ILD's knowledge, the State has not asserted that ILD is not complying with the terms of the Consent Judgment. In sum, the case referenced by the State has nothing to do with whether the voluntary payment doctrine can preclude statutory claims. However, it does show that the State has an arsenal of remedies designed to combat alleged cramming.

CONCLUSION

For the reasons stated herein and in the Response Brief of ILD Telecommunications, Inc., d/b/a ILD Teleservices, ILD respectfully requests that the Court affirm the decision of the Court of Appeals.

Dated this 6th day of July, 2011.

By:__________________________________

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that Defendant-Respondent-Cross-Appellant ILD Telecommunications, Inc.'s Brief. conforms to the rules contained in § 809.19(8)(b) and (c)2, Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 2,775 words.

Dated at Milwaukee, Wisconsin this 6th day of July, 2011.

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CERTIFICATION OF MAILING

I hereby certify that on this 6th day of July, 2011, pursuant to § 809.19(8), Wis. Stats., the original and twenty-one (21) copies of Defendant-Respondent-Cross-Appellant ILD Telecommunications, Inc.'s Response to the State of Wisconsin's Amicus Brief were correctly addressed and paid for delivery by Federal Express to the Clerk of the Wisconsin Supreme Court. Three (3) copies of the same were also deposited in the United States mail correctly addressed and postage prepaid for service upon counsel of record by first-class mail.

Dated at Milwaukee, Wisconsin this 6th day of July, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(12)

I hereby certify I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of July, 2011.

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