

# PRACTITIONER’S GUIDE TO THE VOLUNTARY PAYMENT DOCTRINE

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## I. INTRODUCTION

Sun Tzu famously wrote, “If you know the enemy and know yourself, you need not fear the result of a hundred battles. . . . If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.”<sup>1</sup> It is with the spirit of these words in mind that this Article was written as a guide for practitioners in handling the voluntary payment doctrine. The singular purpose of this Article is to provide a resource for practicing attorneys to utilize when faced with the challenge of either overcoming the doctrine or in attempting to withstand a challenge to its application.

This Article discusses the origins, evolution, modern application, and approaches to defeat the application of the doctrine. The Article aspires to provide practitioners with the tools necessary to navigate their clients’ cases through the treacherous waters of the voluntary payment doctrine by seeing how the doctrine is applied throughout the many American jurisdictions, the underlying rationales, and the ways that litigants have been able to defeat its application. The Article also includes tables to act as quick reference points for busy practitioners.

The concept known commonly as the voluntary payment doctrine “is a long-standing doctrine of law, which clearly provides that one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment.”<sup>2</sup> Courts have described it as a “universally recognized”<sup>3</sup> and “harsh” doctrine.<sup>4</sup> Scholars and practitioners

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1. SUN TZU, *THE ART OF WAR* 17, 94 (Lionel Giles trans., Barnes & Noble Books 2004) (c. 500 B.C.E.).
2. *Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P.*, 668 F.3d 1019, 1030 (8th Cir. 2012) (quoting *Hanson v. Tele-Comm’ns, Inc.*, No. C7-00-534, 2000 Minn. App. LEXIS 1023, 2000 WL 1376533, at \*3 (Minn. Ct. App. Sept. 26, 2000)).
3. *Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677, 685 (10th Cir. 1991).
4. *Getty Oil Co. v. United States*, 767 F.2d 886, 889 (Fed. Cir. 1985).

have called for the complete eradication of the doctrine.<sup>5</sup> Such efforts have led to a dramatic increase in the number and breadth of exceptions to its application.<sup>6</sup> One jurisdiction—Florida—has gone so far as to abrogate the doctrine by statute.<sup>7</sup> Despite the increase in exceptions, rulings such as *Salling v. Budget Rent-A-Car Systems, Inc.*<sup>8</sup> and *Spivey v. Adaptive Marketing LLC*,<sup>9</sup> have led at least one commentator to proclaim “that the voluntary payment doctrine is alive and well as a defense in consumer class action litigation.”<sup>10</sup> Indeed, antithetically to Florida’s abrogation of the doctrine by statute, Georgia has codified it as a defense to repayment.<sup>11</sup> What has become clear, regardless of its ultimate future, is that the once well-settled doctrine has become rather unsettled.<sup>12</sup>

The doctrine has its origins in early nineteenth century English common law and has since been adopted into American jurisprudence.<sup>13</sup> The rule is typically stated as some variance of “money voluntarily paid with knowledge of the facts cannot be recovered back.”<sup>14</sup> The concept has been known by many names throughout various jurisdictions. For purposes of this Article, all references to the concept shall be made as the “voluntary payment doctrine”<sup>15</sup> and not the “doctrine of voluntary payment,”<sup>16</sup> the “rule of voluntary payment,”<sup>17</sup> the “voluntary payment rule,”<sup>18</sup> the

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5. See, e.g., John E. Campbell & Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 VAL. U. L. REV. 501, 504 (2012).
  6. See discussion *infra* Part III.
  7. See FLA. STAT. § 725.04 (2012); see also *Prudential Ins. Co. v. Clark*, 456 F.2d 932, 935 (5th Cir. 1972) (FLA. STAT. § 725.04 “negates the common law defense of voluntary payment”).
  8. 672 F.3d 442 (6th Cir. 2012).
  9. 622 F.3d 816 (7th Cir. 2010) (O’Connor, Assoc. J. (Ret.)).
  10. J. Russell Jackson, *Sixth Circuit Affirms Dismissal Based on the Voluntary Payment Doctrine*, JACKSON ON CONSUMER CLASS ACTIONS & MASS TORTS (Mar. 5, 2012), <http://www.consumerclassactionsmasstorts.com/2012/03/articles/consumer-fraud/sixth-circuit-affirms-dismissal-based-on-the-voluntary-payment-doctrine>.
  11. See GA. CODE ANN. § 13-1-13 (2012); see also *Anthony v. Am Gen. Fin. Servs.*, 626 F.3d 1318, 1322 (11th Cir. 2010).
  12. See, e.g., *Sanders v. Wash. Mut. Home Loans, Inc.*, 248 F. App’x 514, 516 (5th Cir. 2007) (“There is no principle of law better settled than that money voluntarily paid with knowledge of the facts cannot be recovered back.” (quoting *Ken Lawler Builders, Inc. v. Delaney*, 892 So. 2d 778, 780 (La. Ct. App. 2005))).
  13. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 667 (7th Cir. 2001).
  14. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. e (2011).
  15. The “voluntary payment doctrine” is the designation used by RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. e, illus. 20 (2011).
  16. See, e.g., *Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677, 685 (10th Cir. 1991).
  17. This is a fairly antiquated name that has not seen much use in the 20th century. See, e.g., *United States v. Edmondston*, 181 U.S. 500, 513 (1901).
  18. See, e.g., *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 782 (8th Cir. 2010).

“volunteer doctrine,”<sup>19</sup> or the “volunteer rule,”<sup>20</sup> as it is otherwise designated.<sup>21</sup>

## II. A BRIEF HISTORY OF THE VOLUNTARY PAYMENT DOCTRINE

The voluntary payment doctrine has its origins in the principle that “ignorance of the law is no excuse.”<sup>22</sup> Though this principle has been long established in the realm of criminal law, there was a time in which it was a foreign concept in civil jurisprudence.<sup>23</sup> “Indeed, English law at one time recognized in its chancery courts the general rule that relief would be granted for both mistake of fact or law.”<sup>24</sup>

In 1802, English jurisprudence took an abrupt turn explicitly recognizing a civil corollary to the criminal mistake of law rule.<sup>25</sup> In the case of *Bilbie v. Lumley*, the defendant relied upon the argument “that the money having been paid [by the plaintiff] with full knowledge, or with full means of knowledge of all the circumstances could not now be recovered back again.”<sup>26</sup> In response to the defendant’s contentions, the plaintiff “insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law . . . .”<sup>27</sup> The plaintiff’s argument initially carried the day. However, upon review by a higher court, Lord Ellenborough found the plaintiff’s argument lacking. Lord Ellenborough called upon counsel for the plaintiff to cite to even one case in support of his position. With plaintiff’s counsel unable to provide such support, Lord Ellenborough found in favor of defendant.<sup>28</sup>

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19. In some cases this is synonymous with the voluntary payment doctrine. *See, e.g.*, *Genesis Ins. Co. v. Wausau Ins. Cos.*, 343 F.3d 733, 736 (5th Cir. 2003) (applying the volunteer doctrine with the same definition as typically applied to the voluntary payment doctrine). However, in other cases, it seems to be a unique standalone doctrine. *See Kessler v. Visteon Corp.*, 448 F.3d 326, 332 n.1 (6th Cir. 2006) (recognizing that Michigan has abandoned the volunteer doctrine, which “bars recovery from a servant’s master where the servant’s negligence injures one who voluntarily assists him”).
20. *See, e.g.*, 66 AM JUR. 2d *Restitution and Implied Contracts* § 92 (2012).
21. The author provides these other designations for reference in identifying search terms for research. The author also recommends that in order to conduct a thorough search, use of specific phrases typically used to define the voluntary payment doctrine are advisable as some courts refrain from providing a name to the concept and merely recite the rule.
22. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 667 (7th Cir. 2001).
23. *Id.*
24. *Id.*
25. *Campbell & Beatty, supra* note 5, at 506 (citing *Bilbie v. Lumley*, 2 East 469 (102 ER 448) (1802)).
26. *Bilbie*, 2 East at 470.
27. *Id.*
28. *Id.* Though counsel for plaintiff was unable to cite to any such decision, Lord Ellenborough was aware of one unreported case that held as such. Lord Ellenborough, noting that the decision had not been reported, declined to follow it. *Id.* at 470-72

With this new mistake of law doctrine created by *Bilbie*, it was not long before the concept travelled across the pond and became a staple of American jurisprudence, and with it the rise of the modern voluntary payment doctrine.<sup>29</sup> By 1838, the mistake of law principle created in *Bilbie* was already recognized as “well established” by the Supreme Court of the United States.<sup>30</sup> To date, there is not a single court with the power to create binding precedent that has not had occasion to address the voluntary payment doctrine.<sup>31</sup>

### III. RATIONALE SUPPORTING THE DOCTRINE

Courts and other commentators have offered several rationales in support of the doctrine. The first rationale offered stems from Lord Ellenborough himself in his decision in *Bilbie*. He stated, “Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried.”<sup>32</sup> This argument is fundamentally one of a fear of the unforeseeable consequences of finding ignorance of the law to be itself a defense. In the two centuries since the doctrine’s inception this rationale has been expanded upon and added to.

In *Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership*, the Supreme Court of Wisconsin found two primary rationales in support of the doctrine.<sup>33</sup> The first *Putnam* rationale is that “the doctrine allows entities that receive payment for services to rely upon these funds and to use them unfettered in future activities.”<sup>34</sup> Many courts have cited favorably to the Supreme Court of Wisconsin’s enunciation of the primary rationales.<sup>35</sup> The Fifth Circuit expanded on this rationale, concluding that the “doctrine exists because of ‘the stabilizing legal principle preventing payors from disturbing the status quo by demanding reimbursement subsequently of payments made by them voluntarily with full knowledge of [the] facts.’”<sup>36</sup> The rationale has also been couched in terms of the

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29. Campbell & Beatty, *supra* note 5, at 507.

30. Bank of United States v. Daniel, 37 U.S. 32, 55 (1838) (citing Hunt v. Rousmanier’s Adm’rs, 21 U.S. 174 (1823)).

31. See *infra* Table 1.

32. *Bilbie*, 2 East at 472.

33. 649 N.W.2d 626, 633 (Wis. 2002).

34. *Id.*

35. See, e.g., Total Wall, Inc. v. Wall Solutions Supply, LLC, 09-cv-404-wmc, 2010 U.S. Dist. LEXIS 62283, at \*6-7 (W.D. Wis. June 23, 2010); Riensche v. Cingular Wireless LLC, No. C06-1325Z, 2007 U.S. Dist. LEXIS 83921, at \*16-17 (W.D. Wash. Nov. 9, 2007) (containing a fantastic analysis of the state of the doctrine at the time that would be a useful example for anyone tasked with drafting an opinion regarding the doctrine); BMG Direct Mktg. v. Peake, 178 S.W.3d 763, 772 (Tex. 2005).

36. Sanders v. Wash. Mut. Home Loans, Inc., 248 F. App’x 514, 516 (5th Cir. 2007) (quoting Whitehall Oil Co. v. Bogani, 255 So. 2d 702, 705 (La. 1969)).

protection of the person to whom voluntary payment was made. “The rule exists to protect persons who have had unsolicited benefits thrust upon them.”<sup>37</sup>

The second *Putnam* rationale is that “the doctrine operates as a means to settle disputes without litigation by requiring the party contesting the payment to notify the payee of its concerns. After such notification, a payee who has acted wrongfully can react to rectify the situation.”<sup>38</sup> The Supreme Court of Texas added, “The voluntary-payment rule also encourages discourse, rather than litigation, between customers and private enterprises that charge late fees in the course of their business.”<sup>39</sup> The Seventh Circuit found that “the voluntary payment doctrine ‘ensures that those who desire to assert a legal right do so at the first possible opportunity; this way, all interested parties are aware of that position and have the opportunity to tailor their own conduct accordingly.’”<sup>40</sup>

In addition to the *Bilbie* and *Putnam* rationales, courts have found that the doctrine serves the purpose of depriving a plaintiff recovery where injury would not have occurred but for his own negligence. In *Chris Albritton Construction Co. v. Pitney Bowes Inc.*, the Fifth Circuit found that “the voluntary payment doctrine precludes courts from extending relief to those who have neglected to take care of their interests and are in predicaments which ordinary care would have avoided.”<sup>41</sup> The same court applying the *Chris Albritton* decision in a subsequent opinion found that “[w]hen . . . the party paying knows or ought to know the facts and does not avail himself of the means which the law affords him to resist the demand, he has not taken due care.”<sup>42</sup> Thus, where a person has voluntarily paid funds under a circumstance governed by the doctrine, that person has suffered injury as a result of his or her own negligence and therefore ought not to be able to recover damages for those injuries.

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37. Neill v. Minn. Life Ins. Co., No. 10-144-S-REB, 2011 U.S. Dist. LEXIS 59652, at \*24 (D. Idaho June 3, 2011) (quoting *Chinchurreta v. Evergreen Mgt., Inc.*, 790 P.2d 372, 374 (Idaho Ct. App. 1989)) (citing RESTATEMENT (FIRST) OF RESTITUTION § 72 cmt. b (1937)).

38. *Putnam*, 649 N.W.2d at 633.

39. *BMG Direct Mktg.*, 178 S.W.3d at 772.

40. *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816, 823 (7th Cir. 2010) (quoting *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 668 (7th Cir. 2001)). This same position was taken by the Supreme Court of New York. See *Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc.*, 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 2d Dep't 1986) (citing *Flower v. Lance*, 59 N.Y. 603, 610 (N.Y. 1875); *Consol. Fruit Jar Co. v. Wisner*, 93 N.Y.S. 128, 131 (N.Y. App. Div. 1905)). When a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand, and litigate the issue before, rather than after, payment is made.

41. *Burnsed Oil Co., Inc. v. Grynberg*, 320 F. App'x 222, 231 (5th Cir. 2009) (citation omitted) (quoting *Chris Albritton Constr. Co. v. Pitney Bowes Inc.*, 304 F.3d 527, 532 (5th Cir. 2002)) (internal quotation marks omitted).

42. *Id.* at 231-32 (quoting *Chris Albritton*, 304 F.3d at 532) (internal quotation marks omitted).

A fifth rationale that arises in case law and in the Restatement (Third) Restitution and Unjust Enrichment is that the voluntary payment doctrine is the product of the allocation of risk between contracting parties. The Seventh Circuit, referencing a tentative draft of the Restatement, found “[t]he point of the voluntary-payment doctrine” to be the “prevent[ion of] recovery when a transfer was made pursuant to an agreement . . . that allocated . . . the risk of any later-discovered mistake.”<sup>43</sup> The formalized Restatement also adopts this position.<sup>44</sup>

The 1937 Restatement of Restitution provided another rationale:

To allow a person who has made payment of a disputed debt later to seek restitution from the creditor, would be to permit him, by postponing suit, to choose his own time and place for litigation and to change his position from that of a defendant to that of a plaintiff, which would be unfair to the other party.<sup>45</sup>

The Indiana Supreme Court specifically disputed the *Putnam* rationales in arriving at its decision in favor of the plaintiffs in *Time Warner Entertainment Co., L.P. v. Whiteman*.<sup>46</sup> In response to the first *Putnam* rationale—that a recipient be allowed to rely upon the payment—the Indiana Supreme Court found that it was an inappropriate justification to apply the doctrine where the recipient is a business.<sup>47</sup> The court stated:

As to the first of these justifications, we do not believe that it is appropriate as a matter of policy for us to favor a private enterprise over private individuals in this respect. We believe the principle cited here was derived from cases like *City of Evansville* where the payee is a unit of government and presumably makes the “unfettered” use of the funds on behalf of all of the citizens of its jurisdiction.<sup>48</sup>

In further support the Indiana Supreme Court looked to Judge Schudson’s dissent in the intermediary court opinion of *Putnam*.<sup>49</sup> Judge Schudson argued that to allow the defendant to retain fees unlawfully

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43. *CSX Transp., Inc. v. Appalachian Railcar Servs., Inc.*, 509 F.3d 384, 387 (7th Cir. 2007) (citing RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. d (Tentative Draft No. 1, 2001)).

44. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. d (2011).

45. *Hawkinson v. Conniff*, 334 P.2d 540, 544 (Wash. 1959) (quoting RESTATEMENT (FIRST) OF RESTITUTION § 71 cmt. b (1937)).

46. 802 N.E.2d 886, 892-93 (Ind. 2004).

47. *Id.* at 892.

48. *Id.*; see also *City of Evansville v. Walker*, 318 N.E.2d 388 (Ind. Ct. App. 1974).

49. *Id.* at 893.

charged is to permit defendant “to take financial advantage of its own wrongdoing[.]”<sup>50</sup>

The *Whiteman* court also contested the second *Putnam* rationale—“that the doctrine operates as a dispute resolution mechanism . . . .”<sup>51</sup> The Indiana Supreme Court determined that the Restatement (Third) of Restitution and Unjust Enrichment approach that the court adopts in *Whiteman* functions to limit the application of “this rationale to situation[s] where money has been ‘voluntarily paid in the face of a recognized uncertainty as to the existence or extent of the payor’s obligation to the recipient.’”<sup>52</sup>

#### IV. APPROACHES TO DEFEAT APPLICATION OF THE DOCTRINE

Over the past two centuries, resourceful attorneys have created a litany of approaches successful in defeating application of the doctrine. Plaintiffs have successfully contended that the payment was the result of fraud, duress, or mistake of fact.<sup>53</sup> Plaintiffs have also succeeded in arguing that application would be against public policy. The public policy contentions have taken hold in recent years with a handful of courts determining that the doctrine is not applicable where the demand for payments were in violation of a consumer protection statute. Each successful method is discussed in detail below and is listed in Table 2 along with citations to cases discussing the approach.

One important point to keep in mind when dealing with the voluntary payment doctrine is that the doctrine is an affirmative defense to repayment of money to which the defendant had no legal claim.<sup>54</sup> It is not an independent cause of action. However, due to the relative ease with which a defendant can establish the defense, the burden is upon the plaintiff, on a practical level, to defeat application of the doctrine. Because of this burden shifting, it is not uncommon for courts to refer to the methods to defeat the doctrine as defenses. This is an important fact to be mindful of while

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50. *Id.* (quoting *Putnam v. Time Warner Cable of Se. Wis., L.P.*, 633 N.W.2d 254, 270 (Wis. Ct. App. 2001) (Schudson, J., concurring and dissenting), *aff’d in part, rev’d in part*, 649 N.W.2d 626 (Wis. 2002)).

51. *Id.*

52. *Id.* (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. e (Tentative Draft No. 1, 2001)).

53. These arguments are at their heart a claim that the payment was not truly voluntary. “A plaintiff may defeat the doctrine by showing that the payment was ‘not truly voluntary.’” *Shaw v. Marriott Int’l, Inc.*, 474 F. Supp. 2d 141, 151 (D.D.C. 2007) (quoting *Avianca, Inc. v. Corriea, Civ. A. No. 85-3277 (RCL)*, 1992 U.S. Dist. LEXIS 4709, at \*24 (D.D.C. Apr. 13, 1992)), *rev’d in part on other grounds*, 605 F.3d 1039 (D.C. Cir. 2010).

54. *See, e.g., Fradis v. Savebig.com*, No. CV 11-07275 GAF (JCx), 2011 U.S. Dist. LEXIS 154915, at \*18-19 (C.D. Cal. Dec. 2, 2011) (“The voluntary payment doctrine is an affirmative defense.”).

conducting research, as it is easy to overlook very valuable case law due to the mixing of terms.

#### A. Traditional Defenses to Application

The defenses of fraud and mistake of fact are considered to be the traditional defenses to the doctrine.<sup>55</sup> They are so well entrenched into voluntary payment doctrine jurisprudence that many courts' enunciations of the doctrine explicitly mention them.<sup>56</sup> Where the definition of a voluntary payment specifically requires that the payment not be made pursuant to a mistake of fact and in the absence of fraud, the argument against application is essentially that the payment was not itself voluntary.<sup>57</sup>

##### 1. *Fraud*

Of the traditional defenses, the defense of fraud is far less well-developed than mistake of fact. There is no question that the voluntary payment doctrine does not apply to fraud. The doctrine also does not apply in the context where "a plaintiff's claim is predicated on a lack of full disclosure by defendant."<sup>58</sup> The only issue regarding fraud that merits discussion is what burden a plaintiff carries to overcome the doctrine on a claim of fraud. The fundamental question is whether the plaintiff, by merely alleging fraud, is able to prevent summary judgment against him as

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55. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 668 (7th Cir. 2001).

56. *See, e.g., Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 726 (Mo. 2009) (en banc). The court noted:

The voluntary payment doctrine "is well established, both in England and in this country, [and the doctrine provides] that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest.

*Id.* (quoting *Am. Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812 (Mo. Ct. App. 1969)); *Salling v. Budget Rent-A-Car Sys., Inc.*, 672 F.3d 442, 444 (6th Cir. 2012) ("In the absence of fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to another on a claim of right to such payment, cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay." (quoting *Scott v. Fairbanks Capital Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003))).

57. *See Liberty Mut. Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 235 F. App'x 213, 217 (5th Cir. 2007) ("In contrast, an involuntary payment is one not proceeding from choice. Thus, payments made by virtue of a legal obligation, by accident, by mistake, or under compulsion are not considered voluntary and thus are not barred from recovery under the voluntary payment doctrine." (footnotes omitted) (quoting *Genesis Ins. Co. v. Wausau Ins. Cos.*, 343 F.3d 733, 738 (5th Cir. 2003) (internal quotation marks omitted))).

58. *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 649 (S.D.N.Y. 2011) (citing *Spagnola v. Chubb Corp.*, 574 F.3d 64, 73 (2d Cir. 2009); *Samuel v. Time Warner, Inc.*, 809 N.Y.S.2d 408, 418 (N.Y. Sup. Ct. 2005)).

a result of the doctrine, or whether he must prove his fraud claim in order to withstand application of the doctrine.

What appears clear from the few cases having dealt with the issue is that, in order to use the defense of fraud to overcome the doctrine, a plaintiff must sufficiently plead facts upon which a court can find a basis for fraud. Moreover, it would appear that the plaintiff ought to plead a specific cause of action based in fraud.

In *Flournoy v. Ameritech*, the Appellate Court of Illinois reversed a dismissal by the trial court where the plaintiff pleaded a claim for fraud, holding that because the plaintiff pleaded “[h]is cause of action . . . in the nature of fraud . . . the voluntary payment doctrine [did] not bar [his] claim.”<sup>59</sup> In *Horne v. Time Warner Operations, Inc.*, the Southern District of Mississippi dismissed the plaintiffs’ case as barred by the voluntary payment doctrine where the plaintiffs failed to plead a claim for fraud with sufficient particularity.<sup>60</sup>

It also appears that the defense is only viable so long as the specific claim based upon fraud survives. In *RMA Ventures v. SunAmerica Life Insurance*, the District of Utah found in favor of the defendants on summary judgment where the facts were insufficient for the plaintiffs’ fraud claim to survive to a jury.<sup>61</sup> In *Stone v. Mellon Mortgage Co.*, the Supreme Court of Alabama upheld summary judgment for the defendant where the plaintiff did not allege a misrepresentation by the defendant in its complaint.<sup>62</sup>

Based upon these decisions, good practice is to plead a claim based in fraud in the complaint with sufficient particularity so as to satisfy the pleading requirements for fraud. So long as that claim survives, the court should be unable to find for a defendant under the voluntary payment doctrine, and the claim can progress to trial.

## 2. Mistake

Mistake of fact remains a universally recognized exception to application of the voluntary payment doctrine.<sup>63</sup> The exception is generally enunciated in the definition of the doctrine. Such was the case in *State ex rel. Dickman v. Defenbacher*, in which the Ohio Supreme Court stated:

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59. 814 N.E.2d 585, 589 (Ill. App. Ct. 2004).

60. 119 F. Supp. 2d 624, 628-31 (S.D. Miss. 1999) (finding insufficient facts to satisfy F.R.C.P. 9(b); case dismissed with prejudice).

61. No. 2:03-CV-740, 2007 U.S. Dist. LEXIS 86692, at \*12-13 (D. Utah Nov. 26, 2007).

62. 771 So. 2d 451, 458-59 (Ala. 2000).

63. See, e.g., *Kerby McInery & Squire, LLP v. Hall Charne Burce & Olson, S.C.*, 790 N.Y.S.2d 84, 85 (N.Y. App. Div. 2004) (doctrine inapplicable where “the overpayments were clearly made to defendants based on a mistake of fact, namely, the amount of fees actually owed”).

In the absence of fraud, duress, compulsion or mistake of fact, money voluntarily paid by one person to another on a claim of right to such payment cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay.<sup>64</sup>

Other courts have specifically noted that “[w]here the allegedly-voluntary payment was made under a mistake of fact, . . . the doctrine generally does not apply.”<sup>65</sup>

An example of a case in which plaintiff was able to survive a motion to dismiss utilizing the mistake of fact defense is *Parino v. BidRack, Inc.*<sup>66</sup> In *Parino*, Judge William Alsup found that, where a plaintiff made payment of her credit card bill despite the appearance of an unapproved charge, the plaintiff could sustain a defense of mistake.<sup>67</sup> The specific facts alleged that the plaintiff disputed the charge “immediately after noticing that her account had been charged.”<sup>68</sup> Moreover, the court found that even if the plaintiff had made a “payment to her credit card company,” she did “so that she could stay in good standing with creditors while pursuing this action,” and thus her claim would not be barred.<sup>69</sup>

Another illustrative example is *In re Universal Service Fund Telephone Billing Practices Litigation*, from the District of Kansas.<sup>70</sup> In that decision, applying New York law, Judge Lungstrum ruled upon the defendant’s motion for summary judgment against two certified classes.<sup>71</sup> Against one of those classes, the AT&T subclass, defendant AT&T Corp. sought to assert the voluntary payment doctrine as a defense to New York contract law claims.<sup>72</sup> Judge Lungstrum found that “[t]he very nature of th[e] claim is that customers who paid the bills did so while operating under a mistake of fact . . . .”<sup>73</sup> As such, Judge Lungstrum found the doctrine inapplicable to this claim at the summary judgment stage of litigation.

While there are certainly several cases in which a plaintiff has successfully asserted the mistake of fact exception, it is far more common in contemporary case law that a court declines to find a sufficient mistake of fact. In *Horne v. Time Warner Operations, Inc.*, the court found that

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64. 86 N.E.2d 5, 7 (Ohio 1949); see also *Salling v. Budget Rent-A-Car*, 672 F.3d 442, 444 (6th Cir. 2002) (quoting *Scott v. Fairbanks Capital Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003)).

65. *Durant v. ServiceMaster Co.*, 159 F. Supp. 2d 977, 981 (E.D. Mich. 2001).

66. 838 F. Supp. 2d 900, 909 (N.D. Cal. 2011).

67. *Id.*

68. *Id.*

69. *Id.*

70. No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727 (D. Kan. June 30, 2008).

71. *Id.* at \*2-3.

72. *Id.* at \*110.

73. *Id.* at \*111. The claimed mistaken fact was that the Universal Connectivity Charge (UCC) charged to the plaintiff class was a tax-like surcharge that AT&T was required to bill its customers, instead of an optional surcharge assessed at the discretion of AT&T. *Id.*

there was no sufficient mistake of fact where the plaintiffs “lacked sufficient knowledge to determine the validity of [a] late payment fee or how the amount of the fee was determined.”<sup>74</sup> The court went on to state, “[W]hen the payor is aware that he lacks insufficient [sic] information to allow him to determine how much he owes, he is merely ignorant of the facts, but has not made a mistake of fact sufficient for the mistake exception to apply.”<sup>75</sup>

In *Ergo v. International Merchant Services, Inc.*, the Northern District of Illinois found that the defendants’ counterclaim could not survive the voluntary payment doctrine under a mistake of fact defense where the “[d]efendants’ only argument against application of th[e] doctrine is the[ ] contention that they were not aware of the alleged overpayments until they examined payroll records during the discovery phase of this action.”<sup>76</sup> Because the defendants had all of the records within their possession, they could not claim a mistake of fact.<sup>77</sup> The court went on to note: the “failure to recognize error in making a voluntary payment does not constitute mistake of fact under the doctrine when the relevant facts were not obscured or inaccessible.”<sup>78</sup>

In another illustrative case, the Seventh Circuit found that there was no sufficient mistake of fact where the purported mistake of fact was that a husband believed the anomalous charges on his credit card statements had been incurred by his wife.<sup>79</sup> In a Sixth Circuit decision, the court held that the plaintiff had not claimed a mistake of fact where the plaintiff “paid the charge *in anticipation of filing suit* . . . .”<sup>80</sup> The court surmised that the purpose of the plaintiff incurring the charge was to provide him standing to bring the claim.<sup>81</sup> Because his payment was incurred with this intent the court found that he was fully aware of the charge and voluntarily paid it.<sup>82</sup>

There are some outlying jurisdictions that provide recovery for a plaintiff even where there was a mistake of law. New York is one such jurisdiction. The New York Code provides: “When relief against a mistake

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74. 119 F. Supp. 2d 624, 629 (S.D. Miss. 1999).

75. *Id.* (citing *Mobile Telecomm. Tech. v. Aetna Cas. & Sur. Co.*, 962 F. Supp. 952, 955 (S.D. Miss. 1997)).

76. 519 F. Supp. 2d 765, 773-74 (N.D. Ill. 2007).

77. *Id.* at 774.

78. *Id.* (citing *Harris v. ChartOne*, 841 N.E.2d 1028, 1032 (Ill. App. Ct. 2005)).

79. *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816, 821 (7th Cir. 2010).

80. *Salling v. Budget Rent-A-Car*, 672 F.3d 442, 445 (6th Cir. 2012).

81. *Id.*

82. *Id.* Oddly, the plaintiff also contended that the doctrine was inapplicable to his breach of contract claim “because the voluntary payment doctrine does not apply where a party breaches a provision of a written contract.” *Id.* at 445. But, as the court stated, “A payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and if voluntary cannot be recovered back.” *Id.* (quoting *Nationwide Life Ins. Co. v. Myers*, 425 N.E.2d 952, 956 (Ohio Ct. App. 1980)) (internal quotations marks omitted).

is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact.”<sup>83</sup> This code section has been interpreted to allow a court to permit a claim to go forward despite reliance upon a mistake of law but it does not require a court to do so.<sup>84</sup> In *Gimbel Bros., Inc. v. Brooks Shopping Centers., Inc.*, the New York intermediary court found that the trial court did not abuse its discretion by disallowing a claim rooted in mistake of law to proceed where the plaintiff “was not operating under an actual mistake of law but, instead, made the subject payments voluntarily, as a matter of convenience, without having made any effort to learn what its legal obligations were.”<sup>85</sup>

Michigan, like New York, appears to be an outlier to the mistake of law rule.<sup>86</sup> Under Michigan law, “A mistake of either law or fact will entitle a party to restitution unless it is inequitable or inexpedient for restitution to be granted.”<sup>87</sup> “The equity exception arises in the situation where the party receiving the money has changed position in consequence of the payment, and it would be inequitable to allow a recovery.”<sup>88</sup> Michigan and New York are very much the exception to the rule as to mistake, not the majority approach.

A new approach that has arisen with the advent of the Restatement (Third) of Restitution and Unjust Enrichment is the abrogation of the distinction between mistake of law and mistake of fact. The new approach of the Third Restatement is in direct opposition to the approach taken in the 1937 Restatement of Restitution. The 1937 Restatement “provides in relevant part that ‘a person who, induced thereto solely by a mistake of law,

83. N.Y. C.P.L.R. 3005 (CONSOL. 2012).

84. James C. Gacioch, *Judicial Interpretation Not Always Forgiving*, N.Y. CPLR § 3005 (CONSOL. 2012). Gacioch noted:

Mistakes of law were unforgivable at common law because of perceived proof problems regarding the allegedly mistaken motives of the allegedly mistaken litigant and justification for his or her reliance on an error of law. Equity thereafter built in a host of exceptions and differentiated ‘mistakes of fact’, which would seem to suffer from the same problems of proof. To tidy up the messy case law, CPLR 3005 ensures that relief from a mistake is not denied solely because it is determined to be of law, rather than of fact. See Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C., 790 N.Y.S.2d 84 (N.Y. App. Div. 2005).

*Id.*

85. 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986).

86. *Durant v. ServiceMaster Co.*, 159 F. Supp. 2d 977, 981 n.2 (E.D. Mich. 2011) (“There appears to be authority suggesting that the doctrine of voluntary payment does not bar recovery even where the plaintiff has made a mistake of law. See *Hofmann, D.C. v. Auto Club Ins. Ass’n*, 162 Mich. App. 424, 413 N.W.2d 455, 457 (1987).”).

87. *Hofmann*, 413 N.W.2d at 457.

88. *Tara Homes, Inc. v. Nash*, No. 252460, 2005 Mich. App. LEXIS 2084, at \*5 (Mich. Ct. App. Aug. 25, 2005) (citing *Wilson v. Newman*, 617 N.W.2d 318, 321 (Mich. 2000)).

has conferred a benefit upon another to satisfy in whole or in part an honest claim of the other to the performance given, is not entitled to restitution.”<sup>89</sup>

The new approach of the Third Restatement is located in comment c to section 6. It states:

§ 6 Payment of Money Not Due:

Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.

\* \* \*

*c. Mistake as to liability.* A payor’s mistake as to liability may be a mistake about the identity of the creditor. In such a case, the payor believes that an obligation runs to the payee when in fact the obligation is to someone else. More commonly, a mistake as to liability concerns the existence of an obligation, contractual or otherwise; the extent of a valid obligation; or the existence of a defense to an obligation that is otherwise valid. Relief is available in all of these cases without regard to whether the mistake might be characterized as mutual or unilateral, a mistake of fact or a mistake of law.<sup>90</sup>

The language of the recently adopted<sup>91</sup> Restatement is substantially similar to the language issued in a tentative draft of section 6 released in 2001.<sup>92</sup> This draft version was looked upon favorably by the Supreme Court of Indiana in *Time Warner Entertainment Co., L.P. v. Whiteman*.<sup>93</sup> The *Whiteman* court read the tentative draft as suggesting that “the distinction between a mistake of law and a mistake of fact is artificial.”<sup>94</sup> Agreeing with the abrogation of this distinction and relying upon comment e,<sup>95</sup> the court determined that:

A more appropriate statement of the voluntary-payment rule, therefore, is that 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

89. *Time Warner Entm’t Co., L.P. v. Whiteman*, 802 N.E.2d 886, 892 (Ind. 2004) (quoting RESTATEMENT (FIRST) OF RESTITUTION § 45 (1937)).

90. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 (2011).

91. The *Restatement (Third) of Restitution & Unjust Enrichment* was adopted in 2011.

92. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 (Tentative Draft No. 1, 2001). The tentative draft broke this section into two subsections. “(2) Payment of money resulting from a mistake as to the existence or extent of the payor’s obligation to an intended recipient gives the payor a claim in restitution against the recipient to the extent the payment was not due.” *Id.*

93. 802 N.E.2d 886, 891-92 (Ind. 2004).

94. *Id.* at 891

95. The language of comment e was unchanged between the tentative draft and the adopted section.

be recovered, on the ground of “mistake,” merely because the payment is subsequently revealed to have exceeded the true amount of the underlying obligation.<sup>96</sup>

The same tentative draft was relied upon by the Seventh Circuit when the court determined *CSX Transportation, Inc. v. Appalachian Railcar Services*.<sup>97</sup> In *CSX*, the court, looking to the Restatement, determined “when the mistake relates to a contingency not contemplated by the parties at the time of the voluntary payment, a claim for restitution exists.”<sup>98</sup> The court then adopted the Restatement approach that “the voluntary-payment rule has no application to the payment of a claim that neither party regards as doubtful.”<sup>99</sup>

While the majority rule remains—that money voluntarily paid that was not owed cannot be recovered due to a mistake of law—there is most certainly reason to believe there is room for a change in the law as expressed by the Indiana Supreme Court and Seventh Circuit’s interpretations of the Restatement (Third) of Restitution and Unjust Enrichment. Moreover, there are already jurisdictions—New York and Michigan—that have, to some degree, abrogated the distinction between mistake of fact and mistake of law in the voluntary payment context.

### 3. Duress

Duress is another widely recognized defense to application of the voluntary payment doctrine.<sup>100</sup> Like the traditional defenses, duress is often enunciated in the definition of the doctrine.<sup>101</sup> As in the case of the traditional defenses, where the definition of a voluntary payment includes a requirement that it be without duress, the argument for duress is fundamentally an argument that the payment was not voluntary. Because

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96. *Whiteman*, 802 N.E.2d at 892.

97. 509 F.3d 384, 387 (7th Cir. 2007).

98. *Id.* (citing RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. e (Tentative Draft No. 1, 2001)).

99. *Id.* (internal quotation marks omitted). This same line survived into the formal RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6 cmt. e.

100. See 25 AM JUR. 2D *Duress and Undue Influence* § 26 (2004) (citing *Norton v. City of Chicago*, 690 N.E.2d 119 (Ill. App. Ct. 1997)); see also *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 743 n.47 (Neb. 2011).

101. See, e.g., *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 782 (8th Cir. 2010) (“A payment is deemed voluntary, and thus not recoverable, ‘when a person without mistake of fact or fraud, duress, coercion, or extortion pays money on a demand which is not enforceable against him.’” (quoting *Ritchie v. Bluff City Lumber Co.*, 110 S.W. 591, 592 (Ark. 1908))).

the doctrine is traditionally applied in the context of contract law,<sup>102</sup> it is no surprise a traditional defense to contract formation—duress—applies.<sup>103</sup>

While duress may be a traditional defense to contract formation, it has found a unique existence in the realm of the voluntary payment doctrine. Voluntary payment doctrine case law has benefitted from the expansion of duress beyond mere physical duress into the realm of economic duress. This has resulted in courts identifying specific circumstances under which a person may make a payment which is not considered voluntary due to the nature of the service that would be lost but for the payment.

The most thorough enunciation of duress as a defense to the application of the doctrine comes from the Seventh Circuit opinion in *Randazzo v. Harris Bank Palatine, N.A.* In *Randazzo*, the Seventh Circuit looked to Illinois case law to determine whether the district court properly applied Illinois law on exceptions to the doctrine.<sup>104</sup> “Illinois . . . recognize[s] the defense of coercion and, like many jurisdictions, has expanded this defense to cover not only cases of actual physical duress but also of business necessity.”<sup>105</sup> The court went on to note that “[a]lthough the issue of duress is generally one of fact, to be judged in light of all the circumstances surrounding a given transaction, Illinois courts have pinpointed several circumstances in which duress is commonly found.”<sup>106</sup>

The court in *Randazzo* identified three categories of specific circumstances in which duress may readily be found: (1) payment of money under pressure of a disastrous effect to business; (2) payment of money where the payor is an intermediary party in the sale of goods or real estate; and (3) payment for items deemed to be necessities.<sup>107</sup>

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102. *See, e.g.,* *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 170 P.3d 10, 23 (Wash. 2007) (en banc) (“Indoor Billboard is correct that Washington courts have generally applied the voluntary payment doctrine only in the contract context.”).

103. *See, e.g.,* *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 n.3 (Mo. 2012) (en banc) (“[D]escribing fraud and duress as ‘traditional grounds for the abrogation of [a] contract’ that speaks to ‘unfair dealing at the contract formation stage[.]’” (quoting *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 547 (2008))).

104. 262 F.3d 663, 668-69 (7th Cir. 2001). Illinois is among a select few states that has extremely well-developed law on the voluntary payment doctrine.

105. *Id.* at 668 (quoting *Ill. Merchs.’ Trust v. Harvey*, 167 N.E. 69, 71 (Ill. 1929)). The *Randazzo* court noted that:

At the common law duress meant duress only of person, and nothing short of a reasonable apprehension of imminent danger to life, limb, or liberty sufficed as a basis for an action to recover money paid. The doctrine became gradually extended, however, to recognize duress of property as a sort of moral duress, which, equally with duress of person, entitled one to recover money paid under its influence. Today the ancient doctrine of duress of person (later of goods) has been relaxed, and extended so as to admit of compulsion of business and circumstances.

*Id.* at 668-69 (quoting *Harvey*, 167 N.E. at 71).

106. *Id.* at 669 n.1 (citation omitted).

107. *Id.*

a. Payment of Money Under Pressure of a Disastrous Effect to Business

The most frequent form of a “disastrous effect to business” is the impact of rent. The *Randazzo* court cited two cases in which Illinois courts found duress where the failure to pay the disputed rent charge would have had a disastrous effect to the plaintiff’s business. In *Best Buy Co. v. The Harlem-Irving Cos.*, the “company’s payment of disputed rent charges [were] sufficient evidence of duress to withstand summary judgment where [the] landlord threatened to pursue all remedies under the lease, including eviction, if the payments were not made[.]”<sup>108</sup> In *Kanter & Eisenberg v. Madison Associates*, the Supreme Court of Illinois found that “payment of disputed rent made under duress where nonpayment would result in the ‘termination of a valuable leasehold on which [the plaintiffs] had apparently spent a million dollars in improvements’” was sufficient to find duress.<sup>109</sup>

The *Randazzo* court also cited to two other decisions finding a disastrous effect to business for payments that may more appropriately be categorized as made for necessities.<sup>110</sup> Nevertheless, due to the impact upon business, the court chose to designate those cases under this category instead. The first was *Ross v. City of Geneva*, in which the court found duress where the “defendant was the sole provider of electricity to the class members’ commercial enterprises” and “[t]here was evidence that it was defendant’s policy to terminate, and it ha[d] terminated, the supply of electricity to users for non-payment of imposed charges.”<sup>111</sup> The other decision was *Illinois Glass Co. v. Chicago Telephone Co.*, in which the Supreme Court of Illinois did not find duress but “not[ed] that the ‘telephone has become an instrument of such necessity in business houses that a denial of its advantages would amount to a destruction of the business.’”<sup>112</sup>

Illinois is not alone in finding duress where not paying the charge would amount to a disastrous effect on business. In 2010, the Court of Appeals for the Eighth Circuit, applying Arkansas law, held that duress may be found where a company paid rebates to its customers and then sought return of those rebates.<sup>113</sup> The court found that the owner, who was new to the business, made the rebate payments out of fear of losing future

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108. *Id.* (citing *Best Buy Co. v. The Harlem-Irving Cos.*, 51 F. Supp. 2d 889, 898 (N.D. Ill. 1999)).

109. *Id.* (quoting *Kanter & Eisenberg v. Madison Assocs.*, 508 N.E.2d 1053, 1056-57 (Ill. 1987)).

110. The court cites to *Ross v. City of Geneva* for the term “disastrous effect to business” and yet, quite oddly, discusses the case in the intermediary party context. Since it does not make apparent sense to discuss *Ross* in that category, the author chooses to discuss it here.

111. 357 N.E.2d 829, 836 (Ill. App. Ct. 1976).

112. *Randazzo*, 262 F.3d at 669 n.1 (citing *Ill. Glass Co. v. Chi. Tel. Co.*, 85 N.E. 200, 201-02 (Ill. 1908)). This argument may well be fit for expansion into such other items such as internet services and credit card systems, among others.

113. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 782-84 (8th Cir. 2010).

patronage from customers representing seventy-five percent of his business.<sup>114</sup> Michigan has also found that payments were “made under compulsion or duress” where plaintiff would be “denied the right to continue its business unless it paid the [defendant’s] unlawful” building permit fees.<sup>115</sup>

The Restatement (Third) of Restitution and Unjust Enrichment approach permits a finding of duress even where what is being threatened “would normally be a legal right . . . .”<sup>116</sup> One such example is the threat to bring civil litigation.<sup>117</sup> Even though civil litigation generally holds a privileged status exempting it from coercion, “[t]he threat or instigation of legal proceedings in pursuit of a claim known to be unjustified is wrongful prima facie; such acts constitute duress and a transfer induced thereby is voidable.”<sup>118</sup>

In *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, the Supreme Court of Nebraska looked to the Restatement (Third) approach to duress in application of the duress defense to the voluntary payment doctrine.<sup>119</sup> In *City of Scottsbluff*, the court held that “economic duress” or a “business compulsion” were sufficient grounds to withstand application of the doctrine.<sup>120</sup> The court, noting “that duress can occur even if the defendant had a legal right to take a threatened action[,]” held that “[e]conomic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement.”<sup>121</sup>

b. Payment of Money Where the Payor is an Intermediary Party in the Sale of Goods or Real Estate

The *Randazzo* court noted that “[d]uress need not . . . reach the level of disaster to preclude application of the voluntary payment doctrine.”<sup>122</sup> The court cited five cases finding duress where the plaintiff was involved in the purchase of property with a contract to sell that property to a third-party. In one case, *Schlossberg v. E.L. Trendel & Associates, Inc.*, the Illinois Appellate Court found duress where:

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114. *Id.* at 782-83.

115. *Beachlawn Bldg. Corp. v. City of St. Clair Shores*, 121 N.W.2d 427, 430 (Mich. 1963).

116. *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 14 cmt. g (2011)).

117. *Id.*

118. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 14 cmt. h.

119. 809 N.W.2d at 743-44.

120. *Id.* at 744-45.

121. *Id.* at 868.

122. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 669 n.1 (7th Cir. 2001).

[T]he buyer of a parcel of land had in turn agreed to resell the property to a third party. After tender of the purchase price, the seller demanded an additional \$30,000. Because the buyer was already obligated to sell the property to the third party and would be in default if he could not obtain the deed, the buyer had no choice but to pay the additional funds and then sue for recovery of them. The court determined that the buyer's complaint contained "sufficient factual allegations to warrant an evidentiary hearing on the issue of business duress."<sup>123</sup>

In another case, *Pemberton v. Williams*, the Supreme Court of Illinois held that:

[D]uress [is a] question for [the] jury when a buyer ha[s] paid nearly all the contract price for a parcel of land, . . . contracted to resell the property to a third party, and the original seller demand[s] as a condition of the delivery of the deed a sum larger than was set forth in the contract[.]<sup>124</sup>

In *Ball v. Vill. of Streamwood*, the Illinois Appellate Court found that "duress excused plaintiffs' payment[s] of a tax where their homes were subject to contracts to sell to third parties, and the village code provided civil penalties and fines for failure to pay the tax[.]"<sup>125</sup> Another case, *DeBruyn v. Elrod*, found the plaintiffs subject to duress where they "were confronted with the choice of payment of [a] sheriff's fees or his refusal to effect the requested sale, execution or redemption[.]"<sup>126</sup>

In the fifth case, *Peterson v. O'Neill*, the Illinois Appellate Court held that plaintiff's payment of money was not voluntary due to duress when he "had contracted for the resale of property, the defendant was obligated to furnish the deed, and the defendant demanded that the plaintiff pay for the deed, knowing that the plaintiff had contracted for the sale of the property[.]"<sup>127</sup>

### c. Payment for Items Deemed to be Necessities

Under Illinois law, "[i]f the asset is a necessity and the consequences of nonpayment would adversely affect the asset, a case might be made for duress as a motivating factor in payment."<sup>128</sup> One such necessity is the risk

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123. *Id.* (citation omitted) (quoting *Schlossberg v. E.L. Trendel & Assocs., Inc.*, 380 N.E.2d 950, 954 (Ill. App. Ct. 1978)).

124. *Id.* (citing *Pemberton v. Williams*, 87 Ill. 15, 17-18 (1877)).

125. *Id.* (citing *Ball v. Vill. of Streamwood*, 665 N.E.2d 311, 318 (Ill. App. Ct. 1996)).

126. *Id.* (quoting *DeBruyn v. Elrod*, 418 N.E.2d 413, 417 (Ill. 1981)) (internal quotation marks omitted).

127. *Id.* (citing *Peterson v. O'Neill*, 255 Ill. App. 400, 401-02 (1930)).

128. *Id.*

of the loss of a person's home.<sup>129</sup> Another recognized necessity is feminine hygiene products.<sup>130</sup> Telephone services, both landline<sup>131</sup> and cellular,<sup>132</sup> have been found to be necessities. The loss of utilities such as electrical services, as discussed above in *Ross*, have been held to be a necessity.<sup>133</sup> Another instance in which a necessity might be found is where a "person [is] trying to check out of a hotel in a foreign country."<sup>134</sup>

While there are many categories in which plaintiffs have succeeded in arguing the doctrine is inapplicable because of necessity, there are also numerous cases in which plaintiffs have failed on such grounds. One very common ground is in arguing that cable television is a necessity.<sup>135</sup> To date there has only been one decision that has found "that the voluntary-payment rule did not apply because late fees were not paid voluntarily when customers faced the 'duress' of losing their cable television service."<sup>136</sup> It has also been found that the "inability to use a discount coupon"<sup>137</sup> and "potential disappointment" of the plaintiff's child if prohibited from attending an amusement park" were not necessities for purposes of duress.<sup>138</sup>

#### B. Payment Made Under Protest

Perhaps the most confusing area of voluntary payment doctrine jurisprudence is whether a payment made under protest preserves the would-be plaintiff's right to later seek recovery of the payment. Clearly, this question is of the utmost importance when advising a client who is faced with a request for payment. Sadly, despite the great importance of

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129. *Id.* (citing *Arra v. First State Bank & Trust Co.*, 621 N.E.2d 128, 132 (Ill. App. Ct. 1993)).

130. *Id.* (citing *Geary v. Dominick's Finer Foods, Inc.*, 544 N.E.2d 344, 348-53 (Ill. 1989)).

131. *Id.* (citing *Getto v. City of Chicago*, 426 N.E.2d 844, 850 (Ill. 1981)).

132. *Ikechi v. Verizon Wireless*, Civil No.: 10-cv-4554 (JNE/SER), 2011 U.S. Dist. LEXIS 57016, at \*24-25 (D. Minn. Apr. 7, 2011) (claim dismissed on other grounds). *But cf.* *Dreyfus v. Ameritech Mobile Commc'ns, Inc.*, 700 N.E.2d 162, 167 (Ill. App. Ct. 1998) (holding that cellular service is not a necessity). Given that *Ikechi* is much more recent and the increased prevalence of cellular phone service, it is much more likely that a modern court would find that cellular phone service is a necessity.

133. *Randazzo*, 262 F.3d at 669 n.1 (citing *Ross v. City of Geneva*, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976)).

134. *Shaw v. Marriott Int'l, Inc.*, 474 F. Supp. 2d 141, 151 (D.D.C. 2010) (finding decision of this issue at the dismissal stage to be premature), *rev'd in part on other grounds*, 605 F.3d 1039 (D.C. Cir. 2010).

135. *See, e.g.*, *BMG Direct Mktg. v. Peake*, 178 S.W.3d 763, 772 (Tex. 2005); *Horne v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 628 (S.D. Miss. 1999); *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1332-33 (Ill. App. Ct. 1995).

136. *BMG Direct Mktg.*, 178 S.W.3d at 772 (citing *Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 890-93 (Ind. 2004)).

137. *Randazzo*, 262 F.3d at 669 n.1 (citing *Lusinski v. Dominick's Finer Foods, Inc.*, 483 N.E.2d 587, 591 (Ill. App. Ct. 1985)).

138. *Id.* (citing *Isberian v. Vill. of Gurnee*, 452 N.E.2d 10, 14 (Ill. App. Ct. 1983)).

clarity on this issue, authority is split as to whether protestation is sufficient to make the payment involuntary.

Numerous decisions have held that payment under protest or with reservation of rights preserves a later claim for repayment.<sup>139</sup> In *Bishop v. Bishop*, the Arkansas Court of Appeals found that part of the payments made by the plaintiff were not voluntary because they were paid under protest.<sup>140</sup> In *Putnam*, the Supreme Court of Wisconsin stated:

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. When a payee has been given that notice, the funds received can be secured for future use until the dispute is settled.<sup>141</sup>

However, this position is not universally shared. A recent Supreme Court of Missouri recitation of the voluntary payment doctrine indicated that payment under protest is not sufficient to preserve the right to later contest the payment.

The voluntary payment doctrine “is well established, both in England and in this country, [and the doctrine provides] that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, *and under protest*.”<sup>142</sup>

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139. Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1423 n.11 (2009). A handful of cases hold that a reservation of rights avoids the bar of the voluntary payment doctrine. See *Avianca, Inc. v. Corriea*, Civ. A. No. 85-3277 (RCL), 1992 WL 93128, at \*7 (D.D.C. April 13, 1992) (“The voluntary payment doctrine does not generally apply, however, when a party has expressly reserved a right to take some legal action or when the party has paid under protest.”); *Cnty. Convalescent Ctr., Inc., v. First Interstate Mortg. Co.*, 537 N.E.2d 1162, 1164 (Ill. App. Ct. 1989) (“Since plaintiff paid the 30 days’ interest ‘under protest,’ plaintiff is not barred from recovery under the voluntary-payment doctrine.”). A few other cases state in dicta that a debtor could have reserved his rights. *Randazzo*, 262 F.3d at 671 (admitting that Illinois recognizes protest as particularly good evidence of duress, but that the appellee’s protest was not an assertion of a legal right but an appeal to the appellant’s business judgment); *Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677, 685-86 (10th Cir. 1991); *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959); *Putnam v. Time Warner Cable of Se. Wis., L.P.*, 633 N.W.2d 254, 263 (Wis. Ct. App. 2001) (“Even if the late fees were improper—either unreasonable in amount or unlawful, in full, under state or federal regulations—the customers paid without protest, and Time Warner relied on those payments.”), *aff’d in part, rev’d in part*, 649 N.W.2d 626 (Wis. 2002).
140. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 783 (discussing *Bishop v. Bishop*, 250 S.W.3d 570, 573 (Ark. Ct. App. 2007)).
141. *Putnam*, 649 N.W.2d at 636; see also *Total Wall, Inc. v. Wall Solutions Supply, LLC*, 09-cv-404-wmc, 2010 U.S. Dist. LEXIS 62283, at \*6-7 (W.D. Wis. June 23, 2010) (favorably quoting *Putnam*).
142. *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721, 725 (Mo. 2009) (en banc) (emphasis added) (quoting *Am. Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812 (Mo. App. Ct. 1969)); see also *Irving v. Cnty. of St. Louis*, 33 Mo. 575 (Mo. 1863).

At least one commentator has designated this view as the “traditional rule.”<sup>143</sup> Many older cases treat protest as evidence of duress, but not as itself preserving a right to seek repayment.<sup>144</sup>

Traditionally, payment under protest may not have been sufficient to preserve a subsequent suit for repayment, but the modern trend seems to be to allow for recovery of a payment made under protest. The Restatement (Third) of Restitution and Unjust Enrichment, released in 2011, weighs in on the topic.

(1) If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the disputed obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient’s contractual entitlement.

(2) The claim described in subsection (1) is available only to a party acting in good faith in the reasonable protection of its own interests. It is not available where there has been an accord and satisfaction, or where a performance with reservation of rights is inadequate to discharge the claimant’s obligation to the recipient.<sup>145</sup>

The Restatement (Third) contends that this “common-sense solution” acts to promote justice and efficiency.<sup>146</sup> Given the authoritative weight of the Restatements, it is highly likely that the modern trend may be to permit a payment under protest as a preservation of right to seek repayment. As a practical matter, it is of the utmost importance to determine your state’s approach to this rule before advising a client on making payment.

Even in jurisdictions where payment under protest is not sufficient to preserve the right to repayment, a payor may still be able to make payment

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143. Gergen, *supra* note 139, at 1423. Gergen noted:

Clear statements that a reservation of rights does not avoid the voluntary payment doctrine may be found in *Rowe v. Union Central Life Insurance Co.*, 12 So. 2d 431, 433-34 (Miss. 1943), and Comment Note, Relaxation of Common-Law Rule Regarding Recovery of Voluntary Payment, 75 A.L.R. 658, 658 (1931), which states that a payment may not be recovered “though the payer makes the payment with an express reservation of his right to litigate the claim.” The rule is codified in Georgia. Ga. Code Ann. § 13-1-13 (1982).

*Id.* at 1423 n.111.

144. *See id.*; *see also* *Ignatovig v. Prudential Ins. Co.*, 16 F. Supp. 764, 764 (D. Pa. 1935) (“The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intent to claim the money back.”).

145. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 35 (2011); *see also* *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 744 (Neb. 2011) (citing favorably to RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 35(1)).

146. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 35 cmt. a.

and preserve the right to repayment. If both the payor and the recipient “agree[ ] that the payment is conditional upon the validity of the [recipient’s] claim[,]” then the payor will not be barred from subsequent litigation seeking repayment.<sup>147</sup>

### C. Public Policy/Equity

If a payor is unable to challenge application of the doctrine on the basis of the payment not having been voluntary, he may still avail himself of arguments of equity or public policy. Recall that the New York Code grants a judge the discretion to allow a claim to proceed where money was paid due to a mistake of law.<sup>148</sup> That discretion is principally one of equitable authority to which a judge is not bound.<sup>149</sup>

Allowing for repayment of money voluntarily paid on public policy grounds is far from a new concept. As such, it has seen specific carve-outs and enunciations as to what constitutes public policy against application of the doctrine. One such enunciation is from the Supreme Court of North Dakota, which held that it would be against public policy to apply the doctrine where the money was paid to public officers from public funds.<sup>150</sup>

In a more modern trend, courts have begun to find that the doctrine is inapplicable to cases where the payment was demanded in violation of the defined public policy of a statute. In *Pratt v. Smart Corp.*, the Tennessee Court of Appeals held, “[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.”<sup>151</sup> In *Helms v. Consumerinfo.com, Inc.*, Judge Hopkins of the Northern District of Alabama found the doctrine inapplicable to a plaintiff’s

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147. Gergen, *supra* note 139, at 1423 n.111 (quoting RESTATEMENT (FIRST) OF RESTITUTION § 45 cmt. e (1937)); *see also* Prenalta Corp. v. Colo. Interstate Gas Co., 944 F.2d 677, 685-86 (10th Cir. 1991).

148. N.Y. C.P.L.R. 3005 (CONSOL. 2012).

149. *See* Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc., 499 N.Y.S.2d 435, 439 (N.Y. App. Div. 1986).

150. *In re Peschel*, 4 N.W.2d 194, 199 (N.D. 1942).

151. *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997) (citing *Newton v. Cox*, 878 S.W.2d 105, 108 (Tenn. 1994)) (holding “that a medical malpractice client could recover an excessive fee that he had already remitted but which was in derogation of the public policy behind a specific statute”); *see also* *Jackson v. Novastar Mortg., Inc.*, 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) (holding the voluntary payment doctrine inapplicable because application would contradict the defined public policy against racial discrimination found in 42 U.S.C. §§ 1981 & 1982); *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335, 339-40 (Mo. 2007) (en banc) (doctrine inapplicable to payments made for services in the course of the unauthorized practice of law); *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 810 (Ill. App. Ct. 2007) (holding that Illinois, like Tennessee, “has an interest in transactions that violate ‘statutorily-defined public policy,’” and that “[t]he effect of such transgressive acts, generally speaking, is that the voluntary payment rule will not be applicable”).

claims under the Credit Repair Organizations Act<sup>152</sup> because to do otherwise “would totally undermine the statute and its purpose.”<sup>153</sup> This trend has led a handful of courts to hold that the voluntary payment doctrine does not apply in cases charging a violation of a consumer protection statute.

#### D. The Doctrine is Inapplicable Against Consumer Protection Statutes

The single biggest development in voluntary payment doctrine jurisprudence in decades has been the determination by a handful of courts that the voluntary payment doctrine is inapplicable to bar claims for repayment predicated upon the violation of a consumer protection statute. To date, only five courts, covering four states, have explicitly adopted this position, with a sixth court having expressed support for the position without adopting it.

In March 2007, Judge J. Phil Gilbert of the Southern District of Illinois first cast doubt on the applicability of the doctrine to a claim arising under an Illinois consumer protection statute.<sup>154</sup> In his order in *Brown v. SBC Communications, Inc.*, Judge Gilbert declined to dismiss the plaintiffs’ claims<sup>155</sup> for the repayment of money not owed for procedural reasons.<sup>156</sup> However, he also added a footnote, stating:

The Court also expresses some skepticism about the applicability of the voluntary payment doctrine to Brown’s claim under the [Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA)]. The ICFA is of course remedial legislation that is construed broadly to effect its purpose, namely, to eradicate all forms of deceptive and unfair business practices and to grant appropriate remedies to defrauded consumers.<sup>157</sup>

Because Judge Gilbert was able to find for the plaintiffs on other grounds, he was not required to determine whether the doctrine was applicable to remedial legislation such as the ICFA. This issue remains undecided in the Seventh Circuit.

In just over two months after Judge Gilbert’s order in *Brown*, the Supreme Court of Washington managed to completely rewrite the future of

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152. 15 U.S.C. §§ 1679-1679j (2012).

153. Helms v. Consumerinfo.com, Inc., 236 F.R.D. 561, 565 (N.D. Ala. 2005).

154. Brown v. SBC Commc’ns, Inc., No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, at \*29 n.3 (S.D. Ill. Mar. 1, 2007).

155. The case was filed as a purported class action with Brown as the only named plaintiff.

156. *Brown*, 2007 U.S. Dist. LEXIS 14790, at \*29.

157. *Id.* at \*29 n.3.

the voluntary payment doctrine with three short paragraphs in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*<sup>158</sup>

Indoor Billboard questions whether an affirmative defense that is ordinarily asserted only in a contract context can be applied to a [Consumer Protection Act (CPA)] claim at all. . . .

\* \* \*

Indoor Billboard is correct that Washington courts have generally applied the voluntary payment doctrine only in the contract context. . . . One Washington case from the Court of Appeals considered applying the doctrine in a CPA context, although it did not reach the issue because it decided the defendant did not engage in an unfair or deceptive practice.

We agree with Indoor Billboard that the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.<sup>159</sup>

The *Indoor Billboard* decision was the first case to explicitly hold that the doctrine is not applicable to bar claims under a consumer protection statute. The specific rationale—that the statute is to be liberally construed—is a premise that is widely applicable among state consumer protection statutes.<sup>160</sup> This decision was applied only a few months later in an order from the U.S. District Court for the Western District of Washington in support of a plaintiff's contentions.<sup>161</sup>

Despite the monumental change that was the holding in *Indoor Billboard*, its impact was far from immediate. With the exception of the Washington District Court order that soon followed, it was not until August 2009 that the holding would expand beyond Washington. In the case of *Huch v. Charter Communications, Inc.*,<sup>162</sup> the Supreme Court of Missouri

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158. 170 P.3d 10, 23 (Wash. 2007).

159. *Id.* (citing *Robinson v. Avis Rent-A-Car Sys., Inc.*, 22 P.3d 818, 828 (Wash. Ct. App. 2001)).

160. *See, e.g.*, IND. CODE § 24-5-0.5-1 (2004) (providing that because the statutes contained within Indiana's Deceptive Consumer Sales Act serve to protect consumers, they shall be liberally construed); *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 461 (Tex. App. 1990) (quoting TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)) ("Section 17.44 of the [Deceptive Trade Practices-Consumer Protection Act (DTPA)] . . . provides that the DTPA 'shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.'").

161. *See Riensche v. Cingular Wireless LLC*, No. C06-1325Z, 2007 U.S. Dist. LEXIS 83921, at \*29-31 (W.D. Wash. Nov. 9, 2007). District Judge Thomas S. Zilly's discussion of the doctrine in this order is marvelous and a valuable read for anyone charged with drafting a decision based on the doctrine.

162. 290 S.W.3d 721 (Mo. 2009) (en banc).

weighed in on the interplay between the voluntary payment doctrine and consumer protection statutes. The court stated the issue before it as:

Plaintiffs' appeal requires this Court to determine whether the voluntary payment doctrine is a viable affirmative defense to a claim for monetary damages and injunctive relief for a violation of the merchandising practices act. The act's fundamental purpose is the "protection of consumers . . . ." <sup>163</sup>

The court, oddly making no citation to *Indoor Billboard*,<sup>164</sup> held, "In light of the legislative purpose of the merchandising practices act, the voluntary payment doctrine is not available as a defense to a violation of the act."<sup>165</sup>

Unlike *Indoor Billboard*, it did not take long after *Huch* before the issue was again before a court. On this occasion, the issue was before Judge Larry R. Hicks of the District of Nevada.<sup>166</sup> In deciding the issue before him—whether the doctrine could bar a claim under the Nevada Deceptive Trade Practices Act<sup>167</sup>—Judge Hicks looked to both *Indoor Billboard* and *Huch*. He also looked to cases that barred application of the doctrine where it was found to be in violation of public policy.<sup>168</sup> Judge Hicks found that there was support for the proposition that the doctrine does apply even in the case of a consumer protection statute.<sup>169</sup> Nevertheless, Judge Hicks concluded that the reasoning of *Huch* was persuasive and found that as a matter of law the doctrine could not be used as a defense to violations of the Nevada Deceptive Trade Practices Act.<sup>170</sup>

On February 24, 2012, in a decision that quickly received a lot of attention,<sup>171</sup> the Supreme Court of Wisconsin held that the voluntary

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163. *Id.* at 724.

164. This is particularly peculiar when given the fact that the appellate court specifically discussed and declined to apply *Indoor Billboard*. *Huch v. Charter Commc'ns, Inc.*, No. ED89926, 2008 Mo. App. LEXIS 531, at \*15-17 (Mo. Ct. App. Apr. 15, 2008).

165. *Huch*, 290 S.W.3d at 727.

166. *Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218 (D. Nev. 2010).

167. NEV. REV. STAT. §§ 598.005–598.992 (2011).

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169. *Sobel*, 698 F. Supp. 2d at 1223. In contrast, other courts have held that the voluntary payment doctrine applies to bar statutory fraud and consumer protection claims. *See Huch*, 2008 Mo. App. LEXIS 531, at \*17-24 (Mo. Ct. App. April 15, 2008) (summarizing cases); *see also* Putnam v. Time Warner Cable of Se. Wis., 649 N.W.2d 626, 637 (Wis. 2002) (voluntary payment doctrine barred all claims for monetary damages, including claim based on violation of the Wisconsin Trade Practice Act); *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1334 n.8 (Ill. App. Ct. 1995) ("The voluntary payment doctrine seemingly applies to any cause of action which seeks to recover a payment made under a claim of right whether that claim is premised on a contractual relationship; a fraudulent representation; [or] a statutory obligation . . .").

170. *Sobel*, 698 F. Supp. 2d at 1224.

171. *See, e.g.*, Joe Forward, *Voluntary payment doctrine is not a viable defense to deceptive telecommunications billing*, STATE BAR OF WIS. (Feb. 24, 2012), <http://www.wisbar.org/AM/Template.cfm?Section=News&CONTENTID=109304&TEMPLATE=/CM/ContentDisplay.cfm>.

payment doctrine was not a viable defense to Wisconsin Statute section 100.207.<sup>172</sup> In the case, *MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc.*, the court found that the conflict between allowing the doctrine to apply to the statute and “the statute’s manifest purpose . . . leaves no doubt that the legislature intended that the common law defense should not be applied to bar claims under the statute.”<sup>173</sup> In arriving at that conclusion, the court specifically cited to *Indoor Billboard, Huch, and Sobel* for support.<sup>174</sup> The only opinion cited by the Court in opposition was *Lady Di’s, Inc. v. Enhanced Services Billing, Inc.*, which did not directly address application of the doctrine in light of *Indoor Billboard, Huch, and Sobel*.<sup>175</sup>

#### E. The Procedural Juncture is Premature

Another viable approach to defend against application of the doctrine is to contend that the issue of whether payment was voluntary is an issue of fact to be decided by a jury. While this approach has often succeeded, there is no shortage of cases in which the court has found in favor of defendant on the issue of voluntary payment at the dismissal or summary judgment stages.<sup>176</sup> Nevertheless, where it is specifically contested that resolution of the voluntary payment issue is premature, plaintiffs have often been able to survive a dispositive motion.

In *Brown v. SBC Communications, Inc.*, Judge Gilbert of the Southern District of Illinois found that a motion to dismiss is not an appropriate juncture in which to adjudicate the merits of the doctrine.<sup>177</sup> Judge Gilbert wrote:

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172. *MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc.*, 809 N.W.2d 857, 873 (Wis. 2012).

173. *Id.* at 859.

174. *Id.* at 872.

175. No. 1:09-CV-0340-SEB-DML, 2010 U.S. Dist. LEXIS 121906 (S.D. Ind., Nov. 16, 2010), *aff’d on other grounds*, 654 F.3d 728 (7th Cir. 2011). The author of this article is intimately familiar with this case, as he was a law clerk for the firm representing the plaintiff during a large portion of the proceedings and conducted much of the research for the motion for class certification and response to the defendants’ motion for summary judgment, which were determined in the cited order as well as the appeal to the Seventh Circuit. Because the Seventh Circuit found for defendants on other grounds it declined to address the voluntary payment doctrine issues. *See Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728, 738 n.6 (7th Cir. 2011). It is important to note that the argument about the inapplicability of the doctrine to consumer protection statutes was placed before the appellate court by the plaintiff’s brief, which included citations to *Huch* and *Sobel*. Brief and Required Short Appendix of Plaintiff-Appellant, *Lady Di’s, Inc.* at 29, *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728 (7th Cir. 2011) (No. 10-3903). Nevertheless, the court declined to weigh in on this issue.

176. *See, e.g.,* *Horne v. Time Warner Operations, Inc.*, 119 F. Supp. 2d 624, 631 (S.D. Miss. 1999) (motion to dismiss); *Spivey v. Adaptive Mktg., LLC*, 660 F. Supp. 2d 940, 953 (S.D. Ill. 2009), *aff’d* 622 F.3d 816 (7th Cir. 2010) (motion for summary judgment).

177. No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, at \*28-29 (S.D. Ill. Mar. 1, 2007).

In the Court's view, the applicability of the various exceptions to the voluntary payment doctrine is not an issue susceptible of resolution on the pleadings. . . . At this juncture it is sufficient that, under some set of facts consistent with the allegations of Brown's complaint, he could be entitled to relief on his claims.<sup>178</sup>

Judge Kessler of the District Court for the District of Columbia held that, because plaintiffs contended that the payments were made under duress and "[w]hether the duress exception applies . . . 'is generally [a question] of fact, to be judged in light of all circumstances surrounding a given transaction[,] the doctrine could not be applied in a motion to dismiss context."<sup>179</sup> Similarly, Chief Judge Wilson of the Western District of Virginia held that application of the doctrine on a motion to dismiss was premature as "it [wa]s not clear from the face of the complaint that . . . plaintiffs paid [a] franchise fee voluntarily with a full knowledge of the facts . . . ."<sup>180</sup>

In addition to surviving a motion to dismiss, a plaintiff may be able to survive a motion for summary judgment on the grounds that "[w]hether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact."<sup>181</sup> In a multi-district litigation proceeding Judge Lungstrum of the District of Kansas held that "[defendant's] reliance on the voluntary payment doctrine [was] without merit" at the summary judgment procedural juncture.<sup>182</sup>

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178. *Id.* (citation omitted) (citing *Crain v. Lucent Techs., Inc.*, 739 N.E.2d 639, 644 (Ill. App. Ct. 2000)). Judge Gilbert noted:

[U]nder Illinois law the question of the applicability of the voluntary payment doctrine and exceptions thereto is essentially factual and that "[t]he resolution of this issue will require the presentation of evidence so that the court or fact finder can determine whether a payment was voluntarily made without protest and without fraud or mistake."

*Id.* at \*29.

179. *Shaw v. Marriott Int'l, Inc.*, 474 F. Supp. 2d 141, 151 (D.D.C. 2010) (quoting *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 669 n.1 (7th Cir. 2001)), *rev'd in part on other grounds*, 605 F.3d 1039 (D.C. Cir. 2010).

180. *Bova v. Cox Commc'ns, Inc.*, No. Civ.A. 7:01CV00090, 2002 U.S. Dist. LEXIS 4084, at \*10-11 (W.D. Va. March 12, 2002).

181. *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 745 (Neb. 2011) (appeal after determination at trial); *see also Raintree Homes, Inc. v. Village of Long Grove*, 906 N.E.2d 751, 771 (Ill. Ct. App. 2009); *Crown Life Ins. Co. v. Smith*, 657 So. 2d 821, 824 (Ala. 1994); *Speckert v. Bunker Hill Ariz. Mining Co.*, 106 P.2d 602, 611 (Wash. 1940); *Kosmicki v. State*, 652 N.W.2d 883, 893 (Neb. 2002); *Lustgarten v. Jones*, 371 N.W.2d 668, 672 (Neb. 1985).

182. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727, at \*111 (D. Kan. June 30, 2008).

## F. Misc.

In addition to approaches such as the traditional defenses, duress, public policy, and procedural timing, additional exceptions to application have been carved out that are not so easily classified. One such exception is that the doctrine is inapplicable to conventional subrogation.<sup>183</sup> This is based in the concept that “[e]ven if the decision to pay a claim is legally or economically questionable, the ‘desire to preserve customer relations and avoid a complex and costly coverage litigation is . . . sufficient to prevent the [insurer] from being considered a mere volunteer.’”<sup>184</sup> Additionally, courts have found that to hold otherwise would contradict public policy by incentivizing insurers to withhold prompt payment of claims.<sup>185</sup>

One approach that did not succeed was an attempt to contend that the government is exempt from application of the doctrine.<sup>186</sup> In *United States v. Hadden*, the federal government sought repayment of funds “paid by mistake to a war contractor . . . .”<sup>187</sup> The government contended that the doctrine was inapplicable because “public funds have always been zealously guarded, and that there is a long established rule that such funds wrongfully, erroneously, or illegally paid may be recovered from the person to whom the payments were made.”<sup>188</sup> The Sixth Circuit found that the act under which the funds were paid did not provide for a right to restitution, and that “[t]he controversy [wa]s, therefore, governed by the general law of restitution . . . .”<sup>189</sup> Looking to the general law of restitution, the court found no exception to the doctrine for payments made by the government.<sup>190</sup>

## IV. CONCLUSION

The doctrine has seen a tremendous amount of growth and change in the 220 years since Lord Ellenborough first provided its foundation. Whether your state recognizes a strong exercise of the doctrine or is one that has drastically limited it as a tool for defendants, it is vitally important to understand the doctrine so as to guide your clients’ cases through the treacherous waters of litigation.

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183. *Cont'l Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 970-71 (N.D. Ohio 2006) (citing *Commercial Std. Ins. Co. v. Am. Emp'rs, Ins. Co.*, 209 F.2d 60, 65 (6th Cir. 1954)); *see also* *Jorge v. Travelers Indem. Co.*, 947 F.Supp. 150, 156 (D. N.J. 1996).

184. *Cont'l Cas. Co.*, 418 F. Supp. 2d at 971 (quoting *Jorge*, 947 F. Supp. at 155 n.7).

185. *Id.* (citing *Jorge*, 947 F. Supp. at 156).

186. *United States v. Hadden*, 192 F.2d 327, 330 (6th Cir. 1951).

187. *Id.* at 327.

188. *Id.* at 328.

189. *Id.* at 331.

190. *Id.*

**Table 1 -- Index of Cases by Jurisdiction**

<b>Jurisdiction</b>	<b>Citation</b>
Supreme Court of the United States	United States v. State Tax Comm'n of Miss., 412 U.S. 363, 368 n. 11 (1973); Bank of United States v. Daniel, 37 U.S. 32, 55-56 (1838).
First Circuit	Ayer v. White, 62 F.2d 921, 923 (1st Cir. 1933) (applying Massachusetts law).
Second Circuit	Spagnola v. Chubb Corp., 574 F.3d 64, 72-74 (2d Cir. 2009) (applying New York law).
Third Circuit	Essex Ins. Co. v. RMJC, Inc., 306 F. App'x 749, 754 (3d Cir. 2009) (applying Pennsylvania law).
Fourth Circuit	United States v. Wolff ( <i>In re</i> FirstPay, Inc.), 391 F. App'x 259, 264 n.3 (4th Cir. 2010) (applying Maryland law); Johnson v. Sprint Solutions, Inc., 357 F. App'x 561, 563 n.1 (4th Cir. 2009) (applying North Carolina law).
Fifth Circuit	Progressive Gulf Ins. Co. v. Maria Palacios Estate, 394 F. App'x 127, 129-30 (5th Cir. 2010) (applying Mississippi law); Burnsed Oil Co., Inc. v. Grynberg, 320 F. App'x 222, 231-32 (5th Cir. 2009) (same); Sanders v. Wash. Mut. Home Loans, Inc., 248 F. App'x 514, 516 (5th Cir. 2007) (applying Louisiana law); Liberty Mut. Fire Ins. Co. v. Fireman's Fund Ins. Co., 235 F. App'x 213, 217 (5th Cir. 2007) (applying Mississippi law); Genesis Ins. Co. v. Wausau Ins. Cos., 343 F.3d 733, 736 (5th Cir. 2003) (same); Chris Albritton Constr. Co. v. Pitney Bowes Inc., 304 F.3d 527, 531 (5th Cir. 2002) (same); Prudential Ins. Co. v. Clark, 456 F.2d 932, 935 (5th Cir. 1972) (applying Florida law).
Sixth Circuit	Salling v. Budget Rent-A-Car Sys., 672 F.3d 442, 444-45 (6th Cir. 2012) (applying Ohio law); Bryant v. Comm'r, No. 09-1957, 2010 U.S. App. LEXIS 21094, at *6-7 (6th Cir. Oct. 12, 2010) (applying federal law); United States v. Hadden, 192 F.2d 327 (6th Cir. 1951) (same).
Seventh Circuit	Spivey v. Adaptive Mktg. LLC, 622 F.3d 816, 822-23 (7th Cir. 2010) (O'Connor, Assoc. J. (Ret.)) (applying Illinois law); CSX Transp., Inc. v. Appalachian Railcar Servs., 509 F.3d

	384, 387 (7th Cir. 2007) (applying Indiana law); <i>Randazzo v. Harris Bank Palatine, N.A.</i> , 262 F.3d 663, 667 (7th Cir. 2001) (applying Illinois law).
Eighth Circuit	<i>Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P.</i> , 668 F.3d 1019, 1030 (8th Cir. 2012) (applying Minnesota law); <i>Curtis Lumber Co. v. La. Pac. Corp.</i> , 618 F.3d 762, 782 (8th Cir. 2010) (applying Arkansas law); <i>Pure Oil Co. v. Tucker</i> , 164 F.2d 945, 948 (8th Cir. 1947) (applying Iowa law).
Ninth Circuit	<i>Kern Oil &amp; Ref. Co. v. Tenneco Oil Co.</i> , 792 F.2d 1380, 1386 (9th Cir. 1986) (applying Texas law).
Tenth Circuit	<i>Prenalta Corp. v. Colo. Interstate Gas Co.</i> , 944 F.2d 677, 685 (10th Cir. 1991) (applying Wyoming law).
Eleventh Circuit	<i>Anthony v. Am. Gen. Fin. Servs.</i> , 626 F.3d 1318, 1322 (11th Cir. 2010) (applying Georgia law).
D.C. Circuit	<i>Nat'l Assoc. of Broadcasters v. FCC</i> , 554 F.2d 1118, 1128 (D.C. Cir. 1976); <i>Shaw v. Marriott Int'l, Inc.</i> , 474 F. Supp. 2d 141, 151 (D.D.C. 2007), <i>rev'd in part on other grounds</i> , 605 F.3d 1039 (D.C. Cir. 2010).
Federal Circuit	<i>Getty Oil Co. v. United States</i> , 767 F.2d 886, 889 (Fed. Cir. 1985).
Federal Claims/Claims Court	<i>Shang v. United States</i> , 36 Ct. Cl. 466 (1901).
Courts of Customs Appeals	<i>United States v. McCoy</i> , 5 Ct. Cust. 264, 265 (Ct. Cust. App. 1914).
Alabama	<i>U-Haul Co. of Ala., Inc. v. Johnson</i> , 893 So. 2d 307, 311-13 (Ala. 2004); <i>Stone v. Mellon Mortg. Co.</i> , 771 So. 2d 451, 458-59 (Ala. 2000); <i>Mount Airy Ins. Co. v. Doe Law Firm</i> , 668 So. 2d 534 (Ala. 1995); <i>Crown Life Ins. Co. v. Smith</i> , 657 So. 2d 821 (Ala. 1994).
Alaska	<i>Rausch v. Devine</i> , 80 P.3d 733, 744 (Alaska 2003) (applying Iowa law); <i>ERA Aviation v. Campbell</i> , 915 P.2d 606, 609-10 (Alaska 1996) (applying New Jersey law); <i>State v. Stein</i> , 806 P.2d 347 (Alaska Ct. App. 1991); <i>Principal Mut. Life Ins. Co. v. Division of Ins., Dep't of</i>

	Commerce & Econ. Dev., 780 P.2d 1023, 1030 (Alaska 1989).
Arizona	Moody v. Lloyd's of London, 152 P.2d 951, 953 (1944); Ali v. Sitts, 404 P.2d 100, 104-105 (Ariz. Ct. App. 1965); CLN Props. v. Republic Servs., No. CV-09-1428-PHX-DGC, 2010 U.S. Dist. LEXIS 135953, at *28-29 (D. Ariz. Dec. 13, 2010); Brown & Bain, P.A. v. O'Quinn, No. 03-0923-PHX-ROS, 2006 U.S. Dist. LEXIS 7016, at *18-19 (D. Ariz. Feb. 22, 2006).
Arkansas	TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc., 946 S.W.2d 930, 932 (Ark. 1997).
California	Am. Oil Serv. v. Hope Oil Co., 15 Cal. Rptr. 209, 213 (Cal. Ct. App. 1961); Fradis v. Savebig.com, No. CV 11-07275 GAF (JCx), 2011 U.S. Dist. LEXIS 154915 (C.D. Cal. Dec. 2, 2011); Parino v. BidRack, Inc., 838 F. Supp. 2d 900, 909 (N.D. Cal. 2011).
Colorado	Skyland Metro. Dist. v. Mt. West Enter., LLC, 184 P.3d 106, 127 (Colo. Ct. App. 2007).
Connecticut	Crittenden v. Royce, 124 A. 215, 216 (Conn. 1924); Trenwick Am. Reinsurance Corp. v. W.R. Berkley Corp., UWYX01CV094019148S, 2011 Conn. Super. LEXIS 806, at *62-63 (Conn. Super. Ct. April 1, 2011).
Delaware	Home Ins. Co. v. Honaker, 480 A.2d 652 (Del. 1984).
Florida	Ruiz v. Brink's Home Sec., Inc., 777 So. 2d 1062, 1064 (Fla. Dist. Ct. App. 2001) (quoting City of Miami v. Keton, 115 So. 2d 547, 551 (Fla. 1959)) (FLA. STAT. § 725.04, on its face, appears to have abrogated the voluntary payment doctrine, yet Ruiz was decided after the adoption of section 725.04 and fails to cite to or distinguish the statute).
Georgia	Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 460 (Ga. 2010) (citing GA. CODE ANN. § 13-1-13 (2012) (codifying the doctrine)).
Hawaii	Godoy v. County of Hawaii, 354 P.2d 78, 84-85 (Haw. 1960).
Idaho	Chinchurreta v. Evergreen Mgt., Inc., 790 P.2d 372, 374 (Idaho Ct. App. 1989); Neill v. Minn. Life Ins. Co., No. 10-144-S-REB, 2011 U.S.

	Dist. LEXIS 59652, at *24 (D. Idaho June 3, 2011).
Illinois	Raintree Homes v. Vill. of Long Grove, 906 N.E.2d 751 (Ill. App. Ct. 2009); Flournoy v. Ameritech, 814 N.E.2d 585 (Ill. App. Ct. 2004); Crain v. Lucent Techs., 739 N.E.2d 639 (Ill. App. Ct. 2000); Dreyfus v. Ameritech Mobile Commc'ns, Inc., 700 N.E.2d 162, 167 (Ill. App. Ct. 1998); Smith v. Prime Cable of Chicago, 658 N.E.2d 1325, 1332-33 (Ill. App. Ct. 1995); Illinois Graphics Co. v. Nickum, 639 N.E.2d 1282, 1292 (Ill. 1994); Ross v. City of Geneva, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976); Randazzo v. Harris Bank Palatine, N.A., 262 F.3d 663, 669 n.1 (7th Cir. 2001) (discussing Illinois law in great depth); Ergo v. Int'l Merch. Servs., 519 F. Supp. 2d 765 (N.D. Ill. 2007); Brown v. SBC Commc'ns, Inc., No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790 (S.D. Ill. March 1, 2007).
Indiana	Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 892 (Ind. 2004); Lady Di's, Inc. v. Enhanced Servs. Billing, Inc., No. 1:09-CV-0340-SEB-DML, 2010 U.S. Dist. LEXIS 121906 (S.D. Ind., Nov. 16, 2010), <i>aff'd on other grounds</i> , 654 F.3d 728 (7th Cir. 2011).
Iowa	Morgan v. Jasper County, 274 N.W. 310 (Iowa 1937)
Kansas	MacGregor v. Millar, 203 P.2d 137, 139 (Kan. 1949); <i>In re Universal Serv. Fund Tel. Billing Practices Litig.</i> , No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727 (D. Kan. June 30, 2008).
Kentucky	Lee v. Hanna, 70 S.W.2d 673, 674 (Ky. Ct. App. 1934).
Louisiana	Ken Lawler Builders, Inc. v. Delaney, 892 So. 2d 778, 780 (La. Ct. App. 2005).
Maine	State Trailer Sales, Inc. v. First Nat'l Bank, 186 A.2d 370, 373-75 (Me. 1962).
Maryland	Dua v. Comcast Cable of Md., Inc., 805 A.2d 1061, 1086 (Md. 2002) (rejecting defendant's voluntary payment doctrine defense).
Massachusetts	Blay v. Zipcar, Inc., 716 F. Supp. 2d 115, 124 (D. Mass. 2010) (describing the voluntary

	payment doctrine as “antiquated” under Massachusetts law, having received no recent validation by Massachusetts courts).
Michigan	<i>Beachlawn Bldg. Corp. v. City of St. Clair Shores</i> , 121 N.W.2d 427, 430 (Mich. 1963); <i>Pingree v. Mutual Gas Co.</i> , 65 N.W. 6 (Mich. 1895); <i>Tara Homes, Inc. v. Nash</i> , No. 252460, 2005 Mich. App. LEXIS 2084, at *5 (Mich. Ct. App. Aug. 25, 2005); <i>Durant v. ServiceMaster Co.</i> , 159 F. Supp. 2d 977, 981 (E.D. Mich. 2001).
Minnesota	<i>Thomas Peebles &amp; Co. v. Sherman</i> , 181 N.W. 715, 716 (Minn. 1921); <i>Joannin v. Ogilvie</i> , 52 N.W. 217, 217 (Minn. 1892); <i>Hanson v. Tele-Commc’ns, Inc.</i> , No. C7-00-534, 2000 Minn. App. LEXIS 1023, 2000 WL 1376533, at *3 (Minn. Ct. App. Sept. 26, 2000); <i>Ikechi v. Verizon Wireless</i> , Civil No.: 10-cv-4554 (JNE/SER), 2011 U.S. Dist. LEXIS 57016 (D. Minn. Apr. 7, 2011).
Mississippi	<i>McDaniel Bros. Constr. Co. v. Burk-Hallman Co.</i> , 175 So.2d 603, 605 (Miss. 1965); <i>Horne v. Time Warner Operations, Inc.</i> , 119 F. Supp. 2d 624, 628-31 (S.D. Miss. 1999); <i>Mobile Telecomm. Tech. Corp. v. Aetna Cas. &amp; Sur. Co.</i> , 962 F. Supp. 952, 955 (S.D. Miss. 1997).
Missouri	<i>Huch v. Charter Commc’ns, Inc.</i> , 290 S.W.3d 721 (Mo. 2009) (en banc); <i>Brewer v. Missouri Title Loans, Inc.</i> , 364 S.W.3d 486, 492 n.3 (Mo. 2012) (en banc).
Montana	<i>Humbird v. Arnet</i> , 44 P.2d 756, 763-64 (Mont. 1935); <i>Kennedy v. Conrad</i> , 9 P.2d 1075 (Mont. 1932) (applying doctrine in the context of payment on behalf of the debt of another).
Nebraska	<i>City of Scottsbluff v. Waste Connections of Neb., Inc.</i> , 809 N.W.2d 725 (Neb. 2011); <i>Kosmicki v. State</i> , 652 N.W.2d 883 (Neb. 2002); <i>Lustgarten v. Jones</i> , 371 N.W.2d 668 (Neb. 1985).
Nevada	<i>Randall v. Lyon Co.</i> , 14 P. 583, 584 (Nev. 1887); <i>Sobel v. Hertz Corp.</i> , 698 F. Supp. 2d 1218, 1222-24 (D. Nev. 2010).
New Hampshire	<i>Cheshire Oil Co. v. Springfield Realty Corp.</i> , 385 A.2d 835 (N.H. 1978).

New Jersey	<i>In re</i> N.J. State Bd. of Dentistry, 423 A.2d 640, 643 (N.J. 1980); Jorge v. Travelers Indem. Co., 947 F.Supp. 150 (D. N.J. 1996).
New Mexico	State <i>ex rel.</i> Callaway v. Axtell, 393 P.2d 451 (N.M. 1964).
New York	Dillon v. U-A Columbia Cablevision of Westchester, Inc., 790 N.E.2d 1155 (N.Y. 1993); Kerby McInery & Squire LLP v. Hall Charne Bruce & Olson, S.C., 790 N.Y.S.2d 84, 85 (N.Y. App. Div. 2004); Solomon v. Bell At. Corp., 777 N.Y.S.2d 50 (N.Y. App. Div. 2004); Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc., 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986); Samuel v. Time Warner, Inc., 809 N.Y.S.2d 408, 418 (N.Y. Sup. Ct. 2005); Fink v. Time Warner Cable, 810 F. Supp. 2d 633, 649 (S.D.N.Y. 2011).
North Carolina	Guerry v. Am. Trust Co., 68 S.E.2d 272, 274 (N.C. 1951); Shelton v. Duke Univ. Health Sys., Inc., No. COA05-1113, 2005 WL 6013159, at *5 (N.C. Sup. Ct. July 11, 2005).
North Dakota	<i>In re</i> Peschel, 4 N.W.2d 194, 199 (N.D. 1942); Chrysler Light & Power Co. v. City of Belfield, 224 N.W. 871 (N.D. 1929).
Ohio	State <i>ex rel.</i> Dickman v. Defenbacher, 86 N.E.2d 5, 7 (Ohio 1949); Cont'l Cas. Co. v. Fifth/Third Bank, 418 F. Supp. 2d 964, 970-971 (N.D. Ohio 2006).
Oklahoma	Hadley v. Farmers' Nat'l Bank, 257 P. 1101, 1103-04 (Okla. 1927); McWethy v. Telecomms., Inc., 988 P.2d 356, 357 (Okla. Civ. App. 1999).
Oregon	Davis v. Tyee Indus., Inc., 668 P.2d 1186 (Or. 1983).
Pennsylvania	Coregis Ins. Co. v. Law Offices of Carole F. Kafrisen, P.C., 140 F. Supp. 2d 461, 463 (E.D. Pa. 2001) (quoting Ochiuto v. Prudential Ins. Co., 52 A.2d 228, 230 (Pa. 1947)).
Rhode Island	Phillips v. McSoley, 54 A.2d 395, 397 (R.I. 1947) (noting defendant's proposition ordinarily sufficient to create a volunteer); Lyons v. Taylor, 160 A. 782, 784 (R.I. 1932); Nelson v. Swenson, 124 A. 468 (R.I. 1924).
South Carolina	Baker v. Allen, 66 S.E.2d 618 (S.C. 1951).

South Dakota	Siefkes v. Clark Title Co., 215 N.W.2d 648, 651 (S.D. 1974).
Tennessee	Pratt v. Smart Corp., 968 S.W.2d 868, 872 (Tenn. Ct. App. 1998); Jackson v. Novastar Mortg., Inc., 645 F. Supp. 2d 636 (W.D. Tenn. 2007).
Texas	BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 768 (Tex. 2005).
Utah	Flack v. Nat'l Bank of Commerce, 30 P. 746, 748-49 (Utah 1892); RMA Ventures v. SunAmerica Life Ins., No. 2:03-CV-740, 2007 U.S. Dist. LEXIS 86692, at *12-13 (D. Utah Nov. 26, 2007).
Vermont	Brookside Mem'l, Inc. v. Barre City, 702 A.2d 47 (Vt. 1997) (applying doctrine in the context of payments to a municipality).
Virginia	Williams v. Consolvo, 379 S.E.2d 333, 336 (Va. 1989); Bova v. Cox Commc'ns, Inc., No. Civ.A. 7:01CV00090, 2002 U.S. Dist. LEXIS 4084, at *10-11 (W.D. Va. March 12, 2002).
Washington	Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 170 P.3d 10, 23 (Wash. 2007) (en banc); Hawkinson v. Conniff, 334 P.2d 540, 544 (Wash. 1959); Speckert v. Bunker Hill Arizona Mining Co., 106 P.2d 602 (Wash. 1940); Riensche v. Cingular Wireless LLC, No. C06-1325Z, 2007 U.S. Dist. LEXIS 83921 (W.D. Wash. Nov. 9, 2007).
West Virginia	Standard Distrib., Inc. v. City of Charleston, 625 S.E.2d 305, 310 (W. Va. 2005).
Wisconsin	MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc., 809 N.W.2d 857 (Wis. 2012); Putnam v. Time Warner Cable of Se. Wis. P'ship, 649 N.W.2d 626 (Wis. 2002); Total Wall, Inc. v. Wall Solutions Supply, LLC, 09-cv-404-wmc, 2010 U.S. Dist. LEXIS 62283, at *6-7 (W.D. Wis. June 23, 2010).
Wyoming	Commercial Union Ins. Co. v. Postin, 610 P.2d 984, 986-992 (Wyo. 1980); Fulton v. Des Jardins, 227 P.2d 240, 245 (Wyo. 1951); Prenalta v. Colo. Interstate Gas Co., 944 F.2d 677, 685, 686 (10th Cir. 1991) (applying Wyoming law).

**Table 2 -- List of Defenses to the Doctrine with Sources**

<b>Defense to Application</b>	<b>Cases Discussing Defense</b>
Fraud	<p>Stone v. Mellon Mortg. Co., 771 So. 2d 451, 458-59 (Ala. 2000) (upholding summary judgment where plaintiff did not allege a misrepresentation in complaint).</p> <p>Flournoy v. Ameritech, 814 N.E.2d 585 (Ill. App. Ct. 2004) (reversing dismissal where claim for fraud pleaded).</p> <p>Horne v. Time Warner Operations, Inc., 119 F. Supp. 2d 624 (S.D. Miss. 1999) (dismissing case where plaintiffs failed to plead a claim for fraud with sufficient particularity).</p> <p>Fink v. Time Warner Cable, 810 F. Supp. 2d 633, 649 (S.D.N.Y. 2011) (lack of full disclosure).</p> <p>RMA Ventures v. SunAmerica Life Ins., No. 2:03-CV-740, 2007 U.S. Dist. LEXIS 86692 (D. Utah Nov. 26, 2007) (granting summary judgment where facts for fraud claim were insufficient).</p>
Mistake—Mistake of Fact	<p>Padrino v. BidRack, Inc., 838 F. Supp. 2d 900, 909 (N.D. Cal. 2011) (plaintiff was able to survive a motion to dismiss utilizing the mistake of fact defense).</p> <p><i>In re Universal Serv. Fund Tel. Billing Practices Litig.</i>, No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727, at *110-111 (D. Kan. June 30, 2008) (surviving summary judgment due to the fundamental nature of the claim).</p> <p>Horne v. Time Warner Operations, Inc., 119 F. Supp. 2d 624, 628-31 (S.D. Miss. 1999) (no mistake where plaintiffs “lacked sufficient knowledge to determine the validity of [a] late payment fee of how the amount of the fee was determined”).</p>

	<p>Ergo v. Int'l Merch. Servs., Inc., 519 F. Supp. 2d 765, 773-74 (N.D. Ill. 2007) (no mistake where “[d]efendant’s only argument against application of th[e] doctrine is the [ ] contention that they were not aware of the alleged overpayments until they examined payroll records during the discovery phase of this action”).</p> <p>Spivey v. Adaptive Mktg. LLC, 622 F.3d 816 (7th Cir. 2010) (no sufficient mistake of fact where the purported mistake of fact was that a husband believed the anomalous charges on his credit card statements had been incurred by his wife).</p> <p>Salling v. Budget Rent-A-Car Sys., 672 F.3d 442, 444-45 (6th Cir. 2012) (no mistake of fact where the plaintiff “paid the charge <i>in anticipation of filing suit</i>”).</p>
Mistake—Mistake of Law	<p>Gimbel Bros., Inc. v. Brooks Shopping Ctrs., Inc., 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986) (not abuse of discretion to find mistake of law where company “made the subject payments voluntarily, as a matter of convenience, without having made any effort to learn what its legal obligations were”).</p> <p>Durant v. ServiceMaster Co., 159 F. Supp. 2d 977, 981 n.2 (E.D. Mich. 2001) (“There appears to be authority suggesting that the doctrine of voluntary payment does not bar recovery even where the plaintiff has made a mistake of law.”).</p>
Mistake—Restatement (Third) Approach	<p>Time Warner Entm’t Co., L.P. v. Whiteman, 802 N.E.2d 886, 891-92 (Ind. 2004) (“A more appropriate statement of the voluntary-payment rule, therefore, is that money voluntarily paid <i>in the face of a recognized uncertainty as to the existence or extent of the payor’s obligation to the recipient</i> 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”).</p> <p>CSX Transp., Inc. v. Appalachian Railcar Servs., 509 F.3d 384, 387 (7th Cir. 2007) (“[T]he</p>

	voluntary-payment rule has no application to the payment of a claim that neither party regards as doubtful.”).
Duress—Generally	<i>Randazzo v. Harris Bank Palatine, N.A.</i> , 262 F.3d 663, 668-69 (7th Cir. 2001) (affirming defense verdict on summary judgment as barred by voluntary payment doctrine after conducting thorough analysis of law on duress).
Duress—Disastrous Effect to Business	<p><i>Best Buy Co. v. The Harlem-Irving Cos.</i>, 51 F. Supp. 2d 889, 898 (N.D. Ill. 1999) (disputed rent charges by business provided sufficient evidence of duress to survive summary judgment).</p> <p><i>Kanter &amp; Eisenberg v. Madison Assocs.</i>, 508 N.E.2d 1053, 1056-57 (Ill. 1987) (finding duress sufficient to survive summary judgment where plaintiffs disputed but paid rent instead of losing leasehold on property on which they had spent \$1 million in improvements).</p> <p><i>Ross v. City of Geneva</i>, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976) (finding duress where defendant was sole provider of electricity to plaintiff business and nonpayment would likely have led to termination of supply).</p> <p><i>Curtis Lumber Co. v. La. Pac. Corp.</i>, 618 F.3d 762, 782 (8th Cir. 2010) (rebates made under duress where owner new to the business made them out of fear of losing up to 75% of future business customers).</p> <p><i>Beachlawn Bldg. Corp. v. City of St. Clair Shores</i>, 121 N.W.2d 427, 430 (Mich. 1963) (finding duress where plaintiff would be “denied the right to continue its business unless it paid” building permit fees).</p> <p><i>City of Scottsbluff v. Waste Connections of Neb., Inc.</i>, 809 N.W.2d 725, 744 (Neb. 2011) (applying Restatement (Third) approach to duress and noting “duress can occur even if the defendant had a legal right to take a threatened action”).</p>

<p>Duress—Intermediary Party in Sale of Goods/Real Estate</p>	<p>Schlossberg v. E.L. Trendel &amp; Assocs., Inc., 380 N.E.2d 950, 951, 954 (Ill. App. Ct. 1978) (finding duress where buyer of land agreed to resell it to third party and, after tender of purchase price, seller demanded additional \$30,000).</p> <p>Pemberton v. Williams, 87 Ill. 15, 17-18 (1877) (allowing question of duress to advance to jury when buyer paid almost entire purchase price and contracted to resell and initial seller demanded higher price than agreed).</p> <p>Ball v. Vill. of Streamwood, 665 N.E.2d 311, 318 (Ill. App. Ct. 1996) (duress excused tax where homes were subject to contracts to sell to third parties).</p> <p>DeBruyn v. Elrod, 418 N.E.2d 413, 417 (Ill. 1981) (found duress where plaintiffs had choice of paying sheriff's fee or suffering his refusal to effect sale).</p> <p>Peterson v. O'Neill, 255 Ill. App. 400, 401-02 (1930) (finding duress where plaintiff contracted for resale and defendant made demand of payment for deed he had duty to deliver knowing the plaintiff had contracted for sale of the property).</p>
<p>Duress—Necessities</p>	<p>Arra v. First State Bank &amp; Trust Co., 621 N.E.2d 128, 132 (Ill. App. Ct. 1993) (finding risk of loss of home to be duress).</p> <p>Geary v. Dominick's Finer Foods, Inc., 544 N.E.2d 344, 348-53 (Ill. 1989) (finding feminine hygiene products to be necessity).</p> <p>Getto v. City of Chicago, 426 N.E.2d 844, 851 (Ill. 1981) (finding landline telephone to be necessity).</p> <p>Ikechi v. Verizon Wireless, Civil No.: 10-cv-4554 (JNE/SER), 2011 U.S. Dist. LEXIS 57016, at *24-25 (D. Minn. Apr. 7, 2011) (finding cellular telephone to be necessity).</p>

	<p>Dreyfus v. Ameritech Mobile Commc'ns, Inc., 700 N.E.2d 162, 167 (Ill. App. Ct. 1998) (holding that cellular service is not a necessity).</p> <p>Ross v. City of Geneva, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976) (electricity is a necessity).</p> <p>Shaw v. Marriott Int'l, Inc., 474 F. Supp. 2d 141, 151 (D.D.C. 2007), <i>rev'd in part on other grounds</i>, 605 F.3d 1039 (D.C. Cir. 2010) (ability to checkout of hotel in foreign country may be a necessity).</p> <p>BMG Direct Mktg. v. Peake, 178 S.W.3d 763, 772 (Tex. 2005) (holding cable TV not a necessity).</p> <p>Horne v. Time Warner Operations, Inc., 119 F. Supp. 2d 624, 628 (S.D. Miss. 1999) (holding cable TV not a necessity).</p> <p>Smith v. Prime Cable of Chicago, 658 N.E.2d 1325, 1332-33 (Ill. App. Ct. 1995) (holding cable TV not a necessity).</p> <p>Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 890-93 (Ind. 2004) (finding duress for potential loss of cable TV).</p> <p>Lusinski v. Dominick's Finer Foods, Inc., 483 N.E.2d 587, 591 (Ill. App. Ct. 1985) (inability to use discount coupon not duress).</p> <p>Isberian v. Vill. of Gurnee, 452 N.E.2d 10, 14 (Ill. App. Ct. 1983) (disappointment of child not necessity).</p>
Payment Under Protest	<p>Avianca, Inc. v. Corriea, Civ. A. No. 85-3277 (RCL), 1992 WL 93128, at *7 (D.D.C. April 13, 1992) ("The voluntary payment doctrine does not generally apply, however, when a party has expressly reserved a right to take some legal action or when the party has paid under protest.").</p>

	<p>Cnty. Convalescent Ctr. of Naperville, Inc., v. First Interstate Mortg. Co., 537 N.E.2d 1162, 1164 (Ill. App. Ct. 1989) (“[S]ince plaintiff paid the 30 days’ interest ‘under protest,’ plaintiff is not barred from recovery under the voluntary-payment doctrine.”).</p> <p>Randazzo v. Harris Bank Palatine, N.A., 262 F.3d 663, 670-71 (7th Cir. 2001) (Illinois recognizes protest as particularly good evidence of duress).</p> <p>Bishop v. Bishop, 250 S.W.3d 570, 573 (Ark. Ct. App. 2007) (finding payments were not voluntary where paid under protest).</p> <p>Putnam v. Time Warner Cable of Se. Wis. Ltd. P’ship, 649 N.W.2d 626, 636 (Wis. 2002) (can preserve right through protest).</p> <p>Huch v. Charter Commc’ns, Inc., 290 S.W.3d 721, 726 (Mo. 2009) (en banc) (dicta noting protest is not a defense).</p> <p>Ignatovig v. Prudential Ins. Co. of Am., 16 F. Supp. 764, 764 (M.D. Pa. 1935) (“The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intent to claim the money back.”).</p>
Public Policy/Equity	<p>Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc., 499 N.Y.S.2d 435, 438-39 (N.Y. App. Div. 1986) (recognizing N.Y. C.P.L.R. 3005 (CONSOL. 2012) as a doctrine granting equitable authority to a court).</p> <p><i>In re Peschel</i>, 4 N.W.2d 194, 199 (N.D. 1942) (against public policy to apply the doctrine where money paid to public officers from public funds).</p> <p>Pratt v. Smart Corp., 968 S.W.2d 868, 872 (Tenn. Ct. App. 1997) (“[T]he State has an interest in transactions that involve violations of statutorily-defined public policy, and, generally speaking, in such situations, the voluntary payment rule will not be applicable.”).</p>

	<p>Jackson v. Novastar Mortg., Inc., 645 F. Supp. 2d 636, 647 (W.D. Tenn. 2007) (holding the voluntary payment doctrine inapplicable because application would contradict the defined public policy against racial discrimination found in 42 U.S.C. §§ 1981 &amp; 1982).</p> <p>Eisel v. Midwest BankCentre, 230 S.W.3d 335, 339-40 (Mo. 2007) (doctrine inapplicable to payments made for services in the course of the unauthorized practice of law).</p> <p>Ramirez v. Smart Corp., 863 N.E.2d 800, 810 (Ill. App. Ct. 2007) (Illinois “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”).</p> <p>Helms v. Consumerinfo.com, Inc., 236 F.R.D. 561, 565 (N.D. Ala. 2005) (doctrine inapplicable to a plaintiff’s claims under the Credit Repair Organizations Act because to do otherwise “would totally undermine the statute and its purpose”).</p>
Consumer Protection Statutes	<p>Brown v. SBC Commc’ns, Inc., No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, at *29 n.3 (S.D. Ill. Mar. 1, 2007) (expressing skepticism about application of doctrine to consumer protection statute).</p> <p>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 170 P.3d 10, 23 (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 [Consumer Protection Act] liberally in favor of plaintiffs.”).</p> <p>Huch v. Charter Commc’ns, Inc., 290 S.W.3d 721 (Mo. 2009) (en banc) (“In light of the legislative purpose of the merchandising practices act, the voluntary payment doctrine is not available as a defense to a violation of the act.”).</p>

	<p>Sobel v. Hertz Corp., 698 F. Supp. 2d 1218 (D. Nev. 2010) (as a matter of law the doctrine could not be used as a defense to violations of the Nevada Deceptive Trade Practices Act).</p> <p>MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc., 809 N.W.2d 857 (Wis. 2012) (“[T]he statute’s manifest purpose . . . leaves no doubt that the legislature intended that the common law defense should not be applied to bar claims under the statute.”).</p> <p>Lady Di’s, Inc. v. Enhanced Services Billing, Inc., No. 1:09-CV-0340-SEB-DML, 2010 U.S. Dist. LEXIS 121906 (S.D. Ind., Nov. 16, 2010) (applying the doctrine to dismiss a consumer protection statute), <i>aff’d on other grounds</i>, 654 F.3d 728 (7th Cir. 2011).</p>
Procedural Juncture as Premature	<p>Horne v. Time Warner Operations, Inc., 119 F. Supp. 2d 624 (S.D. Miss. 1999) (applying doctrine to bar claims on motion to dismiss).</p> <p>Spivey v. Adaptive Mktg., LLC, 660 F. Supp. 2d 940 (S.D. Ill. 2009) (applying doctrine to bar claims on motion for summary judgment), <i>aff’d</i> 622 F.3d 816 (7th Cir. 2010).</p> <p>Bown v. SBC Commc’ns., Inc., No. 05-cv-777-JPG, 2007 U.S. Dist. LEXIS 14790, at *28-29 (S.D. Ill. Mar. 1, 2007) (holding that a motion to dismiss is not an appropriate juncture in which to adjudicate the merits of the doctrine).</p> <p>Shaw v. Marriott Int’l, Inc., 474 F. Supp. 2d 141, 151 (D.D.C. 2007) (“Whether the duress exception applies . . . ‘is generally [a question] of fact, to be judged in light of all circumstances surrounding a given transaction[,]’ the doctrine could not be applied in a motion to dismiss context.”), <i>rev’d in part on other grounds</i>, 605 F.3d 1039 (D.C. Cir. 2010).</p>

	<p>Bova v. Cox Communications, Inc., No. Civ.A. 7:01CV00090, 2002 U.S. Dist. LEXIS 4084, at *10-11 (W.D. Va. Mar. 12, 2002) (“[I]t [wa]s not clear from the face of the complaint that . . . plaintiffs paid [a] franchise fee voluntarily with a full knowledge of the facts . . .”).</p> <p>City of Scottsbluff v. Waste Connections of Neb., Inc., 809 N.W.2d 725, 745 (2011) (“Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact.”).</p> <p><i>In re</i> Universal Serv. Fund Tel. Billing Practices Litig., No. 02-MD-1468-JWL, 2008 U.S. Dist. LEXIS 107727, at *111 (D. Kan. June 30, 2008) (“[Defendant’s] reliance on the voluntary payment doctrine [was] without merit” at the summary judgment procedural juncture).</p>
<p>Conventional Subrogation</p>	<p>Jorge v. Travelers Indem. Co., 947 F.Supp. 150, 156 (D. N.J. 1996) (doctrine is inapplicable to conventional subrogation).</p> <p>Cont’l Cas. Co. v. Fifth/Third Bank, 418 F. Supp. 2d 964, 970-971 (N.D. Ohio 2006) (doctrine is inapplicable to conventional subrogation).</p>