

IN THE MISSOURI SUPREME COURT

Appeal No. SC 88167

Clark E. Eisel, *et al.*,

Respondents,

vs.

Midwest BankCentre,

Appellant.

Respondents' Substitute Brief

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FACTUAL RESPONSE

The statement of facts in appellant Midwest's substitute brief is accurate and complies with Rule 84.04(c). The factual statements in the *amicus* brief filed by the Missouri Bankers Association (the "MBA") is also consistent with the standard of review. Unfortunately, the other *amici* ignore the applicable standard of review.

Countrywide Home Loans, Inc., repeatedly offers evidence it unsuccessfully presented in a case where it was defendant as though that evidence was part of the "complete, factual record" developed in that case. *Countrywide Brief* at 7–8, 11–12, 15–16, 20, 23–25, and 32.

Countrywide lost its case. Countrywide did not request findings of fact pursuant to Rule 73.01(c). "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.* Thus, the trial court is deemed to have rejected all of Countrywide's evidence. The expert witness testimony and other "evidence" that Countrywide asks this Court to consider in deciding Midwest's appeal would be given no weight in Countrywide's own pending appeal. On an appeal from a bench trial, the appellate court accepts the

evidence and inferences favorable to the prevailing party and disregards all contrary evidence. *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 385 (Mo. 2001); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Countrywide, by filing its *amicus* brief, is blatantly attempting to backdoor its rejected evidence into the record before this Court, knowing the decision reached here will be precedent in its own appeal. This is not the conduct of a true friend of the Court. Countrywide's attempted manipulation of the standard of review through use of an *amicus* brief should not be tolerated.

The other *amici* also attempt to inject into this appeal “facts” that are not part of the record and are not true. ABN AMRO Mortgage Group, Inc. and North American Mortgage Company (the “Federal Savings” or “FSB” *amici*) assert in their brief that “the practices challenged are standard in the industry.” *FSB Brief* at 5. This bald assertion is made without any citation to the record — or even any citation to a scholarly treatise, governmental report, collection of industry statistics, or Chinese fortune cookie.

Class counsel’s pre-suit investigation — which is also not part of the record — concluded that when the Eisels’ suit was filed, a majority of Missouri mortgage lenders did not charge document preparation fees. Those who did not then charge document preparation fees included Commerce Bank, Bank of America, Union Planters Bank (now Regions Bank), Pulaski Bank, Central Bank of Jefferson City and First National Bank of St. Louis, and others.

The FSB *amici* assert their practice of charging a separate document preparation fee is good for borrowers because it provides “transparency” and “full disclosure” of fees, and that if the judgment below is affirmed, lenders will be compelled to hide the cost of document preparation elsewhere in the transaction. *FSB Brief* at 9–10, 27–28, 30, 32, 34. Forgetting for the moment that “hiding” the cost of document preparation elsewhere in a closing statement would violate the federal Real Estate Settlements Procedure Act (“RESPA”), 12 U.S.C. § 2603, nothing in the record supports the contention that Midwest or any other lender was being transparent or honest in charging and disclosing document preparation fees. *See infra* at 12. In fact, the lenders’ own evidence was to the contrary. Although, pursu-

ant to RESPA, 12 U.S.C. § 2604, the United States Department of Housing and Urban Development (“HUD”) provides a clear definition of “document preparation” fee, Midwest and Countrywide contend that they charged their customers for general overhead or profit under the rubric of document preparation fees. Such mislabeling is not consistent with the claim of transparency or full disclosure.

The parties stipulated about the HUD definition:

In each transaction in which a class member purchased a new home, they were provided with a pamphlet entitled “Buying Your Home,” published by [HUD], which contains information about settlement costs and the home buying process.... The HUD pamphlet defines “Document Preparation” fee as: “This is a separate fee that some lenders or title companies charge to cover their costs of preparation of final legal papers, such as a mortgage, deed of trust, note or deed.”

[LF 366 (*Stipulation* ¶ 12)].

Midwest asserts it charged document preparation fees “to recoup a portion of the costs it incurred to complete the loan documents ... as well as other costs associated with processing each loan ... includ[ing] allocated costs for, among other things, supplies, furniture, equipment, document software, staff salaries and benefits, administrative costs in staffing, and office space...” *Midwest Brief* at 17.

Going outside the record in the present case to the *Countrywide* case, Richard Monley, a regional vice president for Countrywide, testified by deposition that Countrywide’s policy was for each Missouri branch office to charge approximately \$500 in closing costs for each loan, and that the manager of each office could attribute that \$500 to whatever category of charge he wished, including document preparation fees, without guidance or direction from the corporate offices. *Monley Deposition* at 47–50, 74–77.

In other words, Midwest and Countrywide both assertedly charged fees for preparing final legal papers that did not simply cover their costs for such documents, but which also served as a separate profit item. Thus, the absurd contention that lenders would be punished for their transparency and honesty is not supported by the record in this case or in the

Countrywide case. Both Midwest and Countrywide treated document preparation fees as “junk fees,” using them to generate income to supplement their other streams of income from residential mortgage loans.

ARGUMENT

I. The trial court did not err in overruling Midwest’s motion for a new trial asserting Section 484.020 is unconstitutional because Midwest failed to raise its constitutional challenge at the first available opportunity. (*Response to Point Relied On No. I.*)

It is well established, as Midwest acknowledges, that constitutional questions must be raised at the first opportunity or are waived. *Midwest Brief* at 29. Midwest acknowledges the first time it raised its constitutional challenge to Section 484.020 was in its post-trial motion for new trial. *Id.* at 32. The challenge, however, could have been made much earlier. After trial, Midwest hired new lawyers with new ideas, the constitutional challenge being primary among them. This challenge was in every sense an afterthought. A constitutional challenge may not be raised for the first time as an afterthought in a post-trial motion. *State ex rel. Laszewski v.*

R.L. Persons Constr., Inc., 136 S.W.3d 863, 871 (Mo. App. 2004). The Court should therefore not reach Midwest’s first point relied on.

Midwest contends its constitutional challenge can nevertheless be reached for plain-error review under Rule 84.13(c). *Midwest Brief* at 29–31. Even if reviewed for plain error, however, there is none. The decision here results in neither “manifest injustice” nor a “miscarriage of justice,” as required by Rule 84.13(c). Midwest’s constitutional challenge, reduced to its essence, is that Section 484.020 violates due process guaranteed by the Fourteenth Amendment because a trial court *must* impose treble damages when a defendant violates the statute regardless of whether the defendant had a culpable mental state. *Midwest Brief* at 39. Midwest contends plaintiffs are constitutionally required to prove a culpable mental state sufficient to support an award of punitive damages before they can recover statutory treble damages. *Id.* at 42–44.

Midwest’s contention, however, is not the law. *See Section II below.* The trial court’s refusal to grant a new trial was not plain error. The Court of Appeals agreed. This Court implicitly agrees because it previously remanded this appeal to the appellate court on jurisdictional grounds

because Midwest's constitutional challenge was insubstantial and only merely colorable. See *Higgins v. State of Missouri Treasurer*, 140 S.W.3d 94, 98 (Mo. App. 2004). A constitutional claim that is insubstantial and merely colorable cannot rise to the level of plain error. Midwest's cases do not compel a contrary conclusion.

Although the Court in *Hanch v. K.F.C. National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981), considered and then rejected a constitutional challenge raised for the first time on appeal, the circumstances in *Hanch* are quite different from those here. There appellant claimed Missouri's service letter statute infringed the right of free speech, a core First Amendment right. *Id.* at 33. Moreover, a federal district court had recently declared Missouri's service letter statute unconstitutional on the very ground raised by appellant. *Id.* There was great public interest in the issue, highlighted by the intervention of the Missouri Attorney General. *Id.* Under those circumstances, none of which are present here, this Court determined it should exercise its discretion to authoritatively declare the statute constitutional.

State v. Groves, 646 S.W.2d 82 (Mo. banc 1983), involved a murder defendant's Fifth Amendment right against self-incrimination. Although appellant failed to raise his *Miranda* claims until after conviction, this Court considered and rejected the *Miranda* claims under plain-error review. It is not unusual for appellate courts to engage in plain-error review of criminal convictions for all kinds of belated claims, including constitutional claims. That the Court engaged in plain-error review in *Groves*, a criminal case, provides no basis for such review here.

Midwest mistakenly cites *In re Schottel*, 159 S.W.3d 836 (Mo. banc 2005), as a case where this Court accepted an untimely-raised constitutional challenge. Not true. Mr. Schottel was confined as a sexually violent predator ("SVP"). Under Section 632.498, RSMo., a SVP is entitled to annual reviews of whether it would be safe to release him. *Schottel* was an appeal from denial of appellant's *second* annual review opportunity. Appellant asserted his constitutional challenge at the initial probable cause hearing. *Id.* at 839. That hearing was his first opportunity to assert the constitutional challenge in that annual review process. Although the State suggested appellant should have asserted his constitutional challenge

when he was initially confined or during his first annual release review, this Court disagreed, holding:

This appeal concerns only the denial of [the] second petition for release ...The State cites no authority for its argument that this Court nonetheless should hold that a question is not preserved for purposes of appeal if it could have been raised to oppose an earlier denial of release, and this Court declines to so hold.

Id. at 840-41.

In *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), defendant did not raise his constitutional challenge to a punitive damages award under Missouri's wrongful death statute until his motion for new trial. But "the issue of punitive damages did not enter the case until the day of trial" — and defendant was not then present because he was in prison. *Id.* at 847. Under those circumstances, the motion for new trial was appellant's first practical opportunity to assert his challenge. The Court considered and rejected the constitutional challenge.

While other cases cited by Midwest are more applicable, none requires this Court to consider Midwest's constitutional challenge. *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501 (Mo. App. 2006), and *City of Overland v. Wade*, 85 S.W.3d 70 (Mo. App. 2002), involve appellate courts exercising discretion to review untimely-raised constitutional challenges for plain error. Neither case purports to require other courts to engage in such reviews. *Petti* involved the referendum process for disapproval of city ordinances. The city charter exempted zoning ordinances from the referendum process. The court denied appellant's constitutional challenge. *Petti*, 190 S.W.3d at 505. *City of Overland* involved a challenge to a city ordinance requiring private landowners to maintain the planted portion of adjoining city right of ways. Appellant contended the ordinance violated the Constitution's prohibition against involuntary servitude. The appellate court denied the challenge. *City of Overland*, 85 S.W.3d at 72-73.

Finally, Midwest ignores the majority of cases refusing to consider untimely-raised constitutional challenges. *See, e.g., State ex rel. Tompras*

v. Board of Election Commissioners, 136 S.W.3d 65 (Mo. banc 2004); *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611 (Mo. 1964).

Midwest's situation is not in the same league as those where appellate courts exercised discretion to consider untimely-raised constitutional issues. Midwest's constitutional challenge only involves money. The cases where appellate courts engage in discretionary plain-error review of late-raised constitutional challenges involve free speech (*Hanch*); the right against self-incrimination (*Groves*); voting rights (*Petti*); and freedom from involuntary servitude (*City of Overland*). Plain-error review is discretionary and can only be invoked when *substantial* rights are affected. *Rule 84.13(c)*. As the Court of Appeals found, the rights purportedly affected here are not substantial. Midwest disputes this, contending "the United States Constitution does not prioritize or rank in some hierarchical order the rights afforded by it and which it protects..." *Midwest Brief* at 31. Midwest also contends, inconsistently, that the due-process rights it asserts are *more important than* free speech and the other rights at issue when plain-error review has been granted. Indeed, according to Midwest,

the economic foundations of our State will collapse if this Court allows the judgment below to stand. *Id.* at 33.

These are astonishing assertions. Contrary to Midwest’s assertions, our society and the courts do value certain constitutional rights more highly than others:

The United States Supreme Court has stated that “the right of access to the courts is indeed but one aspect of the right of petition.” The Court has noted that the right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights,” and that it has “a sanctity and a sanction not permitting dubious intrusions.” As an aspect of the First Amendment right to petition, the right of access to the courts shares this “preferred place” in our hierarchy of constitutional freedoms and values.

Harrison v. Springdale Water & Sewer Comm’n, 780 F.2d 1422, 1427 (8th Cir. 1986) (citations omitted); *accord Braunfeld v. Brown*, 366 U.S. 599,

619 (1961) (Douglas, dissenting) (“The right of a State to regulate ... a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds”).

There is a hierarchy of constitutional values, and a business’s due process claim not to be financially penalized for violating a statute is not as favored as the rights to free speech or to vote or to be free from involuntarily servitude. Midwest waived its constitutional claim by not raising it promptly, and that waiver should not be afforded plain-error review because the rights affected are not substantial.

The Court should decline to exercise its discretion to consider the constitutional challenge asserted in Midwest’s first point relied on.

II. The trial court did not err in overruling Midwest’s motion for a new trial asserting Section 484.020 is unconstitutional because the Constitution does not require finding a culpable mental state as a condition precedent to imposing statutory treble damages. (*Response to Point Relied On No. I.*)

Statutes are presumed constitutional, and will be held unconstitutional only if they clearly contravene a specific constitutional provision. *State v. Schleiermacher*, 924 S.W.2d 269, 275 (Mo. banc 1996). Assuming the Court exercises its discretion to review the constitutionality of Section 484.020, it should reject Midwest’s due process challenge.

In its brief, Midwest analyzes whether statutory treble damages are punitive and whether a statute imposing treble damages is a penal statute. *Midwest Brief* at 40–43. Midwest’s analysis is irrelevant. The issue is not whether treble damages are punitive. The issue is whether Missouri is constitutionally permitted to authorize imposition of treble damages against all who violate Section 484.020 without conditioning this penalty on a finding that the violator had a culpable mental state.

It is telling that Midwest does not cite a case from any jurisdiction holding a state cannot constitutionally impose statutory treble damages without a showing of a culpable mental state. That is because the law is the opposite. A state can impose double or treble damages on those who violate its statutes even if the violation is negligent — or even innocent. It is a decision for the legislature. *See, e.g., Greeson v. Ace Pipe Cleaning, Inc.*, 830 S.W.2d 444, 448 (Mo. App. 1992); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 73-74 (5th Cir. 1982); *Blane v. American Inventors Corp.*, 934 F. Supp. 903, 910 (M.D. Tenn. 1996); *Pennington v. Singleton*, 606 S.W.2d 682, 689-90 (Tex. 1980); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 295-96 (Tex. Civ. App. 1980); *accord State ex rel. Laszewski*, 136 S.W.3d at 868-71.

Greeson was an action for waste brought under Section 527.420, RSMo., which states:

If any tenant, for life or years, shall commit waste during his estate or term, of anything belonging to the tenement so held, without special license in writing so to do, he shall be subject to a civil action

for such waste, and shall lose the thing wasted and pay treble the amount at which the waste shall be assessed.

Section 527.420.

The defendant in *Greeson* committed waste through neglect. Her conduct was not wanton. The trial court refused to award treble damages absent a jury finding that the waste was wantonly committed. 830 S.W.2d at 445. The appellate court reversed, holding: “The statute does not expressly state that waste be committed wantonly before the damages are trebled.” *Id.* at 448. Thus trebling was required under Section 527.420 even though there was no evidence defendant had any culpable mental state when committing the waste. Indeed, this Court subsequently defined waste as *negligent* conduct. “Waste is the failure of a lessee to exercise ordinary care in the use of the lease premises or property that causes material and permanent injury thereto over and above ordinary wear and tear.” *Brizendine v. Conrad*, 71 S.W.3d 587, 592 n.4 (Mo. banc 2002) (affirming statutory treble damages for waste against tenant under lease-

purchase agreement with no finding of intentional misconduct; tenant was simply unable to keep up with maintenance).

There is nothing in *Greeson* or *Brizendine* suggesting the conduct of either defendant would permit punitive damages, yet in both cases statutory treble damages were held to be proper. *Accord Laszewski*, which affirmed an award of double damages under Section 290.300, which provides double damages to any workman on a public construction project who is not paid prevailing wages. *Laszewski* affirmed double damages notwithstanding defendant's innocent but erroneous belief that the prevailing wage act did not apply to independent contractors. 136 S.W.3d at 868-71.

Other Missouri decisions emphasize the distinction between the evidence required for imposition of punitive damages and that required for imposition of statutory treble damages. *Ridgway v. TTnT Development Corp.*, 126 S.W.3d 807 (Mo. App. 2004), illustrates the distinction. *Ridgway* involved claims for both treble damages for trespass under Section 537.340 and for punitive damages. Defendant exceeded the boundaries and reasonable use of a roadway easement, knocking down numerous trees on plaintiffs' land. *Id.* at 810. The trial court awarded plaintiffs treble

damages but denied punitive damages. Defendant appealed the award of treble damages; plaintiffs did not appeal the denial of punitive damages. *Id.* at 818.

The appellate court noted that treble damages under the statute required a showing of either (a) that the trees severed from the land had value in their severed state, or (b) that the removal of the trees from the land diminished the value of the land. *Id.* at 817-18. Because neither requirement was met, the trial court erred in awarding statutory treble damages and the appellate court reversed. *Id.* at 818. Of interest to the present appeal is the appellate court's conclusion that although the evidence of defendant's culpable mental state was sufficient to impose punitive damages, that evidence had no bearing on whether treble damages were properly imposed:

The trial court's judgment states that the damages in this case were trebled pursuant to § 537.340 because Developers "were aware of the encroachments during the construction of the road and yet proceeded to its conclusion." While such intentional

conduct might have furnished a proper basis upon which to award punitive damages in this case, that issue is not before us.... The only issue we must consider is whether the trial court's decision to treble the Ridgways' damages pursuant to § 537.340 was correct. In the absence of substantial evidence to support a recovery under the Ridgways' statutory trespass theory, we conclude that the trial court erroneously applied the law in trebling the Ridgways' \$50,000 award for actual damages.

Id.

These holdings are not unique to Missouri. Other courts presented with similar arguments routinely hold that a culpable mental state is *not* constitutionally required to impose statutory treble or double damages.

In *Indust-Ri-Chem*, the Texas Court of Civil Appeals reversed a trial court's refusal to award treble damages under the Texas Deceptive Trade Practices Act ("DTPA"), rejecting defendant's contention that the Constitution requires a defendant to knowingly or intentionally violate a statute

before treble damages can be imposed. *Indust-Ri-Chem*, 602 S.W.2d at 295-96. While a knowing or intentional violation is required when the conduct prohibited by statute is not sufficiently defined to put a defendant on notice that he may be subject to a treble-damages penalty, when the statute provides sufficient notice of what conduct gives rise to the penalty, the Constitution's due process requirements are satisfied. *Id.* at 296. Here, Section 484.020 gave Midwest sufficient notice of the prohibited conduct, and Midwest does not contend otherwise. The constitutional requirements for due process are therefore satisfied. *See also Schleiermacher*, 924 S.W.2d at 275.

Similarly, in *Pennington*, the Texas Supreme Court held the Texas DTPA required treble damages to be imposed on an individual seller for material false statements made in the sale of a motorboat even though the seller did not know the statements were false and was not reckless in making the false statements. *Pennington*, 606 S.W.2d at 685-86.

It is unquestionably true that deception is more reprehensible when done intentionally and that liability for treble damages is less harsh when

intent is present. The necessity or reasonableness of specific enactments, however, is a matter of legislative discretion. Thus, the balance between expedience and fairness in application of the DTPA is the prerogative of the legislature, so long as constitutional limitations are not transgressed. We cannot hold that § 17.46(b) is unconstitutionally vague because it extends to misrepresentations made without knowledge of their falsity or to acts done without intent to deceive. Section 17.46(b) by its own terms extends to certain specified acts, not just to those acts done knowingly or with intent to deceive. The terms used are not so vague or indefinite as to violate due process, and we will not read into them an intent requirement merely to restrict the scope of their coverage.

Pennington, 606 S.W.2d at 689-90.

The United States Court of Appeals for the Fifth Circuit independently reached the same conclusion in *Mercer*, 665 F.2d at 73-74. “While this Court is not bound by the Texas court’s determinations as to the validity of a state statute under the United States Constitution, we agree and accept what has been said by the Texas Supreme Court.” *Id.* The Fifth Circuit held that imposition of treble damages on innocent violators is rationally related to the statutory purpose of deterring violations and securing consumer protection and is not unconstitutional. *Id.*

The cases cited by Midwest do not hold otherwise.

Fabricor, Inc. v. E.I. duPont de Nemours & Co., 24 S.W.3d 82, 97 (Mo. App. 2000), and *Burnett v. Griffith*, 769 S.W.2d 780, 787-89 (Mo. banc 1989), are both punitive damages cases. Contrary to the present case, the two cases did not involve a statute imposing mandatory double or treble damages. The cases are thus inapposite and provide no guidance about what state of mind, if any, must be established before statutory double or treble damages can be imposed.

Bean v. Branson, 266 S.W. 743, 744-45 (Mo. App. 1924), involved a statutory claim where the statute itself provided, “If any person shall

maliciously or wantonly damage or destroy any personal property ... the person so offending shall pay to the party injured double the value of the thing so damaged or destroyed . . .” *Id.* at 704 (emphasis added). The statute itself imposed a state-of-mind requirement on the award of multiplied damages. *Bean* provides no guidance whether a state of mind is required where, as here, the statute is silent on state of mind.

District Cablevision L.P. v. Bassin, 828 A.2d 714 (D.C. 2003), was a class action brought under a statute providing treble damages and punitive damages as alternate remedies. The trial court viewed treble damages as a species of punitive damages, and subject to the same proof requirements, and therefore refused to automatically award treble damages to the plaintiff class. Instead, the trial court allowed the jurors to decide in their discretion whether to award treble damages or punitive damages in whatever amount they saw fit. *Id.* at 725. The jury awarded punitive damages but not treble damages. The trial court set aside the punitive damages. *Id.*

On appeal, the appellate court held that while it agreed with the setting aside of punitive damages, the trial court erred in not awarding

treble damages. *The appellate court held that treble damages were mandatory under the statute notwithstanding the class's failure to make a case for punitive damages. Id.; see also id.* at 726 (discussing role of treble damages in encouraging Bar to pursue enforcement of law as private attorneys general); accord *Barth v. Canyon County*, 918 P.2d 576, 581 (Idaho 1996) (reversing denial of treble damages).

While *Maxwell v. Samson Resources Co.*, 848 P.2d 1166 (Okla. 1993), held that under the former Oklahoma Sweetheart Gas Bill treble damages could not be imposed without a finding of intentional or wrongful misconduct, that was a matter of statutory interpretation, not constitutional limitation. *Id.* at 1172. Furthermore, contrary to Midwest's contention that treble damages require the same wrongful intent as punitive damages, *Maxwell* held, "We need not determine at this time what degree of wrongful intent is necessary to warrant treble damages..." *Id.* at 1173.

Finally, although Midwest suggests that the United States Supreme Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), held it unconstitutional to impose treble damages without a culpable mental state, see *Midwest Brief* at 44, Midwest completely misstates the case.

Haslip concerned punitive damages, not statutory treble damages. *Id.* at 18-22.

Midwest's constitutional challenge to Section 484.020 is without merit in addition to being untimely, and Midwest's first point relied on should be denied.

III. The trial court did not err in entering judgment against Midwest for engaging in the law business in violation of Section 484.020 because a non-lawyer may not charge for assisting in the drawing of any paper affecting or relating to secular rights even in transactions in which the non-lawyer is a party. (*Response to Points Relied On Nos. II and III.*)

The lawsuit brought by the Eisels and the class against Midwest is an action for damages provided by statute. The case is controlled by two statutes, Sections 484.010 and 484.020, RSMo., which together define and impose criminal and financial penalties on non-lawyers who engage in "the law business." Section 484.010 defines the law business:

The law business is hereby defined to be and is the advising or counseling for a valuable consideration

of any person, firm, association or corporation as to any secular law or *the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights* or the doing of any act for a valuable consideration in a representative capacity obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Section 484.010.2 (emphasis added). Section 484.020 identifies who may engage in the law business:

No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except [listing

certain entity forms permitted for law firms]
engage in the practice of the law or do law business
as defined in section 484.010, or both.

Section 484.020.1. Section 484.020 imposes criminal and civil penalties upon those who violate the statute:

Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof...

Section 484.020.2.

As just stated, this case is brought under and is controlled by the two statutes enacted by the Missouri General Assembly. Midwest and the *amici* implicitly recognize the statutes mandate that the judgment be

affirmed. If they did not recognize that the statutes, if followed, are fatal to their appeal, they would not be adamant in their insistence that the Court ignore the civil penalties established by the General Assembly in Section 484.020 through the device of the Court's power to regulate the practice of law in Missouri. *Midwest Brief* at 34–36; *Countrywide Brief* at 10; *MBA Brief* at 8, 10. Midwest's and the *amici*'s argument misapprehends the distinction between the Court's power to regulate the practice of law, and the General Assembly's power to impose criminal and civil penalties upon conduct it determines to be contrary to the public health, welfare, and safety.

In other words, while only this Court can regulate the practice of law, which it does through its “inherent power to regulate and discipline the Bar, to define and declare what is the practice of law, and to prevent the practice of law by laymen or other unauthorized persons,” that power is separate from the General Assembly's police power to declare certain conduct unlawful and to impose penalties for such conduct. *Hoffmeister v. Tod*, 349 S.W.2d 5, 11 (Mo. banc 1961) (“the legislature may, in the exer-

cise of the police power, aid the court by providing penalties for unauthorized practice”).

This Court recognizes the distinction between its control over the practice of law and the General Assembly’s control over the punishment of persons who engage in “the law business” in violation of the statutes:

We have at times recognized and used the statutory definition...; we may undoubtedly do so reserving the right, however, at all times to fix our own boundaries and declare our own restrictions in all matters *other than a prosecution under the statute*.

Hoffmeister, 349 S.W.2d at 11 (emphasis added). As Midwest repeatedly states, the imposition of treble damages under the statute is a penalty — a penalty to be prosecuted by the Attorney General if the victim of the misconduct does not timely act — and thus is squarely within the realm of the General Assembly’s police powers. See *In re First Escrow*, 840 S.W.2d 839, 843 n.7 (Mo. banc 1992) (“the legislature has criminalized the activities at issue here only when they are done for compensation”).

The Eisels did not seek an injunction barring Midwest from charging document preparation fees. They did not ask that the lawyers employed by Midwest or those who drafted the form documents be disciplined for assisting in the unauthorized practice of law. That type of relief is solely within the domain of the Court. All the Eisels and the class have sought and obtained is the financial penalty mandated by statute. The statute is clear. The statute is a proper exercise of the General Assembly's police powers. The statute should not be disregarded.

A. This Court has consistently held that a non-lawyer's charging of a separate fee for the preparation of legal documents violates Section 484.020 regardless of whether the non-lawyer is a party to the transaction.

Although the statutory language is controlling, this Court's decisions on the practice of law lead to the same conclusion. This Court has twice examined the law business as it relates to the completion of standard-form documents for mortgage loans. *First Escrow* and *Hulse v. Criger*, 247 S.W.2d 855 (Mo. banc 1952). Each time, the Court held that non-lawyers who charge a separate fee for the completion of these standard-form documents are improperly engaged in the law business. *First Escrow*, 840 S.W.2d at 843; *Hulse*, 247 S.W.2d at 862.

Hulse concerned the preparation of closing documents by a real estate broker. The broker prepared documents similar to those prepared by Midwest: deeds conveying real estate, deeds of trust and promissory notes secured by such deeds of trust, leases of real estate, options for purchase, contracts of sale and agreements. *Hulse*, 247 S.W.2d at 856.

This Court issued detailed and very specific holdings — holdings Midwest and the *amici* completely gloss over in their briefs — which this Court had conveniently set forth in numbered paragraphs:

First: A real estate broker, in transactions in which he is acting as a broker, may use a standardized contract in a form prepared or approved by counsel and may complete it by filling in the blank spaces to show the parties and the transaction which he has procured.

Second: A real estate broker, in transactions in which he is acting as a broker, may use standardized forms of warranty deeds, quit claim deeds, trust deeds, notes, chattel mortgages and short

term leases, prepared or approved by counsel and may complete them by filling in the blank spaces to show the parties, descriptions and terms necessary to close the transaction he has procured.

Third: A real estate broker may not make a separate charge for completing any standardized forms, and he may not prepare such forms for persons in transactions, in which he is not acting as a broker, unless he is himself one of the parties to the contract or instrument....

Id. at 862 (emphasis added).

Thus, *Hulse* holds that while a non-lawyer who is a party to a transaction may prepare legal documents necessary to the transaction, the non-lawyer party *may not charge* a fee to another party for preparing the documents, even if document preparation is limited solely to completion of standardized forms prepared or approved by a lawyer:

[T]he preparation of [deeds and deeds of trust] is so closely related to the transaction and the business

of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. The same is true of ordinary short term leases, notes, chattel mortgages and trust deeds in transactions which the broker procures. *However, he cannot make separate charges, in addition to his commission, for preparing any instrument*

Id. at 861 (emphasis added).

In *First Escrow*, this Court expanded on *Hulse*. *First Escrow* considered whether an escrow company, which unlike a broker has no direct financial interest in a real estate transaction, may nonetheless fill in the blanks of standard-form documents without thereby engaging in the unauthorized practice of law. The Court held that escrow companies could fill in the blanks of lawyer-prepared standardized documents, but only under the supervision of and as the agents for an entity with a direct financial interest in the transaction. *First Escrow*, 840 S.W.2d at 840.

In reaching its conclusion, the Court held that the completion of standard-form closing documents *is* the practice of law. *Id.* at 842 n.4. Thus the Court framed the issue as: May escrow companies complete these form documents as the *authorized* practice of law? *Id.* at 843. While the Court answered that question in the affirmative, it held firm to its earlier holding in *Hulse* that non-lawyers *cannot charge* for completing these documents. “Both *Hulse* and our opinion today bar service providers from charging a fee for preparing legal documents...” *Id.* at 843 n.7. The Court defined “service providers” as including “brokers, title companies and *lenders.*” *Id.* at 844, n.10 (emphasis added).

As in *Hulse*, this Court in *First Escrow* issued its holdings in a series of numbered paragraphs. Of particular interest is the fifth paragraph, which held:

Escrow companies may not charge a separate fee for document preparation, or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction.

Id. at 849.

Finally, the Court addressed the specific issue in this case — the charging of document preparation fees by mortgage lenders. In summarizing the law of other states, the Court concluded:

The bulk of the opinions in this area have considered the role of brokers, title companies, and *lenders...*

(3) *Banks* and trust companies may fill in the blanks of standardized real estate forms related to mortgage loans, *so long as they do not charge a fee for the service.*

Id. at 844-45 n.10 (internal citations omitted; emphasis added).

It is interesting that Midwest and the *amici* find ample room in their briefs to quote at length from inapposite opinions from other jurisdictions, and even from Advisory Committee opinions, but fail to quote any portion of the clearly-designated holdings of this Court's opinions in *Hulse* and *First Escrow*, the key cases on the issue. The reason for this is clear. Just as the judgment should be affirmed under the plain language of Section

484.020, it should also be affirmed under the plain language of this Court's holdings in these two cases.

This Court has held that non-lawyers cannot charge for preparing legal documents. Period. Midwest and the *amici* apparently recognize that the Court's explicit holdings in *Hulse* and *First Escrow* end the discussion by compelling affirmation of the judgment below, so it is understandable that they choose to rely now on everything but this Court's holdings and the controlling statutes.

B. Applicability of Section 484.020 to Midwest's conduct is reinforced by recently-enacted Section 484.025.

If there were any doubt Section 484.020 prohibited mortgage lenders from charging their borrowers a fee for completing standard-form documents, that doubt should be erased by Section 484.025, which states:

No bank or lending institution that makes residential loans and imposes a fee of less than two hundred dollars for completing residential loan documentation for loans made by that institution shall be deemed to be engaging in the unauthorized practice of law.

Section 484.025, RSMo.

This statute, effective August 28, 2005, was passed while this case was pending. Section 484.025 changed the law by carving out a narrow exception to the general rule established by Section 484.020. When the legislature enacts a new statute on the same subject as an existing statute, it is ordinarily the intent of the legislature to change the existing law. *State ex rel. Edu-Dyne Systems v. Trout*, 781 S.W.2d 84, 86 (Mo. banc 1989). The new statute changed the law by creating an exception to the statutory ban on lenders charging for preparing legal document for those lenders who charge a fee under \$200 in residential loan transactions.

The conclusion is straightforward. Before August 28, 2005, it was unlawful by statute for any lender to charge a fee for completing loan documents. After that date, it was only unlawful for residential mortgage lenders to charge a borrower a document preparation fee of \$200 or more, while other lenders continue not to have the same safe harbor. This case involves document preparation fees Midwest charged before the new law became effective. The trial court did not err in holding Midwest's conduct to have violated the law as it existed when Midwest charged the fees.

The FSB’s brief offers an odd interpretation of the impact of Section 484.025. These *amici* contend that Section 484.025 “specifically does not take a position on whether the charging of a fee that is *greater* than two hundred dollars would constitute the unauthorized practice of law.” *FSB Brief* at 31. This contention is absurd. The fact that Section 484.025 states that fees under \$200 shall not be deemed the unauthorized practice of law necessarily implies that fees of \$200 and up constitute the unauthorized practice of law. Otherwise, the inclusion of the “less than two hundred dollars” language would be mere surplusage with meaning. “When interpreting a statute ... this Court is required to give meaning to every word of the legislative enactment.” *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 144 (Mo. banc 2002).

While *amici* may be correct in asserting that “there is no principled basis” to draw a line between document preparation fees below \$200 and those above, *FSB Brief* at 31, that does not justify ignoring the clear line the General Assembly chose to draw. Legislatures frequently draw lines based on judgment calls or compromise rather than abstract principle. Why, for example, should the speed limit on any particular road be 55

rather than 50 or 60? It is a judgment call, and so it is with the \$200 limit in Section 484.025. The General Assembly's judgment should be respected, both with regard to the long-established general rule created by Section 484.020 as well as the exception recently enacted in Section 484.025.

C. Although a party to a transaction may prepare related legal documents under the *pro se* exception, charging a fee for such documents turns this otherwise authorized activity into the unauthorized law business.

The key to Midwest's argument — and its critical legal and logical error — is found in the following excerpt from its brief.

This Court in *Hulse* and *First Escrow* expressly stated that the mere filling in of blanks in standardized, pre-printed mortgage forms and related documents is not the unlawful practice of law or unlawful "law business" under § 484.010. *Hulse, supra* at 861; *First Escrow, supra* at 842-843. Common sense and logic dictate that if an activity such as filling in blanks on a standardized form is not the unlawful "law business," the charging of a fee for that activity cannot transmogrify that activ-

ity into the unlawful “law business.” This common sense logic is neither aberrant nor atypical.

Midwest Brief at 50-51.

Midwest’s first error is legal — it misstates the holding in the two cases. As shown by the extensive quotations above, this Court has consistently held it is *the charging of a fee* that converts innocent *pro se* activity by a party to a transaction into the unauthorized practice of law or unlawful law business. *Hulse*, 247 S.W.2d at 861. *Hulse* held: “A real estate broker may not make a separate charge for completing any standardized forms...” *Id.* at 862. *First Escrow* reaffirmed the central importance of whether a charge is imposed for the documents: “Both *Hulse* and our opinion today bar service providers *from charging a fee* for preparing legal documents...” 840 S.W.2d at 843 n.7 (emphasis added). *First Escrow* further explained: “Banks and trust companies may fill in the blanks of standardized real estate forms related to mortgage loans, so long as they do not charge a fee for the service.” *Id.* at 844-45 n.10.

This Court’s holdings could not be clearer. Midwest and the *amici* may not like the rule, but it is our rule. Moreover, the rule established by

this Court allowing a party to lawfully complete their own transaction documents only if they do not charge money for doing so is not contrary to “common sense and logic.” Paying money for something frequently changes its character, and otherwise lawful activity can become unlawful simply by exchanging money in connection with it.

For example, under today’s laws a person can lawfully have sex with a stranger. Having sex with that same person in return for something of value? That’s prostitution. *Section 567.010(2), RSMo.* Prostitution is a class B misdemeanor. *Section 567.020.2, RSMo.* A person can lawfully play cards or dice with others on the street or in the back room of a bar for fun. Stake or risk money on the outcome of that card or dice game? That’s gambling. *Section 572.010(4), RSMo.* Gambling is a class C misdemeanor, unless committed by a professional gambler or with a minor, in which case it is a even more serious crime. *Section 572.020, RSMo.* Any person can approach their elected representative and seek to persuade her to vote in a particular way on a pending bill. That is not only lawful — it is a constitutional right and good citizenship. Offer the elected official some benefit,

direct or indirect, for her vote? That's bribery. *Section 576.010.1, RSMo.*

Bribery of a public servant is a class D felony. *Section 576.010.3, RSMo.*

In short, Midwest's assertions notwithstanding, it is neither illogical nor contrary to common sense for the mere act of exchanging money in performing an otherwise legal activity to "transmogrify" the activity into something unlawful. And so it is with the completion of standard-form legal documents by a non-lawyer party to a transaction.

D. Barring non-lawyers from charging for preparing legal documents even in transactions to which they are a party is good public policy.

The rule prohibiting non-lawyers from charging fees for preparing legal documents makes good common sense and is good public policy. If the underlying business is the real economic driver for a transaction, and the preparation of documents merely incidental, then each party to the transaction is relying on the profit it hopes to make in the underlying business transaction. Charging a fee for preparing legal documents, however, changes the character of the transaction. Charging the fee suggests that the preparation of the documents is itself an economic driver for the trans-

action and that the non-lawyer prepares the documents as a money-making activity.

Midwest charged document preparation fees not merely to recoup its actual direct expenses of preparing loan documents but also to cover items of general overhead, such as salary and rent. *Midwest Brief* at 17. Midwest was charging money for preparing legal documents just like it was charging money for photocopying or underwriting, and the dollars it earned from preparing legal documents flowed down to Midwest's bottom line no differently than the dollars it earned from any of its other activities. This is one of the wrongs the statute and this Court's decisions sought to prevent. "Such conduct would not be any part of his business ... but would be placing the emphasis upon conveyances as a practice of law ... and it would also violate the provisions of [the statute]." *Hulse*, 247 S.W.2d at 861 (discussing why a broker cannot charge a fee for preparing any of the documents relating to the transactions he procures).

Midwest and the *amici* contend this Court's decisions prohibiting non-lawyers from charging document preparation fees in transactions in which they are parties are bad law and do not support the underlying

public policy of protecting the interests of consumers and other members of the public. This Court, in both *Hulse* and *First Escrow*, concluded otherwise. Both experience and common sense suggest this Court was correct. Missteps in choosing the right legal document can have damaging consequences. *See, e.g., Does & Harper Stone Co., Inc. v. Hoover Brother Farms, Inc.*, 191 S.W.3d 59, 61 (Mo. App. 2006) (“The mining lease at issue here ... typifies why the public needs greater protection from the unauthorized practice of law by lay persons, whether by non-lawyer title company employees, on-line non-lawyer purveyors of legal documents, or others”); *Sadofski v. Williams*, 290 A.2d 143, 147 (N.J. 1972) (detailing the misfortune ensuing when a bank officer, a lay person, “did not appreciate the legal significance of the language used or know how to prepare a proper format to carry out [the customer’s] real intention”); *McCollum v. O’Dell*, 525 S.E.2d 721, 722 (Ga. App. 1999) (“This case presents a perfect example of what happens when lay persons exercise their right to draft a legal document”).

Moreover, this Court is not writing fresh on a blank slate. *Stare decisis* strongly weighs against changing a rule that has been part of the

legal framework for more than half a century, at least since *Hulse* was decided in 1952. “[T]he rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires ‘special justification.’” *Randall v. Sorrell*, 126 S. Ct. 2479, 2489, 165 L. Ed. 2d 482, 496 (2006). Adhering to prior case decisions is especially important when the Court is interpreting a statute because the legislature can always change a statute if it disagrees with the Court’s interpretation. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

“The most complex [legal documents] are simple to the skilled, and the simplest often trouble the inexperienced.” *Hulse*, 247 S.W.2d at 861 (citations omitted). The selection of which standard-form document to use requires sophistication and knowledge. Lawyers, who have both the education and the experience to make these selections, may forget how difficult the choice can be in any particular transaction. Lay persons, who often lack both the necessary education and experience, may not recognize the difficulty. *See Coffee County Abstract & Title Co. v. State*, 445 So. 2d 852, 856 (Ala. 1983) (legal discretion involved in choosing correct form document).

Here, nobody selects which document to use — the selection of the documents is made entirely by a computer program. Midwest has no idea how the program works or what criteria the programmers use to determine which documents are selected or why. “Which document forms are used to document a particular loan is determined by the computer software supplied by Midwest’s software vendors... Midwest’s employees have no discretion to pick and choose which documents to use to close a particular transaction.” *Midwest Brief* at 13.

While it is possible that computer programs or robots will someday be welcomed as members of the Bar, that day is not yet here. Until it is, it is misleading for Midwest and other mortgage lenders to pass-off the work of a computer program as the work of a lawyer.

Charging a “document preparation fee” for legal work performed by a computer program misleads the public. The public is presumed to know the law. *Missouri Highway & Transp. Com. v. Myers*, 785 S.W.2d 70, 75 (Mo. 1990) (conclusive presumption). Consumers are therefore presumed to know that Section 484.020 provides that *only* lawyers are permitted to engage in “the drawing or the procuring of or assisting in the drawing for

a valuable consideration of any paper, document or instrument affecting or relating to secular rights...,” and are also presumed to know what this statute means, as interpreted by *Hulse* and *First Escrow*.

Add to this knowledge the definition of document preparation fee provided to every consumer by every lender per HUD requirements whenever a home is purchased on credit, and consumers naturally conclude through simple syllogistic logic that documents for which a document preparation fee is paid have been prepared or reviewed by a lawyer. While the consumer knows the lawyer is not *her* lawyer, the fact that *some* lawyer has vetted the documents would likely give the consumer comfort that the documents are appropriate for her transaction. That simple fact could influence the consumer not to hire a lawyer to review the documents on her behalf.

Finally, a decision affirming the judgment below will not compel lenders to hire attorneys to handle closings, thereby “adding another layer of lawyers, legal costs, and accompanying bureaucracy...” *Countrywide Brief* at 13. Lenders can continue to prepare their own documents for real estate closings. *Hulse*, *First Escrow*, and the decision below all permit it.

Lenders just cannot charge a fee for doing so. If the self-preparation of these legal documents is as convenient, cost-effective, and beneficial to lenders as claimed, then lenders will continue to self-prepare documents even if they cannot charge their borrowers for it and thereby profit from preparing legal documents. If these lenders stop self-preparing documents because they cannot charge the borrowers, then that is evidence preparing documents is an activity lenders engage in not merely as part of the business of making loans but as a separate money-making endeavor.

E. The cited cases from other jurisdictions contradict Section 484.020 and do not provide a sound basis to change Missouri law prohibiting non-lawyers from charging for preparing legal documents even in transactions in which they are parties.

Midwest and the *amici* cite several out-of-state cases to support their contentions. These cases purportedly adopt what Midwest and the *amici* describe as a “broad *pro se* exception” to their states’ laws prohibiting the unauthorized practice of law to permit lenders to charge borrowers for preparing legal documents. Midwest and the *amici* advocate that the Court follow these cases.

These cases do not provide a meaningful basis for either ignoring the clear dictates of Section 484.020 or for overruling this Court’s decisions in *Hulse* and *First Escrow*. The rationale for the decisions reached in these out-of-state cases certainly do not provide the “special justification” to overthrow 50-plus years of *stare decisis*. See *Randall*, 126 S. Ct. at 2489, 165 L. Ed. 2d at 496. And, even if the Court were simply weighing the conflicting cases in a balance to go with the majority, and that is not the approach this Court has taken in past, *Midwest* and the *amici* do not fairly establish the weighing because they fail to disclose to the Court the more numerous decisions from other states *consistent with* the judgment and with *Hulse* and *First Escrow*. There are cases on both sides of the issue — and no general consensus among the states sufficient to provide the justification for this Court to abandon its own precedents.

King v. First Capital Financial Services Corp., 828 N.E.2d 1155 (Ill. 2005), is the primary out-of-state case cited by *Midwest* and the *MBA*. *Midwest Brief* at 68–70, 75–76; *MBA Brief* at 13–16. In *King*, the Illinois Supreme Court accepted all of the arguments made by the lenders here. It concluded as a matter of first impression under Illinois law that charg-

ing a fee for preparing legal documents is consistent with Illinois' court-created *pro se* exception to the prohibition of the unauthorized practice of law. *King*, 828 N.E.2d at 1163. The Illinois Court discussed various state decisions prohibiting charging for document preparation, but rejected those cases because purportedly none (except *Hulse*) gave a reason for so holding. *Id.* at 1166.

King also chose not to follow *Hulse*. The only reason given for that decision was: "The Missouri court also noted that making a separate charge for the document preparation would violate Missouri statutory law." *Id.* at 1165. The Illinois Attorney Act, in contrast with Missouri's Section 484.020, does not provide a private right of action for damages against those who engage in the unauthorized practice of law. *Id.* at 1170. Although this difference was not cited as a basis for the holding in *King*, it is a notable difference between the two state's statutes.

Thus the Missouri unauthorized practice of law statute provides a private cause of action for its breach, while the equivalent Illinois statute does not; and *Hulse* prohibits *pro se* parties from charging others for preparing legal documents, while *King* does not. This does not mean that

Missouri should abandon *Hulse*, or the cause of action provided by Section 484.020, to adopt the Illinois alternative. Illinois simply chooses to follow a different path than Missouri. Each is entitled to follow its own path.

Midwest and the MBA also rely heavily on *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003). *Midwest Brief* at 51 & *MBA Brief* at 16. The decision in *Dressel* flowed from a Michigan definition of the practice of law substantially different than that historically followed in Missouri. It thus provides little if any guidance as to what Missouri law should be under the particular circumstances of the present case. Under Missouri law, the issue is not whether Midwest engages in the practice of law when it completes standard-form documents, for it clearly does. *First Escrow*, 840 S.W.2d at 842 n.4. The issue in Missouri is whether *charging a fee* causes Midwest to be engaged in the *unauthorized* practice of law. *Id.* at 843. In Michigan, the law is completely different: “our courts have consistently rejected the assertion that the Legislature thought that a person practiced law when simply drafting a document that affected legal rights and responsibilities.” *Dressel*, 664 N.W.2d at 156.

Because completing standard-form documents is not the practice of law in Michigan, unlike Missouri, whether a lender charges a fee for completing such forms is irrelevant: “Charging a fee for nonlegal services does not transmogrify those services into the practice of law.” *Id.* at 157.

Thus neither of the cases cited by Midwest provide useful guidance to the Court because both *King* and *Dressel* arise under systems very different than that which we have in Missouri. In Illinois there is no statutory cause of action for damages against persons who engage in the unauthorized practice of law, and in Michigan the drafting of documents affecting legal rights and responsibilities is not the practice of law.

The other *amici* supplement Midwest’s reliance on *King* and *Dressel* with cases from three additional jurisdictions. None of the cases are on point. None suggest any basis for Missouri to change the rule stated in Sections 484.010 and 484.020 and elaborated in *Hulse* and *First Escrow*.

In *Perkins v. CTX Mortgage Co.*, 969 P.2d 93 (Wash. 1999), lawyers employed by CTX performed all of the tasks requiring legal judgment in the preparation of the form documents. Lawyers employed by borrowers prepared the non-form documents requiring an exercise of legal judgment,

such as the purchase and sale agreement, the HUD-1, the warranty deed, and others. *Id.* at 96-97. The only activity lay persons employed by CTX performed relating to legal documents was completing the form documents previously prepared and selected by CTX’s lawyers. The Washington State Supreme Court decided that whether a fee was charged for the activities of these lay persons was irrelevant so long as the lay persons did not exercise any legal discretion. *Id.* at 98.

Thus in *Pekins*, unlike the present case, lawyers were involved throughout the process, including selecting the forms to be used. The facts in *Pekins* are completely different than those here. *Pekins* is not compelling authority for Midwest’s position.

Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864 (Minn. 1988), presents an interesting situation. There, the Minnesota legislature passed a law specifically providing that real estate brokers and agents could engage in “drawing or assisting in drawing, with or without a charge, papers incident to the sale, trade, lease, or loan...” *Id.* at 866-67. The Minnesota Court “accorded, as a matter of comity, limited acceptance of the legislative declaration of public policy...” *Id.* at 867. This acceptance

had not been traditionally extended to “the notion that the nonlawyer could charge for the performance.” *Id.* at 868. Nevertheless, applying its “common sense,” the Minnesota Court held that charging a fee for “the preparation of ordinary documentation for a real estate transaction” does not convert this activity into the unauthorized practice of law. *Id.* at 869. Minnesota is all over the map on the issues, but the Court ultimately held brokers could lawfully charge for completing simple documents in transactions they procured and for which they are receiving a commission. *Id.*

Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334 (Or. 1962), the final case cited by *amici*, is also inapposite. The Bar sought to enjoin two escrow companies from preparing legal documents for closings for customers who used their escrow service. The escrow companies charged their customers fees based on the value of the property in the transaction without regard to whether the escrow agent was preparing documents for closing. *Id.* at 335. The Oregon Court held that when an escrow agent exercises any discretion in selecting or preparing an instrument for another, he engages in the unauthorized practice of law regardless of whether he charges for the service. *Id.* at 339. On the other hand, if an

escrow agent merely fills in the blanks on form documents “selected by their customers, ... carried out under the direction of the customer...,” the agent is not engaged in the practice of law. *Id.* at 340. The case does not appear to deal with any of the issues here and it is puzzling why the *amici* chose to cite it.

In contrast with these cases, a greater number of states hold that a lender cannot charge a fee for preparing legal documents *pro se* without engaging in the unauthorized practice of law. Interestingly, several courts cite *Hulse* approvingly in reaching their decisions.

For example, the Indiana Supreme Court, in considering where to draw the line between a lender’s *pro se* completion of standard-form loan documents and the practice of law, held that one line was drawn against the charging of a separate fee for the completion of such documents:

A lay bank employee may fill in the blanks on a standardized mortgage form which has been approved by an attorney in a transaction which involves the employer bank and the bank’s client. The lay bank employee may not give advice or

opinions as to the legal effects of the instruments he prepares or the legal rights of the parties. The bank may not make any separate charge for the preparation of the mortgage instrument.

Miller v. Vance, 463 N.E.2d 250, 253 (Ind. 1984).

The Indiana Court of Appeals has since applied this rule to factual circumstances similar to those here. *Lawson v. First Union Mortgage Co.*, 786 N.E.2d 279 (Ind. App. 2003). In *Lawson*, First Union charged the plaintiffs a \$175 “documentation fee” on a mortgage. The appellate court held this to be improper:

First Union argues that the holding in *Miller* merely states that when bank lay employees fill in blanks in mortgage instruments, it is not the unauthorized practice of law. The actual holding in *Miller* is that bank lay employees may fill in blanks in mortgage instruments without committing the unauthorized practice of law within certain limitations. One such limitation is that the bank may not

make a separate charge for the preparation of the mortgage instrument. Therefore, whether the fee is modest or extravagant is of no relevance. The language of *Miller* prohibits any fee.

Id. at 283.

Montana follows the same basic rule as Missouri and Indiana. It has adopted a three-part test for whether a party's completion of real estate forms constitutes the unauthorized practice of law. "First, the real estate instruments must be prepared only incident to transactions in which the maker is interested; second, the instruments must be prepared without a separate charge; and third, the preparation must not go beyond the filling in of blank forms." *Pulse v. North American Land Title Co.*, 707 P.2d 1105, 1109 (Mont. 1985). This test is quite similar to the rule established by *Hulse* and reiterated by *First Escrow*. Again, the charging of "a separate charge" is, by itself, sufficient under the Montana test to cause otherwise innocent *pro se* activity to be the unauthorized practice of law.

New Mexico follows the same rule. The New Mexico Supreme Court, citing *Hulse*, explained that although it allows title companies to complete

blank forms, “the making of separate additional charges to fill in the blanks would be considered the ‘practice of law,’ for the reason that it would place emphasis on conveyancing and legal drafting as a business rather than on the business of the title company.” *The State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978).

Similarly, the Connecticut Supreme Court decreed that “one not a member of the bar may draw deeds, mortgages, notes and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made.” *State Bar Ass’n. v. Connecticut Bank & Trust Co.*, 131 A. 2d 646 (Conn. 1957).

North Dakota has the same rule: “A person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefor.” *Cain v. Merchant National Bank & Trust Co.*, 268 N.W. 719, 723 (N.D. 1936).

The same is also true in Arkansas and Virginia. The preparation of real estate documents is the unauthorized practice of law in Arkansas,

unless the preparer “shall make no charge for filling in the blanks.” *Pope County Bar Ass’n v. Suggs*, 624 S.W.2d 828 (Ark. 1981); *see also Commonwealth v. Jones & Robins, Inc.*, 41 S.E.2d 720 (Va. 1947) (holding that real estate brokers who prepared deeds and mortgage documents for a fee were engaged in the unauthorized practice of law).

Some state courts have not reached the issue for reasons favorable to the judgment. As discussed below, in some states, the preparation of documents, including the completion of form documents, is restricted solely to lawyers regardless of whether the lay person charges a fee. In other states, a statute bars this type of conduct for a fee. In either case, the law of these states is contrary to the rule *Midwest* and the *amici* would have this Court adopt.

In Florida, non-lawyers may not complete closing documents because that is the unauthorized practice of law. “We are not shaken in this view because of the argument that oft times the instrument to be executed is a copy of one which has been prepared by an attorney.” *Keyes Co. v. Dade County Bar Ass’n*, 46 So. 2d 605, 607 (Fla. 1950); *Cooperman v. West Coast Title*, 75 So. 2d 818 (Fla. 1954). The same is true in Alabama. *Coffee*

County Abstract & Title Co., 445 So. 2d at 854-55 (holding that completing form documents constitutes unauthorized practice of law).

Texas and Georgia have taken a different tack by enacting statutes prohibiting document preparation fees. Georgia's statute provides:

[N]or shall any person, firm, or corporation be prohibited from drawing any legal instrument for another person, firm, or corporation, *provided it is done without fee* and solely at the solicitation and the request and under the direction of the person, firm, or corporation desiring to execute the instrument. Furthermore, a title insurance company may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, *where no charge is made by it for the papers.*

GA. CODE ANN. § 15-19-52 (emphasis added).

In Texas, anyone who is not a lawyer or licensed real estate broker “may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien.” TEX. GOV’T CODE § 83.001. Licensed real estate brokers, like attorneys, have special training and licensure, and one can acknowledge but respectfully disagree with the policy choice made by the Texas legislature — although different than that in Missouri — to permit brokers to complete for a fee legal instruments within the narrow area of their particular expertise and license.

F. The possibility that federally-regulated savings banks may be subject to different disclosure rules than state-regulated mortgage lenders is no reason to alter Missouri’s law regulating the practice of law.

The FSB *amici* contend they are free to charge document preparation fees in Missouri because federal law permits them to charge such fees and preempts any contrary state laws. *FSB Brief* at 32. The FSB conclude Missouri should change its laws on the unauthorized practice of law to match the purported federal law so that Missouri consumers can avoid the horrors of facing “two distinct fee disclosure regimes.” *FSB Brief* at 34.

The trial court dismissed the claims against the Federal Savings lenders on preemption grounds. [LF 135-36.] This was an interlocutory order of dismissal. Plaintiffs asserting claims against the Federal Savings lenders can seek reconsideration of the dismissal or, should judgment be entered in favor of the Federal Savings lenders, appeal. Thus, the Court should not assume that ultimately there will be two separate “fee disclosure regimes” operating in Missouri. Even if federal preemption is ultimately found to apply, however, that would not support the outcome the FSB *amici* desire. Conformity with a parallel federal regime is not a sufficient justification for changing state law on an issue traditionally the domain of the states. “It is the province of each state to define the practice of law and to prescribe the qualifications and regulate the conduct of those who may engage in such practice, either in its own tribunals or outside any tribunal.” *De Pass v. B. Harris Wool Co.*, 144 S.W.2d 146, 148 (Mo. 1940).

In *De Pass*, this Court held a layman’s contract for fees for representing a company before the federal Interstate Commerce Commission was enforceable because the federal government can authorize persons to practice law before its commissions sitting in a state when those same

persons would not be permitted to practice law in the state's own courts and tribunals. *Id.* at 148-49. This Court had no difficulty with there being two “distinct ... regimes” in the practice of law as a representative of clients in proceedings before federal and state authorities. The supposed difficulties of the two regimes postulated by the FSB fade into insignificance in comparison with that accepted in *De Pass*.

G. A lender may not charge a borrower for preparing legal documents even if the lender is not representing the borrower in the transaction.

Countrywide contends that “for the law business statute to even apply to a lender’s activities, the lender must have acted in a ‘representative capacity’ on behalf of the borrower.” *Countrywide Brief* at 27.

This contention is based upon a strained and improper reading of Section 484.010. To understand the error in Countrywide’s argument, it is helpful to refer to the statute, which Countrywide chose not to quote at length while characterizing it:

The law business is hereby defined to be and is [1]
the advising or counseling for a valuable consideration of any person, firm, association or corporation

as to any secular law or [2] the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or [3] the doing of any act for a valuable consideration in a representative capacity obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Section 484.010 (bracketed numbers added).

The brackets are added to show that Section 484.010 defines three distinct activities as being within the law business: (1) advising; (2) drawing; and (3) representing. “Representative capacity” only appears as an element of the third of the three stated activities, “the doing of any act,” *et cetera*. Representative capacity is not an element of the second of the activities, the activity at issue here, “the drawing ... of any paper...” Countrywide ignores the structure of the statute in contending that the phrase “representative capacity” leaps over the disjunctive ‘or’ into the

second clause, and presumably into the first clause as well. Countrywide's construction is at odds with the actual structure of the statute.

The other authority cited does not support Countrywide's contention that all lawyer-like activities are permitted to lay persons unless undertaken in a representative capacity. Not a single Missouri authority cited by Countrywide — or by Midwest or any of the other *amici* — approves the provision of *pro se* legal services by a non-lawyer charging a fee for that otherwise legal activity, whether or not the non-lawyer is acting in a representative capacity. Non-lawyers are forbidden from engaging in *pro se* legal activity in a representative capacity whether or not they are paid. They are also forbidden from engaging in *pro se* legal activity for pay whether or not they are acting in a representative capacity. Both are prohibited under Missouri law.

For all of the foregoing reasons, Midwest's second and third points relied on should be denied and the judgment in favor of the Eisels and the class should be affirmed.

IV. The trial court did not err in holding that the voluntary payment doctrine did not provide Midwest a defense because

the doctrine does not apply to claims mandated by statute.

(Response to Point Relied On No. IV.)

Midwest asserts the “voluntary payment doctrine” as a defense to Eisels’ claims:

Except where it is otherwise provided by statute it is held that, where one under a mistake of law, or in ignorance of law, but with full knowledge of all facts, and in the absence of fraud or improper conduct upon the part of the payee, voluntarily and without compulsion pays money on a demand not legally enforceable against him, he can not recover it back.

National Enameling & Stamping Co. v. City of St. Louis, 40 S.W.2d 593, 595 (Mo. 1931).

The voluntary payment doctrine is subject to many exceptions. Payments made in the performance of one’s duty are not voluntary, and thus can be recovered. *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726, 728 (Mo. App. 1994). Payments made to someone who knows he has no

right to the money can be recovered. *Western Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 801 (Mo. App. 1982) (consumer who carelessly overpays bill entitled to recover overpayment). Payments made on a loan in excess of the legal rate of interest imposed by statute can be recovered. *McClure v. Nowick*, 382 S.W.2d 731, 733 (Mo. App. 1964). Payments made by mistake, even where there is negligence on the part of the person making the payment, may also be recovered. *Delmar Bank of University City v. Douglas*, 366 S.W.2d 80, 83 (Mo. App. 1963).

Several of the exceptions to the voluntary payment doctrine are applicable here. First is the exception where payment is contrary to statute. The voluntary payment doctrine does not bar statutory claims. *See National Enameling*, 40 S.W.2d at 595; *see also McClure, supra* (payments violating usury statute). Indeed, one of the few appellate decisions considering Sections 484.010 and 484.020 stated: “The activities prohibited by [the statutes] are not subject to waiver, consent or lack of objection by the victim.” *Bray v. Brooks*, 41 S.W.3d 7,13 (Mo. App. 2001). The voluntary payment doctrine is a defense based on waiver or consent. The doctrine

therefore provides Midwest no defense to the Eisels' and the class's claims for violation of the statutes.

A second reason why the voluntary payment doctrine does not apply is that the doctrine applies only when a plaintiff makes payment with full knowledge of all facts. *National Enameling*, 40 S.W.2d at 595. Midwest presented no evidence that class members knew their legal documents were completed by lay persons, not lawyers.

Even if Midwest had presented some evidence on this issue, which it did not, this appeal must nevertheless be decided consistent with a finding that the Eisels and the class did not have full knowledge of the fact that non-lawyers prepared the final legal documents for their transactions. "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 621 (Mo. banc 2002), quoting Rule 73.01(c); *Clippard v. Pfefferkorn*, 168 S.W.3d 616, 618 (Mo. App. 2005). This Court should defer to the trial court's implicit factual findings on the issue of full knowledge, an issue relevant to an affirmative defense for which Midwest had the burden of proof.

A third applicable exception to the voluntary payment doctrine is the exception for transactions where the recipient of a payment knows he has no right to the money. *Ticor Title*, 887 S.W.2d at 728. Here, one can infer that Midwest knew it had no right to receive document preparation fees from its customers because of the clear legal guidance given by *Hulse* and *First Escrow*. This inference is strengthened by Midwest's purported use of the fees to cover general overhead expenses beyond the actual cost of preparing documents as well as by Midwest's disingenuous decision to rename its "document preparation fee" a "processing fee" after the case was filed in an attempt to conceal the nature of the charge from its borrowers. [Tr. 18-21; LF 365-66].

For these reasons, the voluntary payment doctrine is inapplicable and provides no ground for altering the judgment. Midwest's fourth point relied on should therefore be denied.

CONCLUSION

Judgment for the Eisels and the class should be affirmed.

Respectfully submitted,

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