IN THE SUPREME COURT OF MISSOURI

No. SC88167

CLARK E. EISEL and PATRICIA S. EISEL, *et al.*,
individually and on behalf of all others similarly situated,
Plaintiffs/Respondents,
vs.
MIDWEST BANKCENTRE,
Defendant/Appellant.

Brief of Amicus Curiae Missouri Bankers Association

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INTERESTS OF THE AMICUS CURIAE

The Missouri Bankers Association ("MBA") was founded in 1891. MBA membership includes state and national chartered banks, trust companies and savings and loan associations representing over 1,800 banking locations and over 30,000 bank employees in the State of Missouri. The MBA is the principal advocate for the banking industry in Missouri and is dedicated to providing products and services that bring benefits to its members. The MBA is committed to bringing together and serving the best interests of its members by providing education to its members and the consuming public, fostering economic development in Missouri, and advocating on behalf of its constituents on issues of public importance.

This case involves the legality of fees charged by banking institutions and other lenders in connection with the preparation of standard form residential loan documents for transactions to which the banks or other lenders are parties. The members of the MBA are directly affected by the outcome of this case as a decision affirming the trial court's judgment would significantly alter the lending practices of all Missouri lenders to the detriment of both the lending institutions and the borrowing public. The parties have not addressed the issues raised in this litigation from the perspective of the MBA.

STATEMENT OF FACTS

The Missouri Bankers Association adopts the statement of facts in the brief of Appellant Midwest BankCentre.

POINT RELIED ON

I. THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED AS THE COMPLETION OF RESIDENTIAL LOAN DOCUMENTS BY A LENDER THAT IS A PARTY TO THE TRANSACTION IS PROTECTED BY THE *PRO SE* EXCEPTION AND IS NOT THE UNAUTHORIZED PRACTICE OF LAW.

Hulse v. Criger, 47 S.W.2d 855 (Mo. banc 1952).

In re First Escrow, Inc., 840 S.W.2d 839 (Mo. banc 1992).

King v. First Capital Financial Services Corporation, 828 N.E.2d 1155 (Ill. 2005).

Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003).

§ 484.010, RSMo.

§ 484.025, RSMo.

ARGUMENT

I. THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED AS THE COMPLETION OF RESIDENTIAL LOAN DOCUMENTS BY A LENDER THAT IS A PARTY TO THE TRANSACTION IS PROTECTED BY THE *PRO SE* EXCEPTION AND IS NOT THE UNAUTHORIZED PRACTICE OF LAW.

The Court should reverse the judgment of the trial court because a lender's completion of standard form residential loan documents for transactions to which the lender is a party does not constitute the unauthorized practice of law. The validity of such conduct has been upheld under what has been coined the "*pro se* exception," or other related theories, which allow a party to a loan transaction to complete the documentation necessary to effectuate the transaction without running afoul of the prohibitions against the unauthorized practice of law.

This Court previously has considered the underpinnings of the *pro se* exception in cases challenging the conduct of service providers, but has yet to consider its application where a party to the transaction completes the documents. Although this issue is one of first impression in Missouri, recent decisions from other states have analyzed the exception under facts identical to those presented in this case. In those instances, the courts determined that where a lender charges a fee for the preparation of documents in connection with a loan transaction to which the lender is a party, such conduct falls within the *pro se* exception to the prohibition against the unauthorized practice of law.

The trial court's holding fails to properly recognize this important exception, and that failure jeopardizes the ability of all Missouri banks and other similarly-situated lenders to remain competitive in the national mortgage market. Accordingly, the judgment of the trial court should be reversed.

A. The conduct at issue here falls outside the scope of Missouri's statutes governing the unauthorized practice of law.

In considering questions relating to the alleged unauthorized practice of law, it must be recognized that only the judicial branch of government has power to license persons to practice law. *Hulse v. Criger*, 247 S.W.2d 855, 857 (Mo. banc 1952). While the legislative branch may extend aid to the Court by providing mechanisms for enforcement and criminal penalties, it may not extend the privilege of practicing law to those not admitted to practice by the judicial department, and its definition of what constitutes the practice or business of law is subservient to this Court's determination. *Id.* The judicial department, and specifically this Court, is the sole arbiter of what constitutes the practice of law. *Id.; In re First Escrow, Inc.*, 840 S.W. 2d 839, 843, N. 7 (Mo. banc 1992).

Despite the subservient role of the legislative definition of what constitutes the "practice of the law" and "law business," the Plaintiffs have repeatedly focused on definitions of those terms provided by the legislature. These definitions, set forth in Section 484.010, RSMo, underscore the representative qualities of legal practitioners, stating in pertinent part that:

> The "**practice of the law**" . . . is the appearance ***as an advocate in a representative capacity*** or the drawing of papers, pleadings or documents or the performance of any act ***in such capacity*** in connection with proceedings pending or prospective before any court . . . .
>
> The "**law business**" . . . 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***…

§ 484.010, RSMo (emphasis added). Plaintiffs fail adequately to acknowledge that lenders generally, and specifically as to the question of mortgage loans, act neither as an advocate, nor as a counselor. Instead they are parties to each loan transaction, and, therefore, are more analogous to an adversary than an advisor to the borrower. At no time do the lenders act in a representative capacity on behalf of the borrower, which is the focus of the legislative definition of the unauthorized practice of law.[1]

[1] When provided the opportunity to consider the exact question now presented before the Court, the Missouri General Assembly passed Section 484.025, RSMo, which states:

Indeed, at no time during the loan originations at issue in this case did Plaintiffs seek legal advice from Defendant Midwest BankCentre, nor did they think that Defendant was acting as their lawyer. *See* Defendant's Exh. A, Clark Eisel Dep., p. 60; Defendant's Exh. B., Patricia Eisel Dep., p. 91.

Because a lender's completion of standard form documents memorializing a loan transaction inures to the benefit of both the lender and the borrower, as parties to the transaction, and is not performed in a representative capacity, such conduct falls outside the purview of Missouri's unauthorized practice of law statutes and within the *pro se* exception to the prohibition against the unauthorized practice of law.

B. Under the *pro se* exception, the conduct at issue in this case does not constitute the unauthorized practice of law.

Acting in its role as sole arbiter of what constitutes the practice of law, this Court has previously acknowledged one is not necessarily practicing law whenever, for

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> 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 the institution** shall be deemed to be engaging in the unauthorized practice of law.

(Emphasis added). Consistent with Sections 484.010 and 484.020, and in-line with Missouri Supreme Court precedent, the Legislature again noted the important distinction and exception to the unauthorized practice of law for the actions of a party performed in a *pro se* capacity.

compensation, he or she drafts, for another, some document that has legal effect. *Hulse*, 247 S.W.2d at 860. Indeed, such drafting is done in the usual course of the work of occupations that are universally recognized as distinct from the practice of law. *Id.*

In *Hulse*, this Court acknowledged authority for the proposition that the drafting of documents, when merely incidental to the work of a distinct occupation, is not the practice of law, despite the legal consequences inherent in the documents. *Id.* Central to this Court's finding in *Hulse* was that a real estate broker's completion of standardized contracts evidencing the transaction that he had procured did not constitute the unauthorized practice of law. *Id.* at 861. However, the *Hulse* Court held that, in such instances, service providers, such as the real estate broker, could not make a separate charge for the completion of such forms. *Id.* In so holding, the Court recognized that such a charge emphasized conveyancing, rather than the broker's services as a broker, thereby constituting the practice of law. *Id.*

In assessing the propriety of charging a fee for the completion of legal forms by a service provider, this Court was sensitive to the potential perception of a service provider's actions as the practice of law. In so doing, the Court particularly emphasized that the permissibility of the broker's conduct in completing standardized forms and contracts for a particular transaction was contingent upon his role as broker for the transaction, unless the broker "***was one of the parties to the contract***." *Id.* at 862. (emphasis added). In noting this distinction, the *Hulse* Court acknowledged that the circumstances are materially different when a party to the contract undertakes the drafting

role. This distinction set forth the grounds for the *pro se* exception, more recently acknowledged by this Court in *In re First Escrow, Inc.*, 840 S.W. 2d 839.

In *First Escrow,* this Court considered whether an escrow company hired to assist in the closing of a mortgage engaged in the unauthorized practice of law by undertaking document preparation activities on behalf of the parties. *Id.* In reviewing the issue, the Court emphasized the distinction between the escrow company, a third party service provider without an individual stake in the transaction, and the real estate broker in *Hulse* who was a direct beneficiary of the transaction. After reviewing the decisions of sister states, this Court specifically held that it would be imprudent to allow such activity to be performed by third parties who have "no independent financial interest" in the transaction. *Id.* at 846.

Applying this limitation, however, the Court nonetheless extended protection to escrow agents, finding that escrow agents may "complete standard form real estate documents under the supervision of, and as agents for, entities or individuals who could otherwise meet the personal interest test and complete the form documents themselves." The Court maintained the position, however, that service providers, such as the escrow agent, could not independently charge for their services. *Id.* at 849.

Both *Hulse* and *First Escrow* considered situations in which service providers completed legal documents ancillary or incidental to their role in assisting with a closing. In each instance, the Court noted that these actions were not the unauthorized practice of law, only so long as the preparation was ancillary or incidental to the otherwise non-legal business of the preparer.

While the Court in both *Hulse* and *First Escrow* denied the service providers the ability to charge specifically for their document preparation activities, as this would impart too much emphasis on the perceived legal aspect of their task, the Court did not address whether an actual party to the transaction could recover costs incurred in the completion of the same documents. Indeed, research does not reveal a single Missouri case that has considered this specific issue. Recently, however, courts in various other states have held that the exact conduct at issue here did not constitute the unauthorized practice of law.

For example, in *King v. First Capital Financial Services Corporation*, 828 N.E.2d 1155 (Ill. 2005), the Supreme Court of Illinois determined that a lender that prepares documents for use in loan transactions to which the lender is a party, and charges the borrower a fee for the preparation of those documents, is not engaged in the unauthorized practice of law. *Id.* at 1160.

In *King*, the Court began with the assumption that the preparation of mortgage documents constituted the practice of law and, absent a recognized exception, would require the skill of an attorney. *Id.* at 1162-63.[2] In considering whether there was an

[2] Although, unlike the parties in *King*, the parties here have not agreed that the acts of Midwest BankCentre constitute the practice of law, that should not affect the Court's ultimate determination. If the Court determines the acts are not the practice of law, then plaintiff's have no claim; if the Court determines the acts to be the "practice of law," the Court must still consider whether the acts constitute the "unauthorized" practice of law.

applicable exception, the *King* court reviewed the *pro se* exception to the unauthorized practice of law. *Id.* at 1163.

The *King* court held that the *pro se* exception applies to the preparation of documents in situations where the party preparing the legal documents does so for his or her own benefit ***in a transaction to which the preparer is a party.*** *Id.* (emphasis added). In *King*, as in the case now before the Court, the defendant lender was a party to the mortgages in question and the plaintiffs were the borrowers. In the process of securing the mortgages, the lender completed the necessary form documentation to finalize the transactions and charged a fee to the plaintiffs to recoup the costs it had incurred. Unlike the transactions in both *Hulse* and *First Escrow*, the disputed fee that had been charged reflected expenses incurred by an actual party to the mortgage.

The plaintiffs in *King* asserted that the mere charging of a fee for document preparation, when the conduct would otherwise fall within the *pro se* exception, changed the nature of the transaction to the unauthorized practice of law. *Id.* at 1168. Relying on the Illinois Court's decision in *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771 (1966), the plaintiffs in *King* suggested that the *pro se* exception precluded the receipt of a fee by the lender.

The facts in the *Quinlan* case are strikingly similar to those at issue in the *Hulse* case. Unlike this Court's decision in *Hulse*, however, the *Quinlan* court determined that the defendant had engaged in the unauthorized practice of law because he was not a party to the transaction in question. Quoting a Missouri case, the *Quinlan* court noted that:

> Any one who wants to pay the price may purchase a set of form books and read and copy them. **He may use them in his own business** if he so desires. **But when he advises others for a consideration,** that this or that is the law, or that this form or that is the proper form to be used in a certain transaction, **then he is doing all that a lawyer does when a client seeks his advice**.

214 N.E.2d at 775 (emphasis added) (quoting *Clark v. Reardon*, 104 S.W.2d 407, 410 (Mo. App. 1937)). The plaintiffs in *King* contended that this language established that a non-lawyer charging a fee for the preparation of legal documents voided any *pro se* exception that might apply and transformed the defendant lender's actions into the unauthorized practice of law. *King*, 828 N.E.2d at 1164.

Rejecting the plaintiff's attempt to expand *Quinlan*, the *King* court noted that the overriding concern of the *Clark* and *Quinlan* courts was the provision of legal advice or services provided to others. *Id.* As the lender in *King* was a party to the mortgages under dispute and the preparation of the loan closing documents was necessary to finalize the mortgages, the *King* court held that the lender's acts could not be deemed the provision of legal services for others, and thus, the challenged conduct fell within the *pro se* exception to the general prohibition against the unauthorized practice of law. *Id.* at 1166-67.

In so holding, the *King* court denied the plaintiff's invitation to find that the mere charging of a fee for document preparation, when the conduct is otherwise within the *pro se* exception, changed the nature of the transaction to one that becomes the unauthorized

practice of law. *Id.* at 1167. Instead, the court held that the charging of a fee, without more, for the preparation of the loan documents by a party to the transaction did not transform the conduct into the unauthorized practice of law. *Id.*

The Supreme Court of Michigan also recently applied the *pro se* exception to the practices of a bank in a position substantially similar to the Defendant in the case now before this Court. In *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003), the Michigan Supreme court held that the unauthorized practice of law involves those instances in which a person counsels another in matters that require the use of legal knowledge and discretion. *Id.* at 156-57. The court held, however, that it is not the unauthorized practice of law for that same person to undertake legally related actions, such as the completion of mortgage forms, on its own account. Moreover, and similar to the holding of the *King* court, the *Dressel* court held that charging for those actions does not transform them into the unauthorized practice of law. *Id.* at 158. The holdings of *King* and *Dressel* support a similar result here.

Application of the *pro se* exception to the facts now before the Court is consistent with this Court's holdings in *Hulse* and *First Escrow*, supported by Missouri statutory law, and important to the future of the Missouri banking industry.

C. The *pro se* exception should be applied in this case.

MBA member banks enter into hundreds of residential loans in Missouri each day. Those entered into between Defendant Midwest BankCentre and the members of the plaintiffs' class in this case are but a small representative sample. Many of these loans

involve fees charged by banks practicing in Missouri to recoup costs associated with the preparation of the loan. The ability to recoup these costs is essential to each lender's ability to compete in the national mortgage market. Invariably, the lender charging the fee is a primary party to the mortgage. As a result, the application of the *pro se* exception to what might otherwise be considered the unauthorized practice of law is crucial to the interests of the MBA and its member banks.

Unlike the real estate brokers in *Hulse*, or the escrow agents in *First Escrow*, MBA member banks are not mere "service providers" whose completion of mortgage documents is merely incidental to their business. For MBA banks and other lenders, **the completion of loan documents is part of their lending business.** Neither this aspect of their business, nor the receipt of funds therefore, is prohibited by currently existing Missouri case law.

Contrary to the Plaintiff's position here, the trial court's judgment and the decision of the Court of Appeals, this Court held in *Hulse* and *First Escrow* only that service providers, who are not direct parties to residential loan transactions, cannot make a separate charge for the completion of loan forms. *Hulse*, 247 S.W.2d at 861. The Court prohibited this practice due to the expressed belief that a separate charge in such instances would place too significant an emphasis on the conveyancing as a practice of law, instead of the service provided as an agent or broker. *Id.* In each instance, the party in question was not a party to the transaction and was acting in a representative capacity on behalf of others.

Neither *Hulse* nor *First Escrow* involved facts like those here in which an actual party to the instrument was attempting to recover costs it incurred in completing the document. As such, neither *Hulse* nor *First Escrow* prohibits the fees charged by Defendant, nor those charged by other similarly situated lenders. Rather, the Court should follow the analysis and holdings of the Supreme Court of Illinois in *King* and the Michigan Supreme Court in *Dressel*. In determining that the activity in question did not constitute the unauthorized practice of law, both the *King* and *Dressel* courts found dispositive the role of the lenders as parties to the challenged transactions. As indicated in the holdings of *King* and *Dressel*, and consistent with this Court's holdings in *Hulse* and *First Escrow*, the overriding concern in relation to allegations of unauthorized practice of law relates to the provision of unauthorized legal advice and services **to others**. *King*, 828 N.E.2d at 1164.

MBA member banks, like Midwest BankCentre, as well as other similarly situated lenders, are invariably parties to the transactions in question and undertake the completion of loan documentation for their own benefit, with an indirect benefit to the borrower; they are not acting as representatives of, or on behalf of, the borrower. These lending transactions and related fees are an integral component of each MBA member bank's ability to compete in the national mortgage market.

If this Court were to uphold the trial court's decision and deny Missouri banks the ability to recover these fees, it would create an entirely separate fee disclosure regime in Missouri, as a result of federal statutes and regulations governing certain federally-chartered lenders. These statutes and regulations authorize loan document preparation

fees and preempt state law. Such a separate and distinct regime would serve to confuse Missouri consumers seeking to make comparisons between Missouri banks and federally-chartered lenders practicing in Missouri, such as the *amici* federal savings associations. Uniformity of disclosure practices would serve to reduce consumer confusion in Missouri.

Missouri banks should be protected by the *pro se* exception to the unauthorized practice of law in the same way that such lenders are protected in other states such as Illinois and Michigan. Only in that way will Missouri banks and other Missouri lenders remain competitive in the national mortgage market and consumer confusion be avoided.

CONCLUSION

For the foregoing reasons, and for those set forth in the briefs of Defendant Midwest BankCentre and the other amici curiae, the judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief includes the information required by Rule 55.03 and complies with the requirements contained in Rules 84.04 and 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 3,579 exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free.

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CERTIFICATE OF SERVICE

Two copies of this brief and a disk containing a copy of this brief were mailed, first-class, postage pre-paid, on January 5, 2007, to:

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