IN THE SUPREME COURT OF MISSOURI

Case No. SC 88367

CYNTHIA CARPENTER, *et al.*
Plaintiffs/Respondents

v.

COUNTRYWIDE HOME LOANS, INC.
Defendant/Appellant

On Appeal from the Circuit Court of St. Louis County,
Hon. Gary M. Gaertner, Jr., Circuit Judge

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the trial court awarding damages of $6,150,966.59, including treble damages, against Defendant Countrywide Home Loans, Inc., a residential real estate lender ("Countrywide"). Plaintiffs assert that Countrywide violated R.S.Mo. §§ 484.010 and 484.020 (2000) (the "Law Business Statute"), which prohibit the unauthorized doing of law business, by completing form loan documents and charging certain Countrywide borrowers a document preparation fee. The appeal presents a question of the validity of R.S.Mo. § 484.020 under the Constitutions of the United States and of Missouri. It is therefore within this Court's appellate jurisdiction under Article V, § 3 of the Constitution of Missouri.

The constitutional question giving rise to this Court's jurisdiction is whether R.S.Mo. § 484.020, as applied by the trial court, violates the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution. The trial court interpreted the statute to require the court to award treble damages in every case where there is a violation, without regard to the presence or absence of a culpable mental state on the defendant's part. Mandatory treble damages are in the nature of punitive damages. Countrywide contends that imposing punitive damages in the absence of a culpable mental state deprives a defendant of property without due process of law, contravening the cited constitutional provisions, so that the statue, as interpreted by the trial court, is invalid.

Even if the Court finds that the case is not one within its original appellate jurisdiction, the Court should also exercise jurisdiction pursuant to Article V, § 10 of the Missouri Constitution and Mo. Sup. Ct. R. 83.01. Such jurisdiction is appropriate due to the pendency in the Court of *Eisel v. Midwest Bankcentre*, No. SC 88167 (Mo. Sup. Ct.), another case raising very similar issues which was transferred to this Court by the Court of Appeals because of the general importance of the issues involved in construction of R.S.Mo. § 484.020.

STATEMENT OF FACTS

This case arises out of mortgage loans made to Plaintiffs by Countrywide. In connection with each loan, Countrywide completed a series of form documents. The form documents included notes and deeds of trust, as well as other administrative and informational documents necessary for Countrywide's business. As is customary in the residential lending industry, Countrywide charged Plaintiffs certain closing fees, which were fully disclosed, to recoup some of Countrywide's costs. One of the disclosed fees was a "document preparation" fee. This appeal presents the question whether the actions of Countrywide in completing the forms and collecting these document preparation fees constituted the unauthorized doing of law business in violation of R.S.Mo. §§ 484.010 and 484.020.

A. Plaintiffs' Claims.

This case was initially brought on March 18, 2002 against more than a dozen mortgage lenders, including Countrywide, in the form of a Petition for Individual and Class Action Relief, *Casey v. Accel Mortgage Services, Inc.*, St. Louis Co., No. 02-CC-1055. Legal File ("LF") 64-90. After settlements and several motions eliminated some defendants, claims against five of the lenders were certified for class treatment under Mo. Sup. Ct. R. 52.08. LF 280-82. The case was administratively severed in the trial court on January 7, 2005. LF 283-84, 286. The severance created distinct causes against the various lenders, each proceeding under the same Third Amended Petition for Individual and Class Action Relief ("Third Amended Petition").

One of the now-separate cases was *Eisel v. Midwest Bankcentre*. That case involved a lender other than Countrywide. Following a trial on a stipulated record and judgment against the lender, affirmed by the Court of Appeals and transferred to this Court, *Eisel* is presently pending before this Court (No. SC 88167). Briefing in *Eisel* has just been completed.

The class action against Countrywide, styled *Carpenter et al. v. Countrywide Home Loans, Inc.*, No. 02-CC-1055B in the trial court, was another of the severed cases. In May 2006 it was tried to the court over four days without a jury on the basis of the Third Amended Petition. That pleading, like the earlier petitions in the case, contained two counts.

Count I of the Third Amended Petition alleged that Countrywide engaged in the unauthorized doing of the law business, violating the Law Business Statute, R.S.Mo. § 484.010 *et seq*. LF 120-24, 133-35 (Third Amended Petition ¶¶ 56-57, 79-81, 136-39). The allegations under Count I were that:

(a) Countrywide and the other lenders were "preparing" the "documents of legal significance," most notably promissory notes and deeds of trust, for their own lending transactions. LF 103 (Third Amended Petition ¶ 1);

(b) Countrywide charged a document preparation fee for "preparing" those "documents of legal significance." LF 103 (Third Amended Petition ¶ 2);

(c) The charging of a document preparation fee, standing alone, turned Countrywide's conduct into the unauthorized "doing of the law business." LF 124 (Third Amended Petition ¶¶ 79-81).

Count II alleged that the identical conduct was a deception and an unfair trade practice under the Merchandising Practices Act, R.S.Mo. § 407.010 *et seq.* ("MPA"). LF 135-37 (Third Amended Petition ¶¶ 140-44).

Plaintiffs sought a refund of all fees paid by class members, and trebling of such refunds for all fees paid within the two years before the filing of the petition under the Law Business Statute. LF 124 (Third Amended Petition ¶ 81). They also sought prejudgment interest, attorneys' fees and costs. LF 140 (Third Amended Petition ¶¶ 149(f), (g)).

B. Countrywide's Document Preparation Process.

1. The Documents At Issue And How They Are Drafted.

As one of the nation's leading mortgage companies, Countrywide offers over one hundred different loan programs to potential homeowners. Transcript ("Tr.") 420. Different loan programs typically use different documentation. Tr. 252, 420. Most documents prepared by Countrywide are administrative or informational and assist Countrywide with the closing, servicing or sale of the loan. Tr. 247-49, 251-55, 321-23. The few documents of a strictly legal nature – in particular the note and deed of trust, and any riders and addenda to the deed of trust – are form documents promulgated by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Tr. 223, 262-64, 340; Trial Exhibits C3, D3, E3.[1] Loans may involve approximately 30-35 separate documents prepared for the transaction, and the documents used vary from loan to loan. Tr. 389-91; Trial Exs. C1, C3, D1, D3, E1, E3.

Almost every lender in Missouri (and in the United States) uses standardized form notes and mortgages from Fannie Mae and Freddie Mac to document conventional mortgage loans. Tr. 340, 344, 346. Participants in the secondary mortgage market − those who buy closed loans − led by Fannie Mae and Freddie Mac, require the use of

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[1] The trial exhibits will be separately submitted at or before the time of Countrywide's Reply Brief pursuant to Mo. Sup. Ct. R. 81.16. They will be hereinafter cited as "Trial Ex. ___."

standardized form documents. Tr. 227-29, 340-41, 344, 346; Trial Ex. M2. Fannie Mae and Freddie Mac are corporations chartered by Congress to aid the flow of home mortgage lending funds by buying loans already made (Tr. 219, 339), thereby allowing lenders to re-lend the funds to other consumers. Tr. 344-45.

So that mortgage loans may be bought and sold more easily, Fannie Mae and Freddie Mac have created standardized residential loan documents. Tr. 340-41, 344-45. This standardization of basic notes and mortgages, and the rights and remedies provided in them, means that Fannie Mae and Freddie Mac (and other investors) can more easily value a loan before purchasing it and can more easily service a loan (i.e. collect payments, respond to defaults, etc.) if it is sold. Tr. 344. Because the substantive loan terms (repayment obligations, type of security instrument, foreclosure rights, etc.) are standardized, the investors who buy these loans − typically in large volume transactions − know exactly what they are getting. Tr. 341, 346-47. Inconsistent terms would erode the marketability of mortgage loans, and, hence, an efficient secondary market. Tr. 344-45, 352.

The process of standardization allows the secondary market to function more efficiently. It thus makes more funds available for lenders to offer to the public. Tr. 344-345. A healthy secondary market reduces costs for consumers, because loans are sold more efficiently and more competition exists for the consumer's business. Tr. 225, 340-41. Therefore, both lenders and customers are benefited by the use of form notes and deeds of trust. Tr. 225, 346-47, 352.

The particular notes and deeds of trust used in the loans in this case were drafted and/or reviewed and approved for use in Missouri by St. Louis attorney John McNearney. Tr. 342. Mr. McNearney testified at trial that in the late 1990s, Fannie Mae and Freddie Mac hired him as part of a project to revise their legal instruments used in mortgage transactions throughout the country. Tr. 338-39, 342. Mr. McNearney reviewed, revised and approved the Missouri form deeds of trust and Missouri form fixed rate notes, among other documents, that were adopted by Fannie Mae and Freddie Mac. Tr. 342, 348-49. As a result of this process, all of the legal language contained in each Fannie Mae/Freddie Mac form instrument used in Missouri was prepared or approved by Missouri attorneys. Tr. 342-49.

The Fannie Mae and Freddie Mac forms indicate on their faces that they are, in fact, Fannie Mae and Freddie Mac forms. Tr. 261-63; Trial Ex. A at 1217 (MULTISTATE FIXED RATE NOTE-Single Family Fannie Mae/Freddie Mac UNIFORM INSTRUMENT), 1279 (MISSOURI-Single Family -Fannie Mae/Freddie Mac UNIFORM INSTRUMENT). Objective information such as name, property address, and interest rate is left blank on the Fannie Mae/Freddie Mac form instruments and must be filled in by the lender making each loan. Tr. 229, 281, 375-80. As noted below, the notes and deeds of trust prepared for Plaintiffs' loan transactions were on these forms. Trial Ex. A at 01217-1218, 01294-1307.

2. Filling In The Blanks On The Closing Documents.

Countrywide uses a proprietary computer system called "EDGE" to process loan documents. Tr. 245, 321. The EDGE system generates both pre-closing documents, such as introductory materials for the borrower and internal worksheets, and nearly all of the closing documents that Countrywide needs for each loan transaction. Tr. 260, 361-63.[2]

The evidence at trial detailed the programming and operation of EDGE, primarily through the testimony of a Countrywide executive who oversees EDGE document preparation and compliance, Kimberly McMann, and the testimony of a Countrywide branch office employee in St. Louis, Kellea Woods. Ms.Woods has prepared documents for thousands of loans, including the documents for the loan made to one of the three named Plaintiffs. Tr. 258-307, 299.

The computer system contains within it all forms of legal and non-legal documents that Countrywide might use for a loan. Tr. 266-67. When Countrywide is ready to extend a loan to a particular borrower and the closing date is set, the Countrywide employee preparing documents prompts EDGE to do two things – EDGE locates the correct set of form documents for the type of loan and, with further information from the

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[2] The notable exceptions are that Countrywide does not prepare the settlement statement (Tr. 366), the closing agent does (*see* 12 U.S.C. § 2603), and Countrywide does not prepare any warranty deed, if the transaction involves a sale. Tr. 366.

processor, EDGE fills in the blanks on those form documents so that the documents are completed for the particular transaction. Tr. 271.

With respect to the first function, Ms. McMann explained that Countrywide has dozens of types of loan programs,[3] and each type of loan program has a set of legal and non-legal documents that Countrywide has developed to be used for the loan. Some forms may be used in many different types of loans, while others might be unique to one particular loan type. Tr. 269-73. The forms are kept on Countrywide's computer system. Tr. 266-67, 365. The forms are programmed to be used (or not used) depending on the type of loan. Tr. 271. The decision as to which form of promissory note and which form of deed of trust to be used for each loan program was made by in-house lawyers at Countrywide. The EDGE system is programmed to use the appropriate lawyer-selected form whenever the loan program is chosen. Tr. 271. Countrywide processors in the branch did not have any discretion as to which deed of trust to use as to any particular loan, because the EDGE system was programmed to provide only the single form approved by lawyers for use with that loan. Tr. 273-74.

The form documents are then completed, in that, the blanks on the forms are filled in. Ms. Woods demonstrated the process through the computer screens that she uses to

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[3] Loan programs are differentiated by loan terms, such as length of time or type of interest rate. So, for example, a 30-year fixed rate loan is a different loan program from an adjustable interest rate loan with rates adjusting every 6 months.

prepare the completed documents. *See* Tr. 283-297; Trial Ex. O. To generate documents for a specific loan, Countrywide loan processors gather information from Countrywide's closing agents, brokers, appraisals, insurance applications and other sources. Tr. 283. Much of the necessary objective information (name, address, etc.) is already contained in EDGE, having been input through earlier parts of the process, such as when the borrower submits the loan application. Tr. 281-83, 285-86. The loan processors then type the remaining loan-specific objective information into EDGE. Tr. 288-92, 365. The information is not typed directly into a given form. Rather, it is entered through various computer screens on the EDGE system (Tr. 273), which the computer later uses to fill in the document blanks. Tr. 366. Examples of the screens on which Countrywide's loan processors verify or input information are contained in Trial Ex. O. The Countrywide personnel responsible for filling in these blanks cannot change any of the substantive language or terms in the forms. They can only input the objective information particular to that loan. That is, they fill in the blanks. Tr. 286. After typing the data into EDGE, the loan processor either prints or electronically forwards the closing documents to the closing agent to close the loan. Tr. 296.

Some, but not all, Missouri Countrywide branch offices formerly charged certain borrowers a document preparation fee. Tr. 323-24, 395. If and when a document preparation fee was charged, it always was disclosed to borrowers in writing at least twice. Tr. 254, 328, 363-64, 391-394. Each of the named Plaintiffs admits that the amount of the document preparation fee was disclosed to him or her twice before closing,

and again at closing on the HUD-1 Settlement Statement. Tr. 82-83, 549, L.F. 509-511 (Deposition of Cheryl Held ("Held Dep.") Tr. 550-51, L.F. 517-518, 520-521, 521-522) (Deposition of Cynthia Carpenter ("Carpenter Dep.") Tr. 552-54, L.F. 532, 532-533, 534-535, 538-539, 539-540) (Deposition of Andrew Cole ("Cole Dep.") Trial Exs. C10, D18, E13).[4]

C. Plaintiffs' Loan Transactions.

This case was tried as a class action with three class representatives, although four other putative class representatives were named and subsequently dropped from the case when the evidence demonstrated that they never paid the fee at issue.

1. The Held Loan And The Original And First Amended Petitions.

Cheryl Held was the original Plaintiff asserting claims against Countrywide in the original Petition, filed March 18, 2002. LF 71 (Petition for Individual and Class Relief ¶ 11). She did not appear at trial.

Ms. Held's loan was a purchase loan and closed on December 14, 2001. The note and deed of trust used for the loan were on standard Fannie Mae/Freddie Mac forms. Trial Ex. C3 at 00468 − 00483. The Held loan consummated a complicated transaction,

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[4] The portions of witnesses' deposition transcripts read into the record are included as part of the Legal File, in the order in which they were read into the record. They will be referred to herein as "Tr. __, L.F. __ (Deposition of _____)" citing both to the page of the transcript evidencing the designation and to the page numbers of the Legal File.

involving a "like-kind exchange," structured to avoid taxes to Ms. Held − the sale of a family property in which Ms. Held did not live, and the commensurate purchase of an investment property, financed by Countrywide, in which Ms. Held was not permitted to live for at least two years. Tr. 548-49, L.F. 504-505 (Held Dep.). At closing, Held was charged a $125 document preparation fee. That fee was fully disclosed to her on two good faith estimates provided to her prior to closing and on the HUD-1 Settlement Statement that she signed at the closing. Tr. 549-50, L.F. 509-510, 512-513 (Held Dep); Trial Exs. C10, C12, C13A.

Ms. Held's personal lawyer was involved in this transaction to look after her interests, and he was paid for his work out of the proceeds of the loan on the investment property. *See* Trial. Ex. C at 00464.[5] Ms. Held testified in deposition that Countrywide was not her lawyer and was not acting on her behalf in any way. Tr. 549, L.F. 507-508 (Held Dep.). The loan was brokered by Rick Bauer of St. Louis Mortgage, a long-time personal friend of Ms. Held and someone she "trusted" to provide a "fair" transaction. Prior to closing Ms. Held never asked Mr. Bauer a single question about the document preparation fee or any other closing charge she incurred. Instead, she was satisfied with

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[5] Indeed, it was Held's personal lawyer, N.E. Brown, whose title company closed the loan on *Countrywide's* behalf, who then advised Held of the alleged illegality of the document preparation fee and put her in touch with plaintiffs' attorney. Tr. 548, L.F. 501, 502, 503 (Held Dep.).

the good interest rate she obtained and the fact she could finance all closing costs charged. Tr. 548-49, L.F. 503, 509-510 (Held Dep. at 46, 114). Ms. Held had no complaints with the manner in which her loan documents were prepared. Tr. 550, L.F. 513 (Held Dep.).

2. Carpenter, Cole And The Second Amended Petition.

In November 2002 the Circuit Court held that all Law Business claims arising prior to two years before the complaint were time-barred. LF 94. On January 6, 2003, in response to that ruling, Plaintiffs filed a Second Amended Petition. The new Petition also added Cynthia Carpenter and Andrew Cole as named Plaintiffs as to Countrywide.

Cynthia Carpenter testified at trial as Plaintiffs' only live fact witness. Carpenter's loan was a refinance and closed on August 22, 2002. Tr. 70; Trial Ex. D at 0044-46, D18. The note and deed of trust used for the Carpenter loan were on standard Fannie Mae/Freddie Mac forms. Trial Ex. D3 at 00053-00071. Copies of the blank forms used of the note and deed of trust are included in the Appendix at A8-A23, and the as-completed, executed note and deed of trust are included at A24-A40.

At closing, Carpenter was charged a document preparation fee in the amount of $125.00. Tr. 64; Trial Ex. 11; Tr. 140, L.F. 554 (Corcoran Dep.). That fee was fully disclosed to her twice on prior good faith estimates, and on the HUD-1 Settlement Statement that she signed at the closing. Tr. 82-83, 551, L.F. 519, 521 (Carpenter Dep.); Trial Exs. D15, D18. She did not object to the document preparation fee before or at closing and had no discussions with her broker regarding it. Tr. 65, 550-51,

L.F. 514, 515, 520-21 (Carpenter Dep.).

Carpenter knew at the time of closing that Countrywide was not a lawyer. Tr. 73. She did not believe Countrywide was acting as her lawyer or performing legal work. Tr. 73-74. Indeed, Carpenter knew and understood that Countrywide was not protecting her interests. *Id.* She believed Countrywide's fees were reasonable and fair. Tr. 78.

Carpenter also took out a simultaneous home equity line of credit, for which yet another set of documents was prepared. Tr. 67-68. Countrywide did not charge a separate document preparation fee for the equity line, instead collecting only one fee, but preparing more documents. *Id.*; Trial Ex. D.

Cole's loan was a real estate purchase loan. The first closing cost estimate he received informed Cole he would be charged a document preparation fee of $150. The note and deed of trust used for the Cole loan were on standard Fannie Mae/Freddie Mac forms. Trial Ex. E3 at 00139- 00162. At closing, Cole was charged a lower document preparation fee of $125. Tr. 552-53, L.F. 532-533 (Cole Dep.). That fee was fully disclosed to him on a second good faith estimate that was provided to him prior to closing and on the HUD-1 Settlement Statement that he signed at the closing. Tr. 553-54, L.F. 534-535, 538-539 (Cole Dep.); Trial Exs. E11, E13.

D. Disclosures To Class Members.

Document preparation fees were disclosed to Plaintiffs and to all class members both in advance of closing and at closing. Tr. 143, L.F. 563, 564 (Corcoran Dep.), Tr. 327-29, 363-64, 391-92; *e.g.*, Trial Exs. C10, C13, C13A. For most class

members, a mortgage broker was involved in addition to Countrywide, and the mortgage broker typically disclosed the fee in writing as well. *Id.*; Tr. 359-61. This means the fee was disclosed in writing at last twice, and in many cases three times.

E. Relevant Procedural History.

1. The Addition And Deletion of Plaintiffs And The Third Amended Petition.

On March 31, 2003, Plaintiffs filed their Third Amended Petition. This is the operative Petition as to which the trial was held. During the course of the pretrial proceedings, four other putative claimants appeared and filed claims against Countrywide – Carl Makarewicz, Peter and Karen Nevins, and Geri Thompson. Makarewicz's claim appeared in the original Petition, and lead to the filing of a motion, and an unsuccessful writ request, as to the proper time period from the putative class. Petition for Writ of Prohibition, *State of Missouri ex. rel. v. Countrywide Home Loans, Inc. v. Hon. Melvyn W. Wiesman*, No. 085214 (Mo. Apr. 15, 2003).

Thereafter, during discovery it became obvious that although Countrywide had *charged* a document preparation fee in each of these four Plaintiffs' transactions, the fee was *paid* by their mortgage broker or by the seller, not by the putative Plaintiffs themselves. Tr. 143, L.F. 568, 569, 570 (Corcoran Dep.), Tr. 397-401. Having appeared in the case long enough to have it shown that they did not even pay some or all of the fee, Makarewicz, the Nevins and Thompson dismissed their claims.

2. Trial Proceedings And Post-Trial Motions.

At trial, the Court denied Countrywide's Motion for Summary Judgment and the matter was tried in May 2006. The trial was without jury, and spanned four days of testimony with eleven (11) witnesses, and the admission of 81 exhibits. As noted above, the factual record included the testimony of not only the Plaintiff borrowers, but of the individuals involved in "preparing" the legal and non-legal loan documents for Countrywide. There was also testimony from two liability experts. Former Supreme Court Judge Holstein opined that the facts elicited at trial did not support a finding that Countrywide had engaged in the unauthorized doing of the law business as alleged in the petition. Tr. 427-61. John McNearney, the Missouri attorney who reviewed, revised and approved the form loan documents, the note and deed of trust, used both in this case and in *Eisel,* also testified as to his work in drafting and/or reviewing the form documents and as to the simplicity of filling in the blanks on these form loan documents. Tr. 334-52. Plaintiffs provided no expert testimony in response.

Damages were proven by expert testimony. The parties stipulated to a list of 16,852 loans to class members ("Undisputed Group") as to which a document preparation fee was charged and there was no evidence on the loan closing statement that the fee was paid by anyone other than the class member. Tr. 500-01. A second list of 2,396 class members ("Disputed Group") was in dispute as to damages because, Countrywide contended, their loan closing statements showed that someone else paid the fee that had

been charged. Tr. 501-02. The mathematical calculation of damages as to each of these Groups, should one or both recover, was undisputed.

On the first day of trial, Plaintiffs moved to expand the class from five years to six years, based on R.S.Mo. § 516.420, as interpreted in *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 178 (Mo. App. 2006). LF 364-66; Tr. 26-32. The Court stated that it would grant the motion, but that the trial would need to be postponed. In response, Plaintiffs abandoned their motion. Tr. 31-32.

At the close of evidence on May 25, 2006, the Circuit Court took the matter under advisement. On November 28, 2006, the Court of Appeals issued its decision in the *Eisel* case, No. ED87582. On December 6, 2006, relying on *Eisel*, the Circuit Court entered judgment in the case at bar. The judgment was in favor of the Class on the Law Business claim, but in favor of Countrywide on the Merchandising Practices Act claim. LF 367. The Court found that the 2,396 class members in the Disputed Group were not entitled to damages.

The Court's total award was to the Undisputed Group of class members, in the amount $6,150,966.59. This consisted of actual damages of $2,558,298,94 (representing document preparation fees paid), treble damages of $2,661,563.36, and prejudgment interest of $931,104.29. Damages were trebled only for Class members who had closed a loan with Countrywide within two years of the filing of the suit (i.e. March 18, 2000-March 18, 2002), while single damages were awarded to class members who took loans more than two years but fewer than five years before filing of the Petition. LF 375-76,

415-417. The treble damages award was not based on a finding of a culpable mental state. Nothing in the order or the trial record even suggests any evidence of a culpable mental state, and the only evidence submitted at trial was to the contrary. Tr. 370.

Both parties filed post-trial motions. LF 370-91.[6] Countrywide's motion was directed to the fact that the Court had only found liability on the Law Business claim, which has a two year limitation period, but awarded damages to all class members − even those whose claims arose more than two years before suit was filed. LF 373-74.

On January 18, 2007, the Court denied Countrywide's post-trial motion and entered final judgment in favor of the Class. LF 490-91.

Countrywide filed its notice of appeal on January 25, 2007. LF 492-500.

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[6] Plaintiffs' motion sought to correct typographical errors in the amount of the judgment and attorneys' fees, and was granted by the Court.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS AND THE CLASS ON THE BASIS THAT COUNTRYWIDE VIOLATED R.S.MO. §§ 484.010 AND 484.020, BECAUSE THE COMPLETION OF STANDARDIZED FORMS DOES NOT CONSTITUTE DOING LAW BUSINESS IF COMPLETING THE FORMS IS NOT THE BUSINESS BEING CARRIED ON BUT IS MERELY ANCILLARY TO ANOTHER BUSINESS OF THE PREPARER OR IF THE PREPARER DOES NOT HAVE A REPRESENTATIVE RELATIONSHIP WITH THE OTHER PARTY; COUNTRYWIDE'S FORM PREPARATION WAS ANCILLARY TO ITS BUSINESS OF LENDING MONEY, AS SHOWN BY A PROPER APPLICATION OF THE FACTORS USED IN RESOLVING THIS ISSUE, IN THAT THE FORMS ARE SIMPLE AND STANDARDIZED, THE NATURE AND CUSTOM OF THE LENDING BUSINESS IS THAT SUCH FORMS ARE ROUTINELY PREPARED BY LENDERS FOR TRANSACTIONS TO WHICH THEY THEMSELVES ARE PARTIES; THE PUBLIC IS WELL SERVED BY THE EFFICIENT MARKET FOR MORTGAGES THAT RESULTS; COUNTRYWIDE HAS A FINANCIAL INTEREST THAT SAFEGUARDS THE TRANSACTION; AND THE ASSESSMENT AND ITEMIZATION OF A DISCLOSED DOCUMENT PREPARATION FEE AS PART OF THE LENDER'S

CHARGES DOES NOT CONVERT THE LENDER'S ORDINARY COMMERCIAL ACTIVITIES INTO THE LAW BUSINESS; AND COUNTRYWIDE HAD NO REPRESENTATIVE RELATIONSHIP WITH PLAINTIFFS AND THE CLASS.

Hulse v. Criger, 247 S.W.2d 855 (Mo. banc 1952)

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

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

II. THE TRIAL COURT ERRED IN INCLUDING TREBLE DAMAGES IN ITS JUDGMENT IN FAVOR OF CERTAIN PLAINTIFFS, BECAUSE IMPOSITION OF PUNITIVE DAMAGES WITHOUT A SHOWING OF A CULPABLE MENTAL STATE VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE MISSOURI CONSTITUTION; THAT OCCURRED HERE IN THAT THERE WAS NO EVIDENCE WHATSOEVER THAT COUNTRYWIDE ACTED IN KNOWING DISREGARD OF THE LAW OR WITH RECKLESS DISREGARD FOR THE LAWFULNESS OF ITS CONDUCT; RATHER THE TRIAL COURT TREBLED THE DAMAGES AWARDED CERTAIN PLAINTIFFS AS A MATTER OF COURSE AND WITH NO CONSIDERATION WHATSOEVER OF COUNTRYWIDE'S MENTAL STATE, SO THAT THE LAW BUSINESS STATUTE, AS APPLIED BY THE TRIAL COURT, VIOLATED THESE PROVISIONS.

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003)

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996)

Burnett v. Griffith, 769 S.W.2d 787 (Mo. banc 1989)

III. THE COURT ERRED IN REJECTING COUNTRYWIDE'S VOLUNTARY PAYMENT DEFENSE AND ENTERING JUDGMENT FOR PLAINTIFFS, BECAUSE A PERSON WHO VOLUNTARILY PAYS MONEY WITH FULL KNOWLEDGE OF ALL THE FACTS IN THE CASE, AND IN THE ABSENCE OF FRAUD AND DURESS, CANNOT RECOVER IT BACK; THAT OCCURRED HERE IN THAT THE EXISTENCE AND NATURE OF THE DOCUMENT PREPARATION FEES WERE FULLY DISCLOSED TO PLAINTIFFS, WHO PAID THEM WITHOUT COMPLAINT AS PART OF THE CONSIDERATION FOR THE LOANS THEY SOUGHT FROM COUNTRYWIDE.

American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809 (Mo. App. 1969)

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

IV. THE TRIAL COURT ERRED IN ASSESSING DAMAGES AND ENTERING A JUDGMENT ORDERING REFUNDS COVERING THE ENTIRE FIVE YEAR CLASS PERIOD, BECAUSE DAMAGES MAY NOT BE AWARDED FOR INJURIES OCCURRING PRIOR TO THE APPLICABLE LIMITATION PERIOD AND THE APPLICABLE LIMITATION PERIOD HERE IS TWO YEARS, NOT FIVE OR SIX, IN THAT THE LAW BUSINESS STATUTE CONTAINS A TWO YEAR LIMIT ON PRIVATE LAWSUITS THAT PREVAILS OVER ANY GENERAL LIMITATIONS STATUTE.

Collier v. Roth, 515 S.W.2d 829 (Mo. App. 1974)

Robinson v. Health Midwest Dev. Group, 58 S.W.3d 519 (Mo. banc 2001)

Viacom v. Transit Casualty Co., 138 S.W.3d 723 (Mo. banc 2004)

Div. of Labor Standards, Dep't of Labor and Indus. Relations v. Walton Constr. Mgmt. Co., 984 S.W.2d 152 (Mo. App. 1998)

V. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST, BECAUSE SUCH INTEREST MAY NOT BE AWARDED WITHOUT CONTRACTUAL OR STATUTORY AUTHORIZATION; THERE IS NO SUCH AUTHORIZATION HERE IN THAT COUNTRYWIDE DID NOT CONTRACT TO PAY INTEREST ON THE AMOUNTS AT ISSUE AND NEITHER THE LAW BUSINESS STATUTE NOR ANY OTHER STATUTE PROVIDES FOR INTEREST IN THIS CASE.

Denton Constr. Co. v. Missouri State Highway Comm'n, 454 S.W.2d 44, 59 (Mo. 1979)

R.S.Mo. § 484.020

ARGUMENT

Summary Of Argument

The prohibitions on unauthorized practice of law and the unlawful doing of law business contained in R.S.Mo. §§ 484.010 and 484.020 exist for one reason only: protecting the public. Their purpose is preventing members of the public from being advised or represented in legal matters by incompetent or unreliable persons. The present case does not in any way implicate this purpose. Countrywide did not provide legal advice or legal representation to its borrowers. The named Plaintiffs were fully aware that Countrywide was not their lawyer, and so testified.

Countrywide's employees did not provide legal services to anyone. Rather, they filled in the blanks on standardized legal forms that had been prepared by others − Fannie Mae and Freddie Mac. Those forms had been reviewed and approved by a Missouri lawyer retained by those entities. Use of these standardized forms, rather than specific lawyer-drafted forms tailored to particular transactions, is now the norm in residential real estate lending in the United States.

Under decisions of this Court involving real estate brokers and escrow agents, completion of standardized forms constitutes the law business only if completion of the forms is itself the business being conducted by the preparer. *Hulse v. Criger*, 247 S.W.2d 855 (Mo. banc 1952); *In re First Escrow*, 840 S.W.2d 839 (Mo. banc 1992). If the forms are being completed ancillary to some other

business, their completion is not the doing of law business and is not proscribed by the statutes at issue. This Court has established a number of factors to be used in considering whether the completion of standardized forms constitutes the doing of law business, or is merely ancillary to some other business of the preparer. These factors include the simplicity or complexity of the forms, the nature and custom of the business involved, the convenience to the public, whether or not separate charges are made, and whether or not the preparer has an interest in the transaction. None of these factors is in itself decisive, but all should be taken into account.

When all these factors are considered here, it is evident that Countrywide was not doing law business. The forms are simple and standardized. It is the nature and the custom of the real estate lending business that lenders create large numbers of documents in connection with a transaction, both legal and non-legal, and collect document preparation fees to recover the cost of doing so. Use of standardized forms in fact serves the public. It reduces expense and makes mortgages saleable in the secondary market that is an important source of funds for real estate lending in the United States today. Countrywide's financial interest in the transaction also ensures its proper documentation.

That Countrywide charged a document preparation fee does not swing the balance of factors in Plaintiffs' favor. Whether the preparer charges a fee is only one factor among many to be taken into account. In the present case, the

document preparation fees were part of the consideration that the borrowers paid to obtain their loans. The fee does not change the ordinary commercial transaction of a real estate loan into the performance by the lender of law business for the borrower. The trial court erred by relying on this one factor as overriding all others.

The trial court further erred in not concluding that the absence of a representative relationship between Countrywide and the Plaintiffs and the class takes this case outside the reach of the law business regulation. The court's judgment that Countrywide violated the Law Business Statute should be reversed, as shown in Section I of this argument.

Even if the trial court correctly found that Countrywide's document preparation fees violated the Law Business Statute, the court's judgment should be modified because of a number of additional errors that the trial court made. The trial court trebled the damages awarded to every Plaintiff and class member who borrowed funds in the period starting two years before suit was filed. It did so without any showing or finding that Countrywide possessed the culpable mental state necessary before an entity may be punished under the due process clauses of the United States and Missouri Constitutions. This was error, as shown in Section II of this Argument.

The trial court also erroneously rejected Countrywide's voluntary payment defense, as shown in Section III of this Argument. It is undisputed that the

document preparation fee was fully disclosed to borrowers. Having knowingly paid the fees as part of the consideration for the loans that they sought, the borrowers may not now sue to recover them.

The trial court also erred in using a five year limitation period in computing actual damages (Argument Section IV) and in including prejudgment interest in the judgment without contractual or statutory authorization to do so (Argument Section V). The limitation period specifically applicable to these statutes is two years, not five, for private lawsuits. There is no contract or statute that authorizes the recovery of prejudgment interest. Absent such authorization, prejudgment interest may not be recovered.

The judgment of the trial court should be vacated, and the cause remanded with directions to enter judgment for Defendant. Alternatively, the cause should be remanded with directions to conduct further proceedings to correct the errors as to damages identified in argument Sections II, IV and V of this Argument.

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS AND THE CLASS ON THE BASIS THAT COUNTRYWIDE VIOLATED R.S.MO. §§ 484.010 AND 484.020, BECAUSE THE COMPLETION OF STANDARDIZED FORMS DOES NOT CONSTITUTE DOING LAW BUSINESS IF COMPLETING THE FORMS IS NOT THE BUSINESS BEING CARRIED ON BUT IS MERELY ANCILLARY TO ANOTHER BUSINESS OF THE PREPARER OR IF THE PREPARER DOES NOT HAVE A REPRESENTATIVE RELATIONSHIP WITH THE OTHER PARTY; COUNTRYWIDE'S FORM PREPARATION WAS ANCILLARY TO ITS BUSINESS OF LENDING MONEY, AS SHOWN BY A PROPER APPLICATION OF THE FACTORS USED IN RESOLVING THIS ISSUE, IN THAT THE FORMS ARE SIMPLE AND STANDARDIZED, THE NATURE AND CUSTOM OF THE LENDING BUSINESS IS THAT SUCH FORMS ARE ROUTINELY PREPARED BY LENDERS FOR TRANSACTIONS TO WHICH THEY THEMSELVES ARE PARTIES; THE PUBLIC IS WELL SERVED BY THE EFFICIENT MARKET FOR MORTGAGES THAT RESULTS; COUNTRYWIDE HAS A FINANCIAL INTEREST THAT SAFEGUARDS THE TRANSACTION; AND THE ASSESSMENT AND ITEMIZATION OF A DISCLOSED DOCUMENT PREPARATION FEE AS PART OF THE LENDER'S CHARGES DOES NOT CONVERT THE LENDER'S ORDINARY

COMMERCIAL ACTIVITIES INTO THE LAW BUSINESS; AND COUNTRYWIDE HAD NO REPRESENTATIVE RELATIONSHIP WITH PLAINTIFFS AND THE CLASS.

Standard Of Review

Review of the trial court's judgment in this court-tried case is governed by the standard of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Under this standard the Court will affirm a trial court's judgment unless there is no substantial evidence to support it, the decision is contrary to the weight of the evidence, or the trial court has erroneously declared or applied the law.

If the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment as to factual matters. *Hinnah v. Director Of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). This is such a case. The facts about the manner in which Countrywide prepared loan documents and dealt with borrowers, including Plaintiffs, are undisputed. The issues before this Court go to the legal conclusions to be drawn from the undisputed facts, so that review here should be on a *de novo* basis.

Countrywide anticipates that Plaintiffs will contend that because the trial court made no findings in this court-tried case, it should be deemed to have rejected all of Countrywide's evidence, by operation of Mo. Sup. Ct. R. 73.01. *See* "Respondent's Substitute Brief," at 9-10, filed in *Eisel,* No. 88167 (commenting on Countrywide's *amicus* brief filed therein). Rule 73.01 only concerns how the Court will consider

"controverted fact issues." When the facts are not controverted, or the case involves admitted or uncontested facts, or where the evidence is not in conflict, neither Rule 73.01 nor general principles of appellate review operate to refute or somehow negate that evidence. *Reinert v. Director of Revenue*, 894 S.W.2d 162, 164 (Mo. banc 1995) (rejecting Rule 73.01 argument that undisputed testimony of police officer must be ignored due to the absence of findings that the Court had believed officer); *In re Marriage of Kenney*, 137 S.W.3d 487, 490 (Mo. App. 2004); *Jones v. Jones*, 891 S.W.2d 551, 553 (Mo. App. 1995); *Cushman v. Mutton Hollow Land Dev., Inc.*, 782 S.W.2d 150, 152 (Mo. App. 1990). In the case at bar, the facts as to all material issues (other than certain facts relating to damages) were uncontested, so the Court should consider the record as a whole.

Moreover, Rule 73.01(c) provides only that "all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Because the Circuit Court's finding was explicitly based solely on *Eisel*, and the only fact pertinent to the *Eisel* analysis was that a fee was charged by a non-lawyer, the Rule would apply only to that single fact – which Countrywide concedes is true – and the Rule neither suggests not requires the rejection of all of the other evidence in the trial.

Analysis

A. This Court, Not The General Assembly, Decides What Constitutes The Law Business.

The General Assembly has defined the "practice of law" and the "law business" in R.S.Mo. § 484.010 (referred to throughout as the "Law Business Statute").[7] The Law Business Statute provides, in pertinent part, as follows:

"484.010 Practice of . . . law business defined.

> 2. 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 of 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

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[7] The General Assembly has defined the "practice of law" and the "law business" as distinct activities. *See* R.S.Mo. § 484.010.1-2. This case involves only the "law business." Throughout this brief, however, for ease of reading, Countrywide shall from time to time refer to the "law business" and the "practice of law" interchangeably.

securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 484.020 defines the persons who may engage in the practice of law and the law business, and also establishes penalties for violation of the statute.

This Court has held that the judiciary alone "is necessarily the sole arbiter of what constitutes the practice of law." *Hulse*, 247 S.W.2d at 857; *see also First Escrow*, 840 S.W.2d at 843 n. 7 ("[T]he General Assembly may only assist the judiciary by providing penalties for the unauthorized practice of law, the ultimate definition of which is always within the province of this Court.") (emphasis in original). While the statutory definition of "law business" was "cited favorably" in *Hulse*, this Court has stated that "it is impossible to lay down an exhaustive definition of 'the practice of law.'" *First Escrow*, 840 S.W.2d at 842 n.6 (citing *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 8-9 (Ariz. 1961)).

The Court's guiding principle in defining the law business is "to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *Hulse*, 247 S.W.2d at 857-58. The "clear intent … of the General Assembly [was] to assist the Court in protecting the public from receiving incompetent legal advice by unlicensed laypersons." *First Escrow*, 840 S.W.2d at 849-50.

B. This Court Has Formulated A Multi-Factor Test To Be Used In Determining Whether The Completion Of Standardized Real Estate Forms Constitutes The Unauthorized Practice Of Law Or The Law Business.

This Court has twice addressed the question of whether the completion of standardized real estate forms by participants in the real estate business constitutes the doing of law business. *Hulse*, 247 S.W.2d at 862-63; *First Escrow*, 840 S.W.2d at 848-49.

In *Hulse*, a licensed real estate broker prepared for persons other than himself documents relating to and affecting real estate and the title to real estate. 247 S.W.2d at 856. These included deeds, deeds of trust, promissory notes, leases, options to purchase, contracts of sale and agreements. *Id.* The broker admitted that he obtained pertinent facts by conferring with one or more of the parties to the transaction, selected and determined the forms to be used, and then filled in the blanks on the forms. *Id*. at 856-57. The broker was not a party to any of the documents that he prepared. *Id.* at 857. He received commissions as a broker for his services, and also charged one or both of the parties to the transaction a fee for the preparation of the documents. *Id.* Bar authorities brought an action against the broker for the unauthorized practice of law and unlawfully engaging in the law business. *Id.* at 856.

In considering whether the broker was engaged in unauthorized practice, the *Hulse* Court stated:

> We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business.

Id. at 862. The Court identified four factors, *each* "hav[ing] a bearing" upon whether the preparation of papers was the business carried on or was simply performed ancillary to the defendant's real estate brokerage:

> (1) the simplicity or complexity of the forms, (2) the nature and customs of the main business involved, (3) the convenience to the public, and (4) whether or not separate charges are made.

Id. Weighing each of these factors, the *Hulse* Court concluded that real estate brokers could complete standardized form real estate documents without engaging in the unauthorized practice of law. *Id.* at 861. However, under the specific facts and circumstances before it, the Court found that when the broker charged a fee for document preparation, in addition to his usual broker's commission, the fee placed emphasis on a distinct business of conveyancing and drafting instruments as a separate practice of law instead of on his services as a broker. *Id.* The broker whose conduct was challenged in *Hulse* had actually prepared documents for transactions in which he was not acting as a broker. *Id.* at 861-62. This, the Court held, violated R.S.Mo. § 484.010. *Id.*

First Escrow involved two escrow companies that provided real estate closing or settlement services, and were charged with the unauthorized practice of law. 840 S.W.2d at 840, 847. The escrow companies completed pre-printed forms prepared or approved by Missouri attorneys including deeds, promissory notes and deeds of trust. *Id.* at 841. The companies' employees obtained information necessary to complete the forms by communicating with the parties to the transactions to obtain the pertinent information, or by reviewing purchase and sale agreements. *Id.* The escrow companies were not parties to the documents their employees prepared. *Id.* They charged parties flat fees at closing. *Id.*

This Court concluded that the escrow agencies' actions were the unauthorized practice of law. Its reasoning is instructive here. In effect, the Court added a fifth factor to the four identified in *Hulse*: whether the party whose conduct is challenged has a "direct financial interest in the transaction." *First Escrow*, 840 S.W.2d at 840, 847. The Court found that because the escrow companies were not parties to the transactions that they closed, they did not have "the requisite personal financial interest to safeguard the transaction." *Id.* at 844. The Court concluded, however, that escrow companies can fill in the blanks on certain standardized form documents if they do so under the direct supervision of, and as agents for, a party, to the transaction. *Id*. at 846-47. The Court specifically identified a mortgage lender as one such party, thereby permitting mortgage lenders to use escrow agents to prepare documents and close transactions, provided that they control the activities of the agents. *Id*.

C. Under *Hulse* And *First Escrow,* The Practice At Issue Here Is Not The Conduct Of The Law Business.

1. The Real Estate Documents Are Ancillary To Countrywide's Lending Business.

In applying the standards of *Hulse* and *First Escrow* to the case at bar, the trial court had before it facts that were largely undisputed. Acting on the basis of the Court of Appeals' opinion in *Eisel*, which is now before this Court on transfer, the court erred in applying the law to those facts. The Court accepted Plaintiffs' argument, and *Eisel*'s conclusion in a similar case, that Countrywide's charging the borrower a document preparation fee was dispositive of the question whether Countrywide engaged in the law business. *See infra* at 59-63. In fact, as the above discussion shows, the presence of the fee is but one factor, among several that are considered. *First Escrow* did not hold that the charging of a fee alone turns the lawful conduct of filling in blanks into illegal lawyering. When all the appropriate factors are considered, it is evident that Countrywide did not engage in the law business.

Hulse makes clear that the analysis is to be governed by a "guiding principle": whether completing standard real estate documents is merely ancillary to the main business of the person completing them, or whether the lender is truly carrying on a separate business of preparing legal documents. *See Hulse*, 247 S.W.2d at 862; Tr. 440 (testimony of Judge Holstein: the "guiding principle" in unauthorized practice determination is whether the preparation of the papers involved is the business being

carried on, or whether it is "really ancillary to an essential part of another business."). It is undisputed that Countrywide, as a mortgage lender, has as its main business lending money so that borrowers can purchase or finance homes. Tr. 138, L.F. 542-543 (Corcoran Dep.), Tr. 218, 236-37. Filling out the paperwork to effectuate those loans is, by its very nature, ancillary to the main lending business, as the testimony at trial made clear. Tr. 252, 255 (Countrywide not "in the business" of preparing loan documents for others); 447-48 ("Clearly, the drafting of these documents is ancillary to the lending business. It is not a stand-alone business. There may be places in the country where they set up kiosks in malls to do − to sell this kind of service, but that is not, as I understand it, what Countrywide or the other lenders here are doing."). Based on the undisputed fact that the documents at issue here are ancillary to Countrywide's main business of lending, the Circuit Court should have entered judgment for Countrywide.

The "ancillary" test on its face makes this case distinguishable from the activities that concerned the Court in *Hulse* and *First Escrow*. In *Hulse*, for example, the real estate broker was engaged in brokering the property for the seller. He then separately took it upon himself to prepare legal documents, once the buyer was located, to assist the buyer and seller. He even prepared the legal documents in cases where he was not himself involved as a broker. All of this suggested to the Court that the broker's work preparing documents was a separate business. 247 S.W.2d at 861. In the case at bar, in contrast, in every instance the documents that Countrywide prepared merely memorialized the transaction engaged in by Countrywide that is its main business −

lending money. There was no dispute at trial that mortgage documents for a mortgage loan are "ancillary to and an essential part of" Countrywide's lending business.

2. The Factors Contained In *Hulse* And *First Escrow* Support Countrywide's Position.

The facts relevant to the *Hulse* factors were essentially undisputed. They were presented through testimony of Countrywide employees involved in document management and preparation and the testimony of Attorney McNearney.

To assist the trial court in applying the test in this bench trial, Countrywide called Judge Holstein as an expert witness to opine as to whether those facts supported, or did not support, a finding that there had been the unauthorized doing of the law business. After thoroughly analyzing the relevant practices and sitting through Countrywide's trial presentation, including testimony of all witnesses describing Countrywide's business and its document preparation work (Tr. 436), Judge Holstein gave his opinion:

> Q: And, based on your application of those factors, and your review of the facts and circumstances of this case, have you formed an opinion as to whether the weight of those factors support the finding of unauthorized doing of the law business?
>
> A: The weight of those factors supports a finding that this was not the unauthorized practice of the law.

Judge Holstein's opinion is correct, as an analysis of the *Hulse* and *First Escrow* factors shows.

a. The Legal Instruments At Issue Are Standard Forms On Which Objective Information Is Inserted; They Require No Legal Training To Complete.

The legal instruments at issue here − notes, deeds of trust, and riders and addenda − are standardized forms that come with blanks for objective information (*e.g.*, name, address). Tr. 229, 245, 281, 375-80. The forms are simple, not complex, requiring no specialized legal training to fill in. *See Hulse*, 247 S.W.2d at 861 (stating that "general warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training."); *First Escrow*, 840 S.W.2d at 844 (recognizing the "relatively simple nature of the task of filling in form documents" that includes promissory notes and deeds of trusts).[8] Although drafting a note or deed of trust from scratch might require a high degree of legal skill, Countrywide

[8] Other documents are prepared for an ordinary home loan transaction, such as informational documents concerning the loan. The documents that were the centerpiece of Plaintiffs' case against Countrywide, and on which liability was found, were the legal documents involved in the loan – the note, deed of trust, and legal riders and addenda to notes and to deeds of trust. This brief will limit its discussion of the ancillary test to the preparation of those latter types of documents.

was not accused of drafting the body of the mortgage documents but instead was only criticized for filling in blanks in those forms.

For convenience, Countrywide includes in the Appendix to this brief the blank Fannie Mae/Freddie Mac note and deed of trust that were used in the Carpenter loan, and those documents as filled in by Countrywide and documented at closing. *See* Appendix at A8-A40, reproducing Trial Ex. A at 01217-1218, 01294-1307; Trial Ex. D at 00053-67, 00070-71. As those attachments show, these are plain and standard forms whose completion is straightforward and accomplished by filling in simple blanks.

The body of the standard Fannie Mae and Freddie Mac notes and deeds of trusts used in Plaintiffs' transactions − the legal language − was approved or revised by Missouri attorney John McNearney. *Supra* at 20; Tr. 342. While Countrywide has a computerized and regimented process to ensure that the blanks in the form documents get filled in with objective information such as the borrower's name, address, interest rate and the like, (*supra* at 20-22; Tr. 245), the legal language on the legal documents for Plaintiffs' loans was indisputably drafted not by Countrywide, but by a Missouri lawyer. Tr. 342-43.

Countrywide employee Kellea Woods testified at length at trial as to what she and others at Countrywide did to "prepare" the loan documents. That testimony is summarized *supra* at 21-23, but there is no dispute whatsoever that the work of Ms.

Woods and others like her is entirely clerical in nature.[9] Tr. 280-305. As Judge Holstein confirmed:

> These documents are standard form documents. They are -- they are -- the part that the Clerk does is simple. Obviously, if you were drafting it from square one, as you would if you were sitting alone in a dark room drafting a -- a warranty deed or a deed of trust or a note, you might have to really exercise some skill. But I think that, the way that it's done using the computer screen, the EDGE -- the EDGE system, it is all regimented, and only -- only by following the regime are you able to get the documents prepared. So, in that sense, they are simple.

Tr. 449-50.

As is obvious from the forms themselves, and as this record establishes, the completion of the blanks on these standard notes and deeds of trust using computer software is so highly regimented it becomes a clerical act, and that there is no actual drafting of the deed of trust or the note by the lender's non-lawyer employees. Tr. 229-

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[9] The record includes substantial testimony as to the processes for the actual preparation of the documents themselves. *See*, *e.g.*, Tr. 229-33, 249-55, 267-72, 280-98, 320-23.

33, 350-51, 448-49. There can be no dispute that the first *Hulse* factor (the simplicity of the forms) favored Countrywide. *See* 247 S.W.2d at 862.

b. The Nature And Custom Of The Lending Business Is To Prepare And Use Those Standardized Legal Forms.

The nature and custom of the lending business is to prepare and to use these standardized legal forms. Thus the second factor also favored Countrywide, based on the undisputed evidence at trial. The pre-printed legal loan document forms that Countrywide used for Plaintiffs' loans included, primarily, a deed of trust and a promissory note. These are standardized forms promulgated by Fannie Mae and Freddie Mac that nearly every lender uses to memorialize the fundamental legal terms of most mortgage loans. Tr. 252-53, 323, 344. Industry practice and economic considerations compel use of these standardized legal forms. *Id.* To understand why requires some explanation of the secondary mortgage market.

Fannie Mae and Freddie Mac are private corporations chartered by Congress to aid the flow of home mortgage lending funds. Tr. 219, 339. They accomplish that by buying many closed loans, thereby allowing lenders to re-lend the funds to other consumers. Tr. 344-45. Fannie Mae and Freddie Mac created standardized residential loan documents for use throughout the country, in an effort to simplify and expedite the process through which loans are bought and sold. Tr. 340-41, 344-45. This standardization of basic note and mortgage loan provisions means that Fannie Mae and Freddie Mac (and investors

who buy from them) can more easily value the loan when purchasing it and can more easily service the loan thereafter. Tr. 344.

Nearly all mortgage lenders use standard notes and mortgages/deeds of trust promulgated by Fannie Mae and Freddie Mac, so that the lenders may, in turn, sell the loans made on those documents on the secondary mortgage market. Tr. 323, 340, 344. As discussed above, these form notes and deeds of trust were reviewed and approved for use in this state by a Missouri attorney, John McNearney. *Supra* at 20; Tr. 341-42, 350.

It is also common and customary for lenders to charge a document preparation fee. Tr. 327. This is demonstrated by the large number of defendants in the original *Casey* cause which was brought against more than 20 different lenders and related companies. LF 102-03 (Third Amended Petition). Indeed, the fact the General Assembly recently has explicitly authorized the practice of charging such fees further evidences that the practice is common and customary. R.S.Mo. § 484.025.

As with the first *Hulse*/*First Escrow* factor, there was no dispute at trial that these form Fannie Mae and Freddie Mac legal documents are standard throughout the industry, and that it is customary for lenders to prepare those fill-in-the-blank documents. Tr. 343-44. The second factor, like the first, supported a finding that there was no unauthorized doing of the law business.

c. The Preparation Of Standardized Notes And Deeds Of Trust Benefits The Public.

The preparation of standardized notes and deeds of trust by lenders benefits the public. The practice allows the operation of the secondary mortgage market, which makes lending more affordable. As John McNearney (the Missouri lawyer who actually reviewed and/or drafted the legal language in the Fannie Mae and Freddie Mac notes and deeds of trust used in Plaintiffs' loans) explained:

> Q: Tell us what would happen if every lender out there had different variations of the forms that you talked about; different variations of form of promissory note and the deed of trust, or those kinds of legal documents.
>
> A: It would create uncertainty in the secondary market as far as the marketability of those loans and the flow of funds, and it would increase the costs of loans for consumers.

Tr. 352.

The public interest is also fostered by permitting lenders, without lawyers, to complete standard legal loan documents. The exclusion of lawyers from this process saves time, money and delay. As Judge Holstein opined, if an attorney had to fill in the blanks on the standard loan documents, it would significantly increase the consumer's time and expense in obtaining a mortgage loan in Missouri. Tr. 456-57. The use of non-

form documents, requiring a lawyer to fill in each blank and requiring a lawyer to "bless" every small change to every document in every loan transaction, would make loans more time-consuming and more costly. *Id.*

Nor does it serve the public interest to allow lenders to prepare documents but just not charge a separately denominated fee for it. As discussed below, the economic reality is that lenders will recoup their costs as part of the loan process. Allowing itemization of those costs does not harm the public.

d. The Charging Of A Fee Is Not Dispositive.

It is not contested that Countrywide formerly charged a fee at closing for document preparation. This factor, however, does not "obviate the need to review the nature of, or context in which, the loan documentation was prepared" as the Court of Appeals erroneously concluded in *Eisel* (*Eisel,* at 7) and as the Circuit Court here impliedly ruled. Not only must the court weigh all of the factors set forth above, but the fee factor here is outweighed by the remaining factors, which do not support liability.

The presence of a fee is a relevant factor only because a separate charge might indicate that the defendant is going into a new business, rather than doing something ancillary to its main business. So, in *Hulse*, the Court noted the fact that the broker had charged a separate fee as causing it concern because that tended to place an emphasis on conveyancing and drafting, rather than brokering. *Hulse*, 247 S.W.2d at 861. As with all other factors, the fee is a useful touchstone only as a mechanism to understand the

"ancillary" test, *i.e.*, was Countrywide conducting a separate document preparation business.

Here, it is undisputed, and indisputable, that Countrywide was conducting only one business: lending money. That a fee was charged for some of the work necessary to accomplish the single object of making a loan does not support a finding of liability under *Hulse* or *First Escrow*. The *Eisel* Court's focus (and thus the Circuit Court's focus) on the charging of a fee as determinative of the unauthorized practice question is illogical and inconsistent with the public policy underlying the unauthorized practice rules.

What matters under the unauthorized practice statute and case law is the nature and character of the conduct − is the defendant exercising legal judgment and discretion for another or otherwise acting as only a lawyer can? *See, e.g.*, *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc 1978); *Liberty Mutual Ins. Co. v. Jones*, 130 S.W.2d 945, 955-56 (Mo. 1939). As discussed above, the cases take a multi-factored approach to this legal issue, guided by whether there is a substantial risk of harm to the public. The approach adopted by *Eisel* (and the Circuit Court) effectively ignores the actual conduct, and focuses exclusively on whether a fee was charged.

Countrywide submits that the singular fixation on the fact of a fee should be rejected by this Court. The central conduct that Plaintiffs contend was unauthorized practice was the filling in of blanks on form loan documents. The charging of a document preparation fee does not change in any way what the lender did to prepare

those documents. Since Plaintiffs appear to concede that Countrywide's conduct was entirely legal (if no fee was charged), the fact there was a fee should not change the analysis. The charging of a fee does not magically turn conduct that is legal into conduct that is illegal.

Other states' high courts have similarly concluded that a fee, standing alone, does not convert permissible behavior into the unauthorized practice of law. *See Dressel v. Ameribank,* 664 N.W.2d 151, 157 (Mich. 2003) (bank not practicing law filling in blanks and thus whether fee charged immaterial); *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999), ("whether or not a fee is charged, lenders are authorized to prepare the types of legal documents that are ordinarily incident to their financing activities"); *Cardinal v. Merrill Lynch Realty*, 433 N.W. 2d 864, 869 (Minn. 1988) (same); *Oregon State Bar v. Security Escrows, Inc.,* 377 P.2d 334, 339 (Or. 1962) (rejecting "artificial or haphazard tests" like "payment"); *see also King v. First Capital Financial Services Corp.*, 828 N.E.2d 1155, 1161-63, 1165-66 (Ill. 2005) (lender's preparation of legal documents did not constitute unauthorized practice of law because documents were "incident" to the lender's business and prepared for its "own benefit in a transaction to which the preparer is a party").

Moreover, it is a reality that most lenders in Missouri and throughout the United States prepare documents for their own loan transactions. It is also a reality that lenders will recover at least a portion of their costs of making loans in some way or another, whether that cost involves its own work preparing documents or its use of a document

preparation service. The fact that some lenders specifically enumerate and disclose this individual cost and others roll the cost into a higher interest rate or other loan fees cannot be the basis for determining who is practicing law and who is not. Neither lender is engaging in the unauthorized practice of law.

Ironically, the effect of the fee-focused analysis advanced by *Eisel* and adopted by the Circuit Court is to penalize lenders for itemizing their fees, a notion echoed by Judge Holstein in response to a commonsense observation by the Circuit Judge:

> Q [By the Court]: Well, I think they could have lumped [the fee] in … another area […] [I]nstead of saying "document preparation fee," it would have been just the normal cost.
>
> A: And what I'm saying is . . . separating it out is to penalize them for something they're going to do anyway. [. . .] We're punishing the honest in this case . . . because it's a separate fee . . . .

Tr. 454. It is contrary to sound public policy to penalize lenders for actually itemizing their fees. *Cf. McNabb v. Niagara Fire Ins. Co.*, 22 S.W.2d 364, 367 (Mo. App. 1921) ("[C]ompany is not to be assessed a penalty for its honest intentions").

In the trial court, Plaintiffs argued that a comment in a *First Escrow* footnote established that lenders who charge fees are engaged in the law in all instances. This argument is without merit. The note in question (Footnote 10, 846 S.W.2d at 845) is

nothing more than a lengthy summary of decisions from "other states" regarding "the activities of escrow closing companies." *First Escrow*, 840 S.W.2d at 844. Plaintiffs rely on the footnoted phrase that "banks…may fill in blanks of standardized real estate forms related to mortgage loans, so long as they do not charge a fee for the service." *Id.* at 845, n.10. The escrow agents in *First Escrow* were not mortgage lenders. Unlike mortgage lenders, they had no interest in the transactions before them. The footnoted reference to mortgage lenders could not have resolved the status of their activities, which were not before the Court.

e. Lenders Have A Financial Interest In The Transactions.

Lenders plainly have a direct financial interest in each transaction – they are parties to those transactions, and have a compelling incentive to prepare the documents correctly for their own benefit. Tr. 38, L.F. 543-544 (Corcoran Dep.), Tr. 252 (purpose of loan documents "to protect Countrywide's interest in the loan."). This common sense notion was the premise of this Court's conclusion in *First Escrow* that an escrow company could perform certain tasks that were outside the non-legal business so long as the company was supervised by a lender. 840 S.W.2d at 848.

At trial, it was undisputed that it was in Countrywide's best interest to ensure that the legal loan documents were accurate and complete. In addition, as explained more fully above, it was also in Countrywide's best financial interest to prepare them correctly, as it marketed the loans to Fannie Mae, Freddie Mac or other investors. As Judge Holstein summarized:

Q: . . . [D]id you consider which party to the transaction would likely suffer a loss if the documents were not prepared correctly?

A: If the documents were not . . . prepared correctly, it would be the lender who is trying to market the note and deed of trust through Fannie Mae or Freddie Mac, based on the testimony we heard here.

Q: And . . . as between the lender and the consumer; the borrower, which party would likely suffer the loss?

A: If there were a mistake?

Q: Yes.

A: It would probably be the . . . lender that would suffer the mistake, not the consumer.

Tr. 456. Countrywide has a paramount interest in, and strives to, complete all loan documents correctly and accurately. Tr. 267-74. There can, again, be little dispute that this factor weighs against an unauthorized practice finding.

The application of all five factors from *Hulse* and *First Escrow* – as distinguished from judging the case based solely on the fee – can result in only one conclusion: Countrywide's document preparation was not a separate business and thus it did not

engage in the law business. This Court should so find, and reverse the judgment of the trial court.

D. The Court's Judgment Is Fundamentally At Odds With The Purpose Of The Unauthorized Practice Rules.

This lawsuit is simply not what the unauthorized practice rules are designed to accomplish. Preventing mortgage lenders such as Countrywide from filling in blanks on forms does nothing whatsoever to "protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *Hulse*, 247 S.W.2d at 857-58. Indeed, perhaps stating the obvious, Judge Holstein echoed these sentiments at trial, testifying that the work of this Court as it relates to the unauthorized practice of law "was to protect the public, not to protect lawyers." Tr. 435. Indeed, Judge Holstein succinctly addressed this point when responding to questions by Plaintiffs' counsel on cross examination:

> Q [by Plaintiffs' Counsel]: But isn't it, in fact, Judge Holstein, that it's the "for a valuable consideration" that separates out the pro se from the representation – from the lawyering portion of it?
>
> You can fill out your own papers. You can fill out your own papers in a transaction you're doing with someone else. It's when you do it for a valuable consideration that you step over the line. Isn't that what the statute says?

A: In a representative capacity. And it – even then, I think the Courts have narrowly construed that or more strictly construed that to – to carry out the intent of the statute; the purpose of the statute, rather than some sort of strict artificial interpretation of the statute. The purpose is to protect the public from the guy who sets up the – the place in the mall and starts selling services and closing real estate deals.

Tr. at 469.

The public protection purpose behind this statute and of the regulation of the law business generally is simply not implicated by Countrywide's conduct. There was no allegation that Countrywide improperly completed the requisite documents or otherwise adversely affected the loan transaction of any person in the class. The Plaintiffs did not allege any problems or difficulties with their loans. Nor were there any allegations, or proof, of public or private harm to Countrywide borrowers. In short, this is not a situation where there was (or is) a need to protect the public.

Another oft-stated motivation behind the proscription of unauthorized practice − a concern that a consumer might be misled by persons not authorized to practice law − is also not implicated by lenders charging document preparation fees. There was no evidence that Countrywide ever held itself out as legal counsel to plaintiffs by proposing to sell legal services to them. Instead, plaintiffs admitted they never hired Countrywide

to act as their lawyer and that they knew Countrywide was not representing them as legal counsel or otherwise in their loan transactions. Tr. 73-74, Tr. 552, L.F. 530, 531 (Cole Dep.), Tr. 549, L.F. 507, 508, 509 (Held Dep.); Tr. 550, L.F. 517 (Carpenter Dep.). There was no sale of document services. There was a loan, and the documents were ancillary to it.

If lenders are forced to hire lawyers to perform the fill-in-the-blank tasks, consumers will not be more protected than they are now. Outside "documentation" lawyers would have an attorney-client relationship only with the lender. The only way borrowers could ensure that their interests are protected is to do what plaintiff Cheryl Held here did – retain their own counsel to review the documents and protect their interests.

There is also no doubt though that requiring more involvement by lawyers will also make things more complex and increase costs. As the Washington Supreme Court observed in refusing the same type of unauthorized practice of law claim:

> Ironically, were the [plaintiffs] to prevail, future borrowers would bear the additional cost of having attorneys prepare their loan documents, which would likely exceed that portion of the [plaintiffs'] document preparation fee attributable to legal documents.

Perkins, 969 P.2d at 100; *see also State ex rel. Reynolds v. Dinger*, 109 N.W.2d 685, 692 (Wis. 1961) (noting "the great public inconvenience which would follow if it were

necessary to call in a lawyer to draft these [mortgage documents]"); *Ingham County Bar Ass'n v. Walter Neller Co.*, 69 N.W.2d 713, 719 (Mich. 1955) (same).[10]

Plaintiffs might suggest that *Eisel* does not require new lawyers to be hired because a lender could just do the work itself but not charge a fee. That logic demonstrates the fact that this lawsuit does not add to the protection of the public at all, and further evidences that Plaintiffs' singular focus is on the fact that a fee was charged. As discussed above, the assessment and itemization of the fee is not the determining factor of whether Countrywide's conduct constituted the unlawful practice of law. Moreover, the Court should hesitate long before adding another layer of lawyers, legal costs, and accompanying bureaucracy to the process of closing home loans.

This Court has previously noted its "duty to strike a workable balance between the public's protection and the public's convenience." *First Escrow*, 840 S.W.2d at 844.

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[10] The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), both of which are charged with protecting consumers by enforcing the country's antitrust laws and preventing unfair and deceptive practices affecting commerce, share this view. They have consistently opposed efforts by the organized bar to expand attorney involvement in document preparation and real estate closings, in part by demonstrating how prohibiting lay involvement in those activities would reduce competition and harm consumers. *See, e.g.,* www.ftc.gov/opa/2006/06/fyi0642.htm; www.ftc.gov/be/v030007.htm; www.ftc.gov/os/2003/10/uplindiana.htm.

The utility to the industry and consumers alike of having lenders, like Countrywide, prepare loan documents, with the ability to shift document preparation costs onto the borrower, in terms of efficiency and economy, far outweighs any theoretical risk resulting from Countrywide's practice.

E. Countrywide Was Not In A Representative Relationship With Plaintiffs And The Class, And So Did Not Engage In The Unauthorized Practice Of Law.

The Advisory Committee of the Missouri Bar has issued two opinions in accord with the view that a lender preparing its own loan documents − rather than preparing documents for others − is not engaged in the law business. Advisory Opinion No. 38 says precisely that:

> The advisory committee is of the opinion that the drafting of [contracts, deeds and mortgages] by an employee of a corporation which corporation is an actual and necessary party to said instrument is not the practice of law.

Supreme Court Advisory Committee Formal Opinion No. 38. In contrast, but fully supportive of Countrywide's position here, Advisory Opinion No. 6 found that a lender cannot prepare loan documents, without legal counsel, if the lender is acting in a representative relationship and is not a party to the loan. *Supreme Court Advisory Committee Formal Opinion* No. 6.

The Advisory Committee Opinions are fully consistent with the language of the Law Business Statute itself, which defines law business as the "advising or counseling" or the "drawing" of a legal document or instrument "in a representative capacity." R.S.Mo. § 484.010. Indeed, this Court already has made clear in the past that a company preparing legal instruments for transactions to which it is a party, rather than preparing legal instruments for another person, does not engage in the practice of law. In *Liberty Mutual*, a corporate defendant was permitted to prepare releases for its own transaction:

> If appellants' lay employees were holding themselves out to the public as qualified to draw legal instruments and pass on a great variety of questions, our view doubtless would be different. But here, so far as concerns the question presented, said employees are confining themselves to the work of taking releases of claims already settled on forms already prepared by lawyers, this being a part of the regular business of their employer. We cannot see any benefit to the public in holding such work must be done by lawyers.

130 S.W.2d at 958.

Given this backdrop, the initial question for the trial court in this case should have been whether Countrywide was acting in a representative capacity when preparing the documents for its own loan transactions. Though the issue was presented to the Circuit Court at trial, in connection with Countrywide's unsuccessful summary judgment motion

heard that day, the Circuit Court (and the Court of Appeals in *Eisel*) failed to even address the representative relationship requirement. Judgment was required in Countrywide's favor, so the judgment should be reversed, because there was no substantial evidence that Countrywide represented plaintiffs or any class member. Plaintiffs did not allege that they were advised or represented by Countrywide. Each admitted as much. Tr. 73-74, 549, L.F. 507, 508 (Held Dep.), Tr. 550, L.F. 517 (Carpenter Dep.), Tr. 552, L.F. 530-531 (Cole Dep.).

Nor could a representative relationship have arisen as a matter of law. As an ordinary debtor–creditor transaction, no special relationship can be inferred from Plaintiffs' relationship with Countrywide. It is well established that lenders prepare loan documents for their own benefit, and not for the borrower. *Murray v. Fleet Mortgage Corp.*, 936 S.W.2d 212, 217 (Mo. App. 1996) (activities such as preparing loan documents are "taken by a lender for its own benefit, not for the benefit of the borrowers"). This is logical, of course, because legal loan documents are intended to protect the lender. Tr. 138, L.F. 543 (Corcoran Dep.), Tr. 252. A "note" evidences the borrower's indebtedness to the lender. BLACK'S LAW DICTIONARY (8th ed. 2004). Similarly, a "deed of trust" secures the lender's legal right to recourse in the property. *Id.* Indeed, borrowers would rather not become legally obligated (through a note) or give security for the debt (through the deed of trust), but Countrywide would not make the loans without their written promises. Tr. 138, L.F. 543 (Corcoran Dep.).

When a lender's conduct in no way involves representing another, such as Countrywide's, it does not constitute the practice of law or the law business at all. Since there was no evidence of a representative relationship, Countrywide was entitled to judgment in its favor.

F. Filling In Blanks On Forms Does Not Constitute The Law Business.

This Court need not even reach the application of the *Hulse* and *First Escrow* test to conclude that Countrywide did not, and could not, violate the Law Business Statute. While *Hulse* and *First Escrow* turn on whether a given "law business" practice is authorized or unauthorized, Countrywide contends that this Court should reverse the trial court's judgment for the threshold reason that filling in blanks on form notes and deeds of trust cannot be the practice of law or the law business at all.

As an initial matter, the Law Business Statute simply is not implicated by the conduct proven on the facts of this case. R.S.Mo. § 484.010.2 defines as "law business" "… the *drawing* … for valuable consideration of any paper, document or instrument affecting or relating to secular rights …" To "draw" a legal document means "to compose and write out in due form, as, a deed, complaint, petition, memorial, etc." BLACK'S LAW DICTIONARY (4th ed. 1968). There was no proof in this case that Countrywide "drew" the notes and deeds of trust that plaintiffs challenged as the doing of the law business. Moreover, the defense called in its case the person who did "draw" the documents used in Plaintiffs' transactions – attorney John McNearney – and established

through attorney McNearney and other witnesses that Countrywide did not "draw" those forms. Tr. 229, 245, 281, 334-52.

In contrast, at trial, plaintiffs only proved that Countrywide employees took previously-drawn legal documents and filled in blanks with objective information such as name, address, interest rate and the like. Proof that Countrywide "prepared" documents did not establish their claim, as the Law Business Statute does not address preparation of documents. "Prepare" only means "to make or get ready for use, consideration, etc." THE OXFORD DICTIONARY AND THESAURUS (Am. ed. 1996). Judgment for Countrywide was required on that basis alone.

Even if the statute reaches mere document preparation activities, filling in the types of forms at issue with objective information, such as name, address, and interest rate, by use of a computer software program, cannot be considered the practice of law because no legal discretion is being exercised. This view is consistent with then-Chief Judge Robertson's concurring opinion in *First Escrow*, joined by Judge Benton and former Special Judge Crow, in which Chief Judge Robertson concluded that the similar activities of the escrow companies at issue were not the practice of law at all. *First Escrow*, 840 S.W.2d at 846-47. The concurring opinion held that the escrow companies' activities were merely clerical in nature, and that a blank contract, drafted and approved by an attorney, already created and defined the legal rights and obligations of the parties. *Id.* at 849-50. "The drawing of a legal document is more than the clerical act of filling names, legal descriptions and prices into blanks on form contracts." *Id.* at 850.

Countrywide has done no more than the functions Chief Judge Robertson saw as clerical, not legal.

The view of law practice advocated by Chief Justice Robertson is also consistent with the more recent approach taken by the high courts in other states. In *Dressel*, for instance, the Michigan Supreme Court concluded that a bank was not practicing law when it inserted basic borrower information on forms because the bank was not acting as a lawyer at all, but rather as "an amanuensis, a kind of secretary." 664 N.W.2d at 157; *see also Perkins*, 969 P.2d at 100 ("lenders are authorized to prepare the types of legal documents that are ordinarily incident to their financing activities when lay employees . . . do not exercise any legal discretion"); *Cardinal*, 433 N.W. 2d at 869 (same); *Oregon State Bar*, 377 P.2d at 339 (same).

The trial court (and the Court of Appeals in *Eisel*) may not have considered this view because the *Eisel* Court erroneously concluded that the form notes and deeds of trust themselves were not even prepared by a lawyer − and so that Judge Robertson's premise was inapplicable. Indeed, in *Eisel*, the Court of Appeals noted explicitly that the pre-printed legal forms that Midwest employees completed were "supplied by vendors who obtain them from federal organizations" but that "such forms are not reviewed or approved by Missouri attorneys." *Eisel*, at 2 n.2.

The record in this case is the contrary. As discussed in detail above, the form notes and deeds of trust, and all of the legal language in the documents used for Plaintiffs' transactions, were approved by a Missouri attorney, John McNearney. Tr.

342. This fact only underscores that this case really involves only the non-legal work of filling in blanks. Countrywide urges this Court to adopt the rationale of Chief Judge Robertson's *First Escrow* concurrence, and the rationale of the Michigan, Washington, Minnesota and other Supreme Courts, and find as a matter of law that the activities undertaken by Countrywide do not involve the law business at all.

II. THE TRIAL COURT ERRED IN INCLUDING TREBLE DAMAGES IN ITS JUDGMENT IN FAVOR OF CERTAIN PLAINTIFFS, BECAUSE IMPOSITION OF PUNITIVE DAMAGES WITHOUT A SHOWING OF A CULPABLE MENTAL STATE VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE MISSOURI CONSTITUTION; THAT OCCURRED HERE IN THAT THERE WAS NO EVIDENCE WHATSOEVER THAT COUNTRYWIDE ACTED IN KNOWING DISREGARD OF THE LAW OR WITH RECKLESS DISREGARD FOR THE LAWFULNESS OF ITS CONDUCT; RATHER THE TRIAL COURT TREBLED THE DAMAGES AWARDED CERTAIN PLAINTIFFS AS A MATTER OF COURSE AND WITH NO CONSIDERATION WHATSOEVER OF COUNTRYWIDE'S MENTAL STATE, SO THAT THE LAW BUSINESS STATUTE, AS APPLIED BY THE TRIAL COURT, VIOLATED THESE PROVISIONS.

Standard Of Review

Review of the trial court's judgment in this court-tried case is governed by the *Murphy* standard. 536 S.W.2d at 32. Under this standard the Court will affirm a trial court's judgment unless there is no substantial evidence to support it, the decision is contrary to the weight of the evidence, or the trial court has erroneously declared or applied the law. This point relied on presents a claimed error of law, and is governed by a *de novo* standard.

Analysis

The trial court's award of treble damages under R.S.Mo. § 484.020 violates Article I § 10 of the Missouri Constitution and the Due Process Clause of the United States Constitution. The trial court apparently adopted Plaintiffs' argument that treble damages were mandatory and automatic, and it awarded treble damages with no evidence before it that Countrywide had acted with a culpable mental state when it charged the fees and the Court made no finding that Countrywide had such a culpable mental state.

Statutes that impose multiple damages for a violation are penal statutes. *See e.g.*, *Mikuhich v. Wright*, 85 S.W.3d 117, 119-20 (Mo. App. 2002); *Collier v. Roth*, 515 S.W.2d 829, 833 (Mo. App. 1974); *Powell v. St. Louis Dairy Co.*, 276 F.2d 464, 467 (8th Cir. 1960) (interpreting Missouri law). Whenever sums to be awarded are "a substitute for punitive damages," a complaining plaintiff must meet "the same or similar proof

requirements" as mandated for a punitive damages award. *Dist. Cablevision L.P. v. Bassin*, 828 A.2d 714, 726-27 (D.C. App. 2003) ("When the award of multiple damages is intended to serve penal purposes, it is a substitute for punitive damages, and the same or similar proof requirements usually must be satisfied."). Penal statutes like the Law Business Statute require a culpable mental state as a prerequisite to enforcement. *See, e.g.*, *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989) ("punitive damages require a showing of a … wanton, willful or outrageous act or reckless disregard (from which evil motive is inferred)"); *see also Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996); *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995). A culpable mental state is a constitutional safeguard for damages seeking to punish or deter because it precludes the arbitrary deprivation of property by the state without due process of law. *Burnett*, 769 S.W.2d at 787.

Notwithstanding these requirements, the Law Business Statute does not temper the imposition of exemplary damages with a finding that defendant's conduct rose to the level of outrageous or reckless activity. The statute violates the constitutional guarantee of due process contained in the Missouri and United States Constitutions to the extent it mandates the award of treble damages for a violation. *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 416-17 (2003); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994).

Requiring proof that a defendant had a culpable mental state, before imposing punitive relief, is a critical constitutional safeguard for damages seeking to punish or

deter, as it precludes the arbitrary deprivation of property by the state without due process of law. *See, e.g.*, *Burnett*, 769 S.W.2d at 787. The Law Business Statute does not on its face temper the imposition of such exemplary damages with a requirement or proof of, and a finding that, defendant's conduct rose to the level of outrageous or reckless activity. *See* R.S.Mo § 484.020. In this case, Countrywide has been deprived of due process of law by suffering treble damages with proof of nothing more than a bare statutory violation.

Absent evidence of such a culpable mental state, the trial court's award of treble damages must be reversed. Plaintiffs made no attempt to prove at trial that Countrywide had a culpable mental state when it imposed the document preparation fees, and the Court made no finding to that effect. To allow the imposition of punitive damages, nonetheless, violates due process of law.

III. THE TRIAL COURT ERRED IN REJECTING COUNTRYWIDE'S VOLUNTARY PAYMENT DEFENSE AND ENTERING JUDGMENT FOR PLAINTIFFS, BECAUSE A PERSON WHO VOLUNTARILY PAYS MONEY WITH FULL KNOWLEDGE OF ALL THE FACTS IN THE CASE, AND IN THE ABSENCE OF FRAUD AND DURESS, CANNOT RECOVER IT BACK; THAT OCCURRED HERE IN THAT THE EXISTENCE AND NATURE OF THE DOCUMENT PREPARATION FEES WERE FULLY DISCLOSED TO PLAINTIFFS, WHO PAID THEM WITHOUT COMPLAINT AS PART OF THE CONSIDERATION FOR THE LOANS THEY SOUGHT FROM COUNTRYWIDE.

Standard Of Review

This Point Relied On presents a claimed error of law, governed by a *de novo* standard.

Analysis

Application of the voluntary payment doctrine also requires reversal of the trial court's decision. The voluntary payment doctrine provides "that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back . . . . " *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812 (Mo. App. 1969) (quoting *Claflin v. McDonough*, 33 Mo. 412, 415 (1863)). It was undisputed at trial that each of the Plaintiffs had paid the document preparation fee after written disclosure of it three times, and that all class members received such disclosure at least twice. Tr. 327-329, 363-64, 391-92, 549-50, L.F. 509, 510, 512, 513 (Held Dep.), Tr. 551, L.F. 519, 520, 521 (Carpenter Dep.), Tr. 553-54, L.F. 534, 535, 538, 539 (Cole Dep.); Trial Exs. C10, 12, 13A, D15, D18, E11, E13. Plaintiffs paid the fee because they wanted the loans. There was no legal compulsion or duress shown on the facts. Indeed, Held's loan was a business transaction designed to avoid federal taxes, and both Carpenter and Cole took out loans (Carpenter's was a refinance) seeking economic terms they found more desirable than otherwise available. *See* Tr. 548-49, L.F. 504-515 (Held Dep.), Tr. 551, L.F. 521 (Carpenter Dep.), Tr. 554, L.F. 539 (Cole Dep.).

The *Eisel* Court rejected the voluntary payment defense, and the trial court's adoption of *Eisel* did the same, as unavailable as a matter of law. This was erroneous. In reaching the contrary conclusion, Eisel relied upon certain language from *Bray v. Brooks* – "[t]he activities prohibited by [Section] 484.010 are not subject to waiver, consent or lack of objection by the victim" – which itself was unsupported by citation of legal authority or reasoning. 41 S.W.3d 7, 13 (Mo. App. 2001).

Nothing in the language of the Law Business Statute suggests that it expressly precludes application of the voluntary payment doctrine. The defense is of general application and has been recognized by this Court repeatedly.

Additionally, the Court of Appeals in *Eisel* employed flawed reasoning in rejecting the bank's voluntary payment defense there, maintaining that to recognize the defense would mean that "a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized business of law." This statement suggests a misunderstanding of the doctrine. The voluntary payment defense always dictates that "ignorance or misapprehension of the law" is irrelevant, as is the "potential power in the payee to compel payment." *National Enameling & Stamping Co. v. City of St. Louis*, 40 S.W.2d 593, 595 (Mo. 1931) (holding payment not made under duress). The defense is designed to keep out of courts disputes that could have been avoided, and prevent persons who voluntarily agreed to a party's conduct from taking an inconsistent position later. The Court of Appeals disregarded these sound and just principles.

This Court has recognized that it "would be against the highest policy to permit transactions to be opened" where a party − even in ignorance or misapprehension of the law − voluntarily paid an illegal demand. *Id.* (emphasis added). As such, the voluntary payment doctrine remains a well-accepted defense, long recognized by the courts, and should be applied in this case where payments were voluntarily made with full knowledge of the facts, absent fraud or duress. *Accord Ferguson v. Butler County,* 247 S.W. 795, 796 (Mo. 1923); *Claflin*, 33 Mo. at 412; *Missouri Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 811 S.W.2d 28, 34 (Mo. App. 1991); *Western Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 800 (Mo. App. 1982); *Handly v. Lyons,* 475 S.W.2d 451, 461-62 (Mo. App. 1971); *Staples v. O'Reilly*, 288 S.W.2d 670, 677 (Mo. App. 1956).

A more instructive example of how the voluntary payment doctrine functions in the context of a document preparation fee claim is a recent Illinois case, *King v. First Capital Financial Services Corp.* 828 N.E.2d at 1161-62. There, in a case virtually identical to the present case, the plaintiffs brought 35 separate class actions against numerous lenders alleging that they had engaged in the unauthorized practice of law by charging a fully disclosed document preparation fee. *Id.* at 1161-62. After consolidating the cases, the trial court applied the voluntary payment doctrine and dismissed plaintiffs' claims under the Illinois consumer fraud act, as well as for money had and received. *Id.* The Illinois Supreme Court affirmed the trial court's dismissal, stating: "[R]educed to its essence, plaintiffs' argument is that the preparation of loan documents by non-lawyers is illegal. However, the voluntary payment doctrine applies in the very circumstance where

the payment sought to be recovered was illegally obtained by the defendant. Plaintiffs cannot avoid application of the voluntary payment doctrine by merely alleging that defendants engaged in the unauthorized practice of law." *Id.* at 1173.

Application of the voluntary payment doctrine required judgment for Countrywide. The trial court erred in refusing to apply this defense on the undisputed facts.

IV. THE TRIAL COURT ERRED IN ASSESSING DAMAGES AND ENTERING A JUDGMENT ORDERING REFUNDS COVERING THE ENTIRE FIVE YEAR CLASS PERIOD, BECAUSE DAMAGES MAY NOT BE AWARDED FOR INJURIES OCCURRING PRIOR TO THE APPLICABLE LIMITATION PERIOD AND THE APPLICABLE LIMITATION PERIOD HERE IS TWO YEARS, NOT FIVE OR SIX, IN THAT THE LAW BUSINESS STATUTE CONTAINS A TWO YEAR LIMIT ON PRIVATE LAWSUITS THAT PREVAILS OVER ANY GENERAL LIMITATIONS STATUTE.

Standard Of Review

This Point Relied On presents a claimed error of law, governed by a *de novo* standard.

Analysis

For the reasons set forth above, this Court should reverse the trial court's decision on the Law Business claim and enter judgment in Countrywide's favor. Should the Court not reverse the Law Business Judgment, it needs to address two fundamental errors by the trial court as to damages. First, as discussed in this section, the Court erred when it awarded damages to a five-year class of borrowers when the Law Business claim, the only claim for which it found liability, has a two-year limit on private suits. (Points Relied On IV). Second, as discussed in the following section, the Court should not have awarded any amount for prejudgment interest, as there is no statutory authorization for such an award and there was no proof to support entitlement under any statute allowing prejudgment interest. (Points Relied On V).

A. Damages Should Not Have Been Awarded To Any Class Member Whose Claim Was Time-Barred Under The Two-Year Period Allowed By The Law Business Statute For The Filing Of Private Suits.

1. The Court's Damages Calculation Was Manifestly Incorrect.

The nature of the trial court's error as to damages is straightforward. This case was tried on two theories of liability – Count I, the claim discussed at length above that Countrywide had violated the Law Business Statute, and Count II, a Merchandising Practices Act ("MPA") claim founded on the theory that Countrywide had acted deceptively in charging the document preparation fee. LF 137 (Third Amended Petition ¶ 144). The two theories have different rules of standing or limitations. Count I was

subject to a two-year rule and Count II was subject to a five-year statute of limitations. When the Court found liability under Count I but entered judgment for Countrywide under Count II, it should have awarded damages only to those class members eligible for relief under Count I − namely, those whose loans closed two years before suit was filed. Nevertheless, the Court awarded damages to all class members, even those whose claims were barred by the two-year rule of the Law Business Statute. This was plain error.[11]

It is not debatable that claims for violation of the Law Business Statute are subject to a two-year limitation on when private parties may sue for a private recovery. *See* R.S.Mo. § 484.020.2 (person injured may sue for amounts paid "within two years from the date [monies] shall have been paid"). Plaintiffs conceded at trial that a two year standing limitation applies to the Law Business claim. Tr. 621 ("[T]here is a two year standing period for a private party to bring an action under the Unauthorized Practice of Law Statute").[12] This is consistent with the earlier ruling by the trial court on the point (LF 94), and consistent with *Eisel*, which encompassed only a two-year class because the defendant bank there was exempt from the MPA. Therefore, in this case, the borrowers whose loans closed more than two years before suit was filed were only able to recover if

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[11] Countrywide timely filed a post trial motion, in which it asked the Circuit Court to correct its fundamental legal error. LF 372-76. The Court denied Countrywide's motion. LF 491.

[12] Plaintiffs made similar concessions elsewhere in this record, as noted below.

the trial court found a violation of the MPA. Indeed, the five-year limitations rule for the MPA claim is the only reason the Class reached back to encompass those whose loans closed within five years.

Notwithstanding this plain restriction, the Court awarded damages under Plaintiffs' Law Business claim (Count I), in the amount of $6,150,966.59. LF 367. The total was the precise amount requested by Plaintiffs, as shown through accounting testimony, for the 16,852 class loans stretching back five years before the case was filed. The award included damages to some 6,816 class members whose claims arose more than two years but fewer than five years before suit was filed[13] – that is, persons whose Law Business claims were time barred and could only recover if successful under the MPA.

Because the trial court only awarded damages on the Law Business claim, and because that class can only extend back two years prior to filing, the Court's damages calculation was in error in that it awarded damages to persons who could only claim

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[13] As noted above, the parties stipulated to an "Agreed List" of 16,852 class members, which consisted of those persons within the five-year class period whom both plaintiffs and Countrywide agreed were charged a document preparation fee and as to whom there was no evidence on the Settlement Statement provided at closing of an offsetting credit. Plaintiffs' Trial Ex. 1A. That "Agreed To" class list included 6,816 borrowers who closed their loans and paid a fee more than two years before suit was filed. *Id.* LF 373.

under the deficient MPA count.[14] The error in the single damages calculations also resulted in the prejudgment interest award being incorrect.

2. There Was No Legal Basis For The Court's Award Of Damages To Persons Whose Claims Were Barred By The Two Year Rule In The Law Business Statute.

In opposing Countrywide's post-trial motion, Plaintiffs argued for the first time that the two-year period limiting the right to sue under the Law Business Statute - which period is contained *directly in the statute* - is not controlling over who can recover under that statute, but rather only determines whether the party can sue for treble or just single damages. LF 393-94. Plaintiffs contended that the six year limitations period in R.S.Mo.

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[14] In its post-trial motion, Countrywide pointed to evidence introduced by Plaintiffs at trial that the actual damages for the 10,036 class members who prevailed under Count I were $1,330,781.68, rather than 2,558,298.94. Trial Ex. 19; LF 374-75. Using the admitted spreadsheets (Trial Ex. 1A), the prejudgment interest amount for those 10,036 persons was $469,504.18. Trial Ex. 1A; LF 375. Those figures were confirmed, with no subsequent objections, by Countrywide's expert, Michael Lewis. LF 375. With treble damages included (and assuming the validity of the court's rulings as to liability, trebling, and prejudgment interest), the total amount of the award to the 10,036 class members should have been $4,461,849.22.

§ 516.420 permits recovery for single damages, because Countrywide is a "moneyed corporation." LF 393, citing *Schwartz*, 197 S.W.3d at 178.

The trial court denied Countrywide's post-trial motion, without explanation but apparently adopting Plaintiffs' unusual construction of the statute. LF 491. This was error, for a host of reasons.

a. Plaintiffs Never Requested The Award That The Court Granted; Rather, They Conceded That The Law Business Claim Only Applied To Part Of The Class.

As an initial matter, reversal is required because Plaintiffs never sought an award to the class members whose claims were time-barred by the Law Business Statute other than an award under the MPA. If Plaintiffs had believed that persons whose loan closed beyond the two year period could recover under either Count I (single damages) or Count II, they were bound to request that relief before the trial concluded. *Cotton Belt Ins. Co., Inc. v. Hauck*, 424 F. Supp. 570, 574 (D.C.Mo. 1976) (refusing to allow plaintiff to raise new theory at post-trial stage). They did not.[15] This Court should reverse the trial court's decision to allow Plaintiffs to re-open their case post-trial. *Reed v. Rope*, 817 S.W.2d

[15] Plaintiffs' failure to request an alternative basis for recovery cannot be excused by the fact the issue did not come up because Countrywide argued strenuously during closing argument for a judgment based on the statute of limitations, and the failure of the MPA claims, as to persons whose claims arose beyond the two-year window. Tr. 607-10.

503, 509 (Mo. App. 1991) (refusing to consider damages argument first raised in post-trial brief and inconsistent with position party adhered to at trial).

Notably, Plaintiffs conceded over and over in the case that the Law Business Statute was governed by a two-year standing rule and the MPA by a five-year limitations rule. As set forth in detail in Countrywide's post-trial Reply Brief (LF 408, 410-12), these concessions and representations spanned almost five years and continued up through and including the last points that class counsel made in rebuttal closing argument at trial. The class' repeated admissions, concessions, and failures to object should have prevented them from changing course post-trial. The class members are estopped and have waived the argument they first raised post-trial.

b. The More Specific Law Business Statute Controls Over Any General Limitations Statute.

There was no basis for the Circuit Court to do anything other than apply the two-year rule in the Law Business Statute to define who could – and could not – sue for any type of private recovery. The contrary contention, that a limitations rule of general applicability can trump a time limit contained within the statute creating liability, has no support in the law.

Perhaps the most fundamental rule of statutory construction is that the plain meaning of a statute governs and the court "must give to statutory language its plain and rational meaning." *Smith v. City of St. Charles*, 552 S.W.2d 60, 62 (Mo. App. St. 1977).

R.S.Mo. § 484.010 defines the Law Business. Section 484.020.2 then provides the remedies for violation of the statute, and the time periods under which a party must sue:

> Any person . . . who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefore 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 by the person, . . . paying the same* <u>*within two years from the date the same shall have been paid*</u> and if within said time such person . . . shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the State of Missouri.

R.S.Mo. § 484.020.2 (italics and emphasis added). Under the plain language of the statute, any aggrieved class member had only two years from the date the fee was paid (at the loan closing) to sue. This is exactly what the Circuit Court decided five years ago in dismissing all Law Business claims that arose two years prior to the filing of the Petition. LF 94.

There is simply no basis for the construction Plaintiffs advanced, and the trial court apparently adopted, that the two-year limit in the Law Business Statute should not apply to bar all private claims for recovery under that Statute. The limitations period

from a more generalized statute cannot be employed to override and destroy the plain time limitations of the very specific statute on which the judgment is based. "Where one statute deals with a particular subject in a general way, and a second statute treats part of the same subject in a more detailed way, the more general should give way to the more specific." *State ex rel. Griffin v. R.L. Persons Constr., Inc.*, 193 S.W.3d 424, 429 (Mo. App. 2006) (internal citations and quotations omitted); *Tap Pharm. Products, Inc. v. State Bd. of Pharmacy*, 2006 WL 3431838, at * 7 (Mo. App. Nov. 30, 2006) (same) [16]; *see also Robinson v. Health Midwest Dev. Group*, 58 S.W.3d 519, 522 (Mo. banc 2001) ("[T]he rules of statutory construction are clear that in situations where the same subject matter is addressed in general terms in one statute and in specific terms in another, and there is a 'necessary repugnancy' between statutes, the more specific statute controls over the more general."); *Viacom v. Transit Casualty Co.*, 138 S.W.3d 723, 725 (Mo. banc 2004) ("The provisions of the insolvency statutes prevail over any general statutes or common law because the legislature has set forth the substantive law and the procedures to be followed").

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[16] *Tap* also confirms the rule that a "chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature." 2006 WL 3431838, at *7. The general limitation statute plaintiffs cite, R.S.Mo. § 516.420, was passed in 1865, and predated the Law Business statute by more than 50 years.

In *Robinson*, the plaintiff sued various doctors for negligence stemming from medical treatment. This Court considered which of two limitations periods for the same conduct (one addressing a medical malpractice claim and another for general negligence) should be applied to the claim. The Court affirmed the dismissal of plaintiffs' claims as barred by the more specific statute. 58 S.W.3d at 522-23. Similar, in *Viacom*, this Court held that despite an argument that foreign contract law applied to an insurance coverage dispute, the provisions of Missouri's insolvency statutes (as the defendant was insolvent) "prevail over any general statutes or common law because the legislature has set forth the substantive law and the procedures to be followed." 138 S.W.3d at 725.

The analysis here is identical. There can be no dispute that the more specific limitations period at issue in this case is the one contained directly in the Law Business Statute. As in *Robinson*, the statute here expressly addresses the conduct being challenged − the practice of the Law Business − and provides a specific time rule. Under *Robinson*, the two year limit in the Law Business Statute is controlling. R.S.Mo. § 516.420 dealing with moneyed corporations is plainly more general in this circumstance than the Law Business Statute, and so must yield.

Moreover, as in *Viacom*, in the Law Business Statute, the Assembly has set the "substantive law and the procedures to be followed." 138 S.W.3d at 725. The Statute defines both the cause of action and the procedures to remedy it. Under these circumstances, a limitations standing or timing rule found outside the Law Business Statute has no applicability.

The principle that a specific statute takes precedence over a general one is even more appropriate in situations like this − where the limitations period is actually embedded within the statute itself. As this Court has stated, "general statute[s] of limitations will not be injected into a cause of action that has its own built-in statute of limitations." *Thompson v. Crawford*, 833 S.W.2d 868, 871 (Mo. banc 1992). As the trial court ruled, the two-year period of the Statute bars all claims that arose prior to the filing of the suit. LF 94. There is nothing in the Statute that provides any time period other than two year time period, or that suggests that a limitations period found outside the Law Business Statute should be consulted even though it already contains a time period for suit. The plain language of the Statute provides for only one type of lawsuit − one limited to a two-year window.

There also is no basis for the tortured construction, offered by Plaintiffs, that the two-year period only restricts the availability of treble damages but single damages can be awarded for a longer period. The Law Business Statute says no such thing, and makes no such distinction.

In a larger sense, Plaintiffs' last-minute contention rests on the notion that the Law Business Statute contains an express cause of action, for treble damages, and one that is implied, for single damages. Another basic rule of statutory interpretation is that the "express mention of one or more things implies the exclusion of others." *In re Goldschmidt*, 2006 WL 3780732, at *7 (Mo. App. Dec. 26, 2006). "[P]rovisions or limitations not plainly written or necessarily implied from what is written may not be

interpolated herein to affect some modification of or change in the right conferred by the statute." *Smith*, 552 S.W.2d at 62. As the Law Business Statute provides one and only one private remedy, and there is no construction of the Statute which "necessarily implies" a separate cause of action for single damages, the Law Business Statute cannot be interpreted to allow a private suit beyond the two-year standing rule.

c. R.S.Mo. § 516.420 Has No Application Here.

The only conceivable basis for the trial court's decision was that it adopted Plaintiffs' post-trial justification that R.S.Mo. § 516.420, as interpreted in *Schwartz*, 197 S.W.3d at 178, applied and provided a six-year limitations period.[17] Plainly this Court is not bound by *Schwartz*. Significantly, in *Schwartz*'s application of the specific versus general rule of statutory construction, *Schwartz* actually supports Countrywide's position.

Schwartz was brought under the Second Mortgage Loan Act which, unlike the Law Business Statute, does not contain in its own standing or limitations period. As such, the debate in that case was which of two general limitations period would apply: the one for actions for a penalty or forfeiture (three years, under R.S.Mo. § 516.130) or the

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[17] Plaintiffs' argument was waived, and inequitable, since they had asked the Circuit Court on the first day of trial, to apply that six year statute but abandoned reliance on *Schwartz* when the trial court indicated a continuance would be ordered otherwise. Tr. 30-32. They may not resurrect the six-year limitations argument now. *Reed*, 817 S.W.2d at 509; *Anderson v. Flexel*, 47 F.3d 243, 247 (7th Cir. 1995).

longer limitation period applicable to "moneyed corporations" (six years, under R.S.Mo. § 516.420). The Appeals Court concluded that the moneyed corporation statute was "more specific" than the general limitations rule the defendant had proposed, and therefore applied it. *Schwartz*, 197 S.W. 3d at 178.

Putting aside whether Plaintiffs proved that Countrywide is a moneyed corporation (*infra* at 94-96), R.S.Mo. § 516.420 is not the more specific statute in this case. Plainly, the Law Business Statute which gives rise to the very cause of action alleged is more specific than a general statute Plaintiffs contend should be generally applicable to suits against a type of corporate defendant. As such, *Schwartz* supports the conclusion that the two year limitations period in the Law Business Statute applies rather than the six year limitations period from the "moneyed corporation" statute.

Apart from the foregoing reasons, the trial court should not have employed the six-year period contained in R.S.Mo. § 516.420 for two additional reasons. First, R.S.Mo. § 516.420 does not have independent force, but is only an exception to the limitations rules set forth in R.S.Mo. §§ 516.380-.420. R.S.Mo. § 516.420 ("None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations … "). But Plaintiffs never contended that this case was governed by the time periods in R.S.Mo §§ 516.380-.420. Indeed, Plaintiffs never even contended that R.S.Mo. § 516.420 applied to this case until the day of trial, and then waived the point for tactical reasons.

Also, Plaintiffs offered no evidence that R.S.Mo. § 516.420 applied to Countrywide in any event. The General Assembly has not defined the term "moneyed

corporation" in R.S.Mo. § 516.420, but the Court of Appeals did so in *Div. of Labor Standards, Dep't of Labor and Indus. Relations v. Walton Constr. Mgmt. Co.*, 984 S.W.2d 152 (Mo. App. 1998). *Walton* defined the phrase in specific and narrow terms, enlarging the limitations rules for the type of actions it covers only if the suit was against "a corporation [1] having banking powers, or [2] having the power to make loans upon pledges or deposits, or [3] authorized by law to make insurance." *Id*. at 156.

Under the *Walton* rule, R.S.Mo. § 516.420 is not triggered. Despite the opportunity to do so, Plaintiffs chose at trial not to establish that any of these three criteria apply to Countrywide. To the contrary, Plaintiffs offered no evidence about Countrywide's status and operations (yet another indication that Plaintiffs' reliance on Section 516.420 was a post-trial conversion). On this record, R.S.Mo. § 516.420 was never proven to apply.

Moreover, Countrywide respectfully suggests that the *Schwartz* decision Plaintiffs cited as sole justification for applying R.S.Mo. § 516.420, was wrongly decided in any event. 197 S.W.3d at 178. *Schwartz* rejected the *Walton* rule and instead suggested that nearly any corporation that deals in money by making mortgage loans is a "moneyed corporation" under R.S.Mo. § 516.420. *Id.* at 176-77. The lynchpin of the ruling in *Schwartz* was that to lend money upon a "pledge" includes the provision of a mortgage on real property, and so mortgage lenders qualified as "moneyed corporations" under the *Walton* rule. *Id*.

But that ruling conflicts not only with *Walton* but with other case law. Under this Court's authority, as well as authority within the Eastern District, a "pledge" is defined as a security interest in *personal* or *intangible* property. *Sansone v. Sansone*, 586 S.W.2d 87, 89-90 (Mo. App. 1979); *Williams v. Roher*, 7 Mo. 556 (1842) (mortgages are not pledges). This is consistent with New York law, from which R.S.Mo. § 516.420 was borrowed. *Bank of Rochester v. Jones*, 4 N.Y. 497, 507 (1851).[18] Thus, proof that Countrywide made mortgage loans does not make Countrywide a "moneyed corporation" under *Walton.*[19] Any contrary result suggested by *Schwartz* should be rejected.

3. The Proper Remedy Is Remand, For Reduction Of Damages.

The Circuit's Court's award of single damages to the 6,816 class members whose Law Business claim was time barred was plain error, and cannot be justified, *post hoc*, by any tortured reading of the limitations rules. If the Court does not reverse in its entirety

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[18] New York law informs the interpretation of Section 516.420 because that Section was adopted from the statutes of that State. *State ex rel. Phillip Transit Lines, Inc. v. Public Service Comm'n*, 552 S.W.2d 696, 699-700 (Mo. banc 1977).

[19] Plaintiffs did not take issue post-trial with the re-calculation of damages Countrywide requested. Specifically, Countrywide believes that judgment must be entered in Countrywide's favor as to all persons in the class whose loans closed more than two years before suit was filed, and damages (including interest) must be reduced from $6,150,966.59 to $4,461,849.22. LF 372-76; *see supra* n. 14.

the judgment against Countrywide, it should remand the case for amendment of the judgment to eliminate any recovery of damages and prejudgment interest in favor of the class members whose loans closed prior to March 2, 2000.

V. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST, BECAUSE SUCH INTEREST MAY NOT BE AWARDED WITHOUT CONTRACTUAL OR STATUTORY AUTHORIZATION; THERE IS NO SUCH AUTHORIZATION HERE IN THAT COUNTRYWIDE DID NOT CONTRACT TO PAY INTEREST ON THE AMOUNTS AT ISSUE AND NEITHER THE LAW BUSINESS STATUTE NOR ANY OTHER STATUTE PROVIDES FOR INTEREST IN THIS CASE.

Standard Of Review

This Point Relied on presents a question of law, subject to *de novo* review.

Analysis

The trial court's award of $931,104.29 in prejudgment interest should be reversed. A plaintiff can recover prejudgment interest only if some statutory or contractual authorization exists for it. *Denton Constr. Co. v. Missouri State Highway Comm'n,* 454 S.W.2d 44, 59 (Mo. 1979). Prejudgment interest is not an amount that can be recovered in an action under the Law Business Statute. The remedies section of the Statute, R.S.Mo. § 484.020, makes no provision for prejudgment interest awards, though it does

contain detailed remedial terms allowing suits for treble damages by private parties, suits for treble damages by the State, criminal prosecution, and fines. R.S.Mo. § 484.020.2. A statute that provides for private relief but does not include prejudgment interest as an available remedy bars the award of such interest. *Protective Mut. Ins. Co. v. Kansas City*, 551 S.W.2d 909, 916 (1977). The Legislature has provided for recovery of prejudgment interest in substantive statutes when appropriate. *See*, *e.g.*, R.S.Mo. § 429.625 (prevailing party in lien enforcement action entitled to recover costs "including "reasonable attorney's fees and prejudgment interest"). Its decision not to include prejudgment interest in R.S.Mo. § 484.020 prevented the trial court from awarding prejudgment interest in this case.

While the trial court did not explain its basis for awarding prejudgment interest, Plaintiffs' pre-trial pleadings cited R.S.Mo. § 408.020 as justification:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

LF 323-24. The section is plainly inapplicable because this was an action on a statute, not on a "written contract" or on "accounts" or concerning money "recovered for the use of another" or involving a "promise to pay interest." R.S.Mo. § 408.020.

To scale these hurdles in R.S.Mo. § 484.020, Plaintiff urged the trial court to apply the case of *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990). LF 322-23. In *Vogel*, the court held that prejudgment interest in a tort case is recoverable where the tortious conduct has conferred a benefit on the defendant. *Id*. at 757. This undoubtedly was a confusing contention to make to the Court, for torts are not governed by R.S.Mo. § 484.020. *Vogel* is inapplicable because this case did not involve a tort case or tortious conduct; it was an action on a statute.

Notwithstanding *Vogel*, only a statute or a contract may authorize prejudgment interest. *Denton*, 454 S.W.2d at 59. For torts, such authorization rests solely upon R.S.Mo. § 408.040. *Union Pacific R. Co. v. Carrier Consultants, Inc.*, 973 S.W.2d 500, 503 (Mo. App. 1998) (R.S.Mo. § 408.040 only available procedure for prejudgment interest in tort claims); *see Schreibman v. Zanetti*, 909 S.W.2d 692, 704 (Mo. App. 1995) (interpreting *Vogel* as merely adding to tort statute the requirement that a benefit had been conferred on defendant). Plaintiffs neither plead nor proved compliance with R.S.Mo. § 408.040 which, among other stipulations not met here, requires the presentation to the defendant of a written demand by certified mail, with a clear calculation of a demanded sum. R.S.Mo. § 408.040; *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 449 (Mo. banc 1998).

Whatever the trial court had perceived to be a basis for prejudgment interest, this case did not qualify for an award due to other restrictions common to both prejudgment interest statutes. Each statute requires that a demand be made. *Transamerica Ins. Co. v. Pa. Nat. Ins. Cos.*, 908 S.W.2d 173, 177 (Mo. App. 1995) (R.S.Mo. § 408.020); *Emery*, 976 S.W.2d at 449 (R.S.Mo. § 408.040). Plaintiffs offered no evidence at trial that they had made a demand upon Countrywide.

Plaintiffs can be expected to contend that they met the demand requirement by filing suit, but that position does not address the second critical requirement under each statute – a plaintiff's demands must be definite in amount in order to start the prejudgment interest clock. *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1, 5 (Mo. banc 1975). This requirement is intended to carry through the purpose of the demand requirement – to encourage settlement – and in recognition of the fact prejudgment interest arises not because of the violation but instead as a consequence of a failure to pay a liquidated, stated sum. *Id.*; *Brown v. Donham*, 900 S.W.2d 630, 634 (Mo. banc 1995). Plaintiffs' Third Amended Petition provided no definite demand, never mind a liquidated or stated sum. LF 138-40 (Third Amended Petition ¶ 149(a)-(g)). There is thus no basis on which the trial court could have concluded that the Petition satisfied the demand requirement of the statute.

It also has been recognized that prejudgment interest cannot be awarded when damages are not easily ascertainable. *St. John's Bank & Trust Co. v. Intag, Inc.*, 938 S.W.2d 627, 630 (Mo. App. 1997); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 739

(1987). At trial, the proper measure and amount of damages was a hotly-contested issue, in two ways. Pre-trial and at trial, Countrywide contended that more than 2300 class members did not pay the subject fee, because Countrywide or third parties (sellers or brokers) provided offsetting credits against such fees at the closing table. Plaintiffs attacked this evidence vigorously. LF 348; Tr. 506-09, 524-41; Trial Exs. Q1, Q2. Pre-trial and at trial, Countrywide also contended that any damages should be reduced to reflect the fact that many of the documents prepared were not legal in nature; Plaintiffs argued that such allocation was not supported either factually or legally. LF 350-51; Tr. 511-15, 522-25; Trial Exs. P1, Q4. While Countrywide prevailed as to the first issue but not as to the second issue, and neither are at issue in this appeal, the existence of these disputes went to the heart of the question of what amount would be owing in the event liability was found. Consequently, damages were neither fixed nor ascertainable, making any award of prejudgment interest improper. *Id*.

Finally, the Court's calculation of prejudgment interest was error in that it adopted Plaintiffs' contention that the amount should run from the date of the filing of the suit, or the payment of the fee, which ever occurred later. Under settled law, no prejudgment interest could possibly accrue until after the claims were asserted by each such person (and, if this case arises as a tort, not until ninety days thereafter). *Transamerica*, 908 S.W.2d at 177; *Emery*, 976 S.W.2d at 449; R.S.Mo. § 408.040. For the class, their claims were not made until the Circuit Court's October 1, 2004 class certification order was

entered. LF 280-82, 351-52. The contrary calculation made by the Circuit Court was erroneous.

CONCLUSION

The judgment of the trial court should be reversed, and the cause remanded with directions to enter judgment for Defendant on all of Plaintiffs' claims. Alternatively, the judgment should be vacated and the cause remanded for further proceedings, including the grant of all or some of the following relief: (1) vacating the award of treble damages, (2) reducing the judgment by the amount of the improperly included damages for the time prior to the two year limitations period; (3) reducing the judgment by the amount of the improperly included prejudgment interest; and (4) such other and further relief as is just under the circumstances.

Respectfully submitted,

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Dated: March 12, 2007

CERTIFICATE OF SERVICE

I herby certify that on this 12th day of March, 2007, two (2) copies of the Brief of Appellant, along with one (1) diskette containing a copy of the same, were hand delivered to:

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RULE 84.06(c) CERTIFICATION

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 23,302 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

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