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IN THE MISSOURI SUPREME COURT

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CLARK E. EISEL and PATRICIA S. EISEL, et al.,  
individually and on behalf of all others similarly situated,

Plaintiffs/Respondents,

v.

MIDWEST BANKCENTRE,

Defendant/Appellant.

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On Appeal from the Circuit Court of St. Louis County, Missouri  
Honorable Mark D. Seigel, Circuit Judge

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BRIEF OF AMICI CURIAE ABN AMRO MORTGAGE GROUP, INC.,  
AND NORTH AMERICAN MORTGAGE COMPANY

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## STATEMENT OF FACTS

Clark and Patricia Eisel, on behalf of themselves and other residential home borrowers, sued Midwest Bankcentre (the Lender), asserting that the Lender engaged in the unauthorized practice of law by charging a “document preparation fee” or “document processing fee” (the “Fee”) for the preparation of standard mortgage documents necessary to secure the Lender’s own interests in its own loan transactions. Though this case technically concerns the loan practices of Midwest Bankcentre alone, the practices challenged are standard in the industry. Indeed, the case as originally filed was brought by numerous other named plaintiffs who asserted the unauthorized practice of law claim against thirty different lenders, including Midwest Bankcentre.<sup>1</sup>

The documents at issue include standard loan documents used in the vast majority of residential real estate purchase and refinance transactions. The documents are necessary to secure the lender’s own interests in the transaction.

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<sup>1</sup> The case was later severed into five parts, each of which was made up of named plaintiff-borrowers who asserted unauthorized practice of law claims against each individual or group of lenders in each severed case. The *amici* who participated in preparing this brief, ABN AMRO Mortgage Group, Inc. and North American Mortgage Company, were named as defendants in that original suit.

For example, the promissory note evidences the borrower's indebtedness and unilateral obligation to repay the loan. A mortgage document pledges the borrower's property as collateral in the event the loan is not repaid, providing the security for the lender that is essential to the lender's decision to extend the loan. These documents are not prepared for the borrower at all, and there has been no allegation here or in any of the other cases that the borrower requested the lender to prepare them. These documents are prepared by the lender because they evince the borrower's contractual burdens to the lender and exist to protect the lender's interests in the transaction.

In addition to the documents described above, the Fee includes the cost of preparing other documents as well. The details and purpose of each document is beyond the scope of this brief. It is sufficient to note that the documents are, as a rule, standardized in form, and that it is in the interest of the lender to ensure that they are in the proper standard form. Midwest, as is typical among lenders, sells a large percentage of its loans to third party institutions including government created entities known as Fannie Mae, Freddie Mac and Jennie Mae. Those institutions require that the documents be prepared in a certain form or they will not purchase the loan. Certain additional documents, then, are also prepared in a specific way to protect the lender's interests, specifically the

lender's interest in ensuring that sale of the loan on the secondary market is possible.

The Lender used software to determine which types of documents were necessary to secure their interests in the loans and then "filled in the blanks" on these documents. The Fee charged by the Lender, as is typical in the industry, was for costs incurred in completing and processing the loan documents, as well as direct and overhead costs associated with these activities. The Lender has asserted, and the plaintiffs have not disputed, that the allocated overhead costs include supplies, furniture, equipment, software used to generate the mortgage documents, staff salaries, and administrative expenses.

Plaintiffs have not alleged that they had any problem with their loan transaction. They do not allege that their interest in the transaction has been harmed in any way. They do not allege that they looked to the Lender to protect their interest in the transaction. They do not allege that the Lender inhibited or discouraged them from obtaining legal counsel in connection with the transaction. They do not allege that the Fee was not fully disclosed prior to their entering into the transaction with the Lender. Nonetheless, the plaintiffs maintain that the Lenders engaged in the unauthorized practice of law by passing on the overhead costs of preparing documents necessary to secure Lender's own interests in the loans it issued. Plaintiffs seek the return of the Fee as well as statutory damages.

## SUMMARY OF ARGUMENT

A mortgage lender that prepares loan documents necessary for securing the lender's own interests in its own loans does not engage in the unauthorized practice of law. The unauthorized practice of law covers conduct by a non-lawyer that is *both* legal in nature *and* undertaken in a representative capacity on behalf of another. As a matter of law and common sense, engaging in conduct to protect one's own interests in one's own loan transaction cannot be the unauthorized practice of law. It does not matter whether, as here, a fee is charged to compensate the actor for the administrative expenses incurred in connection with protecting its own interests. Because the conduct at issue was not *representative* conduct, but was undertaken by the Lender for the Lender's own protection, it is not the unauthorized practice of law.

Sound policy counsels in favor of recognizing that when a lender charges a fee for preparing standard loan documents for the purpose of protecting its own interests in a residential real property loan, it has not engaged in the unauthorized practice of law. The rule against the unauthorized practice of law is designed to protect the public. A rule that treats the conduct at issue here as the unauthorized practice of law would not only fail to protect the consuming public, but would in fact result in a less well informed public, and might actually spawn confusion among consumers.

The administrative costs at issue in this litigation are an admitted fact of these transactions; they are an unavoidable cost of doing business as a lender. The question in this case is not whether the lender may recover its costs, but whether a lender may break out this particular administrative cost as a separate line item fee, or whether the cost will be recovered through other means (*e.g.*, by including this cost in calculating the interest rate charged to the borrower). The identification of a document preparation fee enhances the consumer's understanding of the nature of each cost associated with his or her loan. Plaintiffs seek a rule that would diminish the transparency of costs associated with loan transactions.

The transparency that present practice promotes also better enables consumers to compare competing offers from different lenders. The rule plaintiffs seek here threatens actually to confuse borrowers and frustrate their ability to compare competing loan offers because federally chartered institutions, such as the lender *amici* here, are permitted by federal law to disclose their document preparation fees. As a result of federal preemption, a rule holding that the conduct at issue here is the unauthorized practice of law under Missouri law could only be applied to bar the disclosure of the document preparation fee for non-federal institutions. Borrowers who solicit offers from both federal and non-federal institutions, then, would find it more difficult to compare the offers and would be

needlessly confused regarding the relative value of the two offers. This Court should, therefore, recognize that the impact on the consuming public favors full disclosure of the costs associated with their loans, and that the itemization of the costs associated with a lender preparing the documents for its own protection is not the unauthorized practice of law.

## ARGUMENT

### **I. A MORTGAGE LENDER DOES NOT ENGAGE IN THE UNAUTHORIZED PRACTICE OF LAW BY CHARGING A FEE FOR THE PREPARATION OF FORMS THAT PROTECT THE LENDER'S OWN INTERESTS IN ITS OWN LOAN TRANSACTION.**

#### **A. Missouri Law Establishes That When a Lender Completes Documents That Protect Its Own Interests in its Own Loans, it Has Not Engaged in the Unauthorized Practice Of Law.**

A Missouri statute specifically defines what constitutes the practice and business of law. That statute defines the practice of law as occurring *only* when some action is taken “in a representative capacity.”

1. The “practice of the law” is hereby defined to be and is the appearance as an advocate *in a representative capacity* or the drawing of papers, pleadings or documents or the performance of any act *in such capacity* in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

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 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 valuable consideration *in a representative capacity*, obtaining or tending to obtain or securing or tending to secure for any person, firm association or corporation any property or property rights whatsoever.

RSMo § 484.010 (emphasis added). Protecting one’s own interest—*i.e.*, acting in a *non-representative capacity* or *pro se*—cannot be the unauthorized practice of law. The practice of law involves representing the interests of others in legal matters. As a matter of statutory construction, whether one is talking about the “practice of law” or the “law business,” RSMo § 484.010 makes clear that representing the interests of another is a *sine qua non* of the unauthorized practice of law.

With respect to paragraph one, defining the “practice of law,” the statute expressly states that all of the activities identified as constituting the “practice of law,” whether appearing in court or drawing pleadings or other documents, or the performance of any other act before a court or adjudicative body, are not the “practice of law” unless one is acting “in a representative capacity” or “in such [representative] capacity.” RSMo § 484.010(1). One can act “in a representative capacity” only when one acts on behalf of some other. “To represent a person is to stand in his place; to speak or act with the authority on behalf of such person.” Black’s Law Dictionary 1301 (6th ed. 1990). When one acts to present or protect one’s own interests, one is not acting “in a representative capacity” and hence is not engaged in the unauthorized practice of law.

The same is true when one turns to the definition of “law business.” The statute defines the “law business” to include “the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper document or instrument affecting or relating to secular rights ... in a representative capacity.” RSMo § 484.010(2). Indeed, the definition of “law business” begins by explaining that it involves “the advising or counseling ... of any person ... as to any secular law....” *Id.* When one acts to protect one’s own interests, one is not “advising or counseling ... any person.”

Here, the undisputed facts are clear that the Lender, as is typical, did not act “in a representative capacity” or “advis[e] or counsel ... any person” regarding the law in connection with these transactions. The borrowers do not claim to have sought legal advice from the Lenders. They do not claim to have been prevented from obtaining their own legal advice in connection with their loan. The documents that were prepared are not alleged to have protected the borrowers’ interests in the transaction. The documents that were prepared are not alleged to have been requested by the borrowers at all. There is simply no basis to conclude that a residential real estate transaction involves a lender giving legal advice to a borrower at all, much less that the forms that are the basis for any document preparation fee challenged here reflect the results of any such advice, either sought or received.<sup>2</sup>

This Court’s cases reflect appreciation that any unauthorized-practice-of-law claim must be based on conduct that is alleged and proven to be representative in nature. First, this Court has made clear that the purpose of the

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<sup>2</sup> Because both the “practice of law” and “law business” are defined only in terms of acts that are representative in nature, this brief will henceforth employ the phrase “practice of law” in reference to both the “practice of law” and “law business.” *See In re First Escrow, Inc.*, 840 S.W.2d 839, 841 n.3 (Mo. 1992).

rule prohibiting the unauthorized practice of law is “to make sure ‘that legal services required by the public, and essential to the administration of justice, will be rendered by those who have been’” legally trained and have demonstrated certain qualities of character. *Hulse v. Criger*, 247 S.W.2d 855, 858 (Mo. 1952) (quoting *Curry v. Dahlberg*, 112 S.W.2d 345, 346 (Mo. 1937)). This purpose is not implicated unless some member of the public has looked to and expects to receive legal advice or representation from someone else. The fact that one person is relying on another is an essential component of the reason why the practice of law is limited to those with certain training and character. When the actions at issue do not involve such a representative relationship, there is no reason to prevent even one untrained in the law from engaging in legally significant activity, even when such untrained conduct has dire legal consequences for that party. *Bradley v. Capps*, 200 S.W.3d 545 (Mo. Ct. App. 2006) (unlicensed party has right to prosecute his own appeal, but is held to the same standards as party represented by counsel); *Hampton v. Gilmore*, 511 S.W.2d 442, 443 (Mo. Ct. App. 1974) (same).

This fundamental point is reinforced by the specific conclusions reached by this Court in *Hulse*. In *Hulse*, this Court considered whether the preparation of various documents by a real estate broker, including a contract for sale of a home and documents of conveyance, constitute the unauthorized practice

of law. 247 S.W.2d at 856. The key line of demarcation between the permissible and impermissible conduct of a real estate broker not licensed to practice law was whether this Court concluded that the specific conduct at issue amounted to advising others as to legal matters separate from protecting the broker's own personal interest in the transaction. *See id.* at 861-62. That is why this Court concluded that it is permissible for a broker to fill in a form real estate sales contract. *Id.* at 861. The contract is itself signed by the broker as well as the parties to the contract, and it is an essential part of completing the transaction which entitles the broker to a commission. "Thus the broker's function is commercial in character and not merely advisory." *Id.* Only when the broker's conduct crosses the line into the giving of advice to others distinct from the broker's own personal interest in the commission does a problem arise. As this Court emphasized, "[e]ven in transactions in which he is acting as a broker, a real estate broker may not give advice or opinions as to the legal rights of the parties, as to the legal effect of instruments to accomplish specific purposes or as to the validity of title to real estate...." *Id.* at 862. The unauthorized practice of law involves conduct taken on behalf of others or for the benefit of others, while permissible conduct involves action to advance or protect one's own personal interest in the transaction.

The same point was reaffirmed more recently in this Court's decision in *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. 1992). In drawing the distinction between the permissible and impermissible conduct of escrow companies in connection with real estate closing and settlement services, this Court once again stated that non-lawyers may not "provide legal advice to customers...." *Id.* at 840. The *First Escrow* Court emphasized that the *Hulse* Court's decision rested substantially on the fact that the real estate broker had a sufficient personal financial interest in the completion of the transaction to support allowing the broker to fill in standardized forms, *id.* at 843-44, and that it "would be imprudent to allow such activity to be performed by individuals without legal training, who have no independent financial interest in the transaction," *id.* at 846. The *First Escrow* Court thus understood that part of determining whether the unauthorized practice of law has occurred involves identifying whether the defendant has an independent business or financial connection to the transaction such that the defendant acts in its own interests, rather than on behalf of another. If the defendant's independent business interest is present and sufficiently implicated, then the defendant is not acting on behalf of another and it is not engaged in the unauthorized practice of law.

Significantly, the *First Escrow* Court specifically said that "a mortgage lender" possesses the necessary "direct financial interest in the

transaction” to satisfy the *Hulse* test. *Id.* at 846-47; *see id.* at 847 (noting that *Hulse* “authorized ... by implication lenders ... to complete closing documents”). That is both correct and dispositive. The mortgage lender’s financial interest in the transaction is more direct and substantial than that of a real estate broker. It is even more clear that a mortgage lender is acting to protect its own interests when it prepares loan documents for its own loan transactions than when a real estate broker prepares a contract for sale or documents of title.

Once again, the specific conclusion reached by this Court with respect to escrow companies supports the principle, advocated by *amici*, that the unauthorized practice of law occurs only when the defendant has taken action on behalf of and for the benefit of others. This Court concluded that an escrow company may complete standard real estate documents when acting “under the supervision of, and as agents for, entities or individuals who could otherwise meet the personal interest test and complete the form documents themselves.” *Id.* at 846. When the escrow company legally stands in the shoes of an entity that has a sufficient personal interest in the transaction, it is acting not as an advisor or counselor to any party to the transaction, but rather merely as the active force of that interested party’s own independent judgment to protect its own independent interests. Therefore, it has not engaged in the unauthorized practice of law under those circumstances.

The fact that a mortgage lender charges a separately itemized fee for preparation of documents does not change the dispositive fact that a lender is protecting its own interests when preparing the documents. And the fact that the documents protect the lender's own interest in the transaction defeats the unauthorized practice of law claim. Nothing in *Hulse* or any other case suggests that such a claim can be revived because a lender charges a fee to recover the costs of preparing documents that protect its interests in its own transaction.

In *Hulse*, this Court explained that a real estate broker who charged a separate fee, aside from his or her commission, for preparation of documents would be engaged in the unauthorized practice of law. 247 S.W.2d at 861. That makes sense because the broker's commission was itself the basis for the Court's conclusion that the broker had a sufficient personal interest in the transaction to treat his or her conduct as personal, and not on behalf of others. The broker was otherwise a stranger to the transaction whose connection to the parties would be severed upon being paid. If a broker received separate and independent compensation for the act of preparing documents, then there would no longer be any reason to believe that the document preparation was undertaken to protect his or her own independent personal business interest in the transaction. Rather, the broker's separate fee for preparing the documents would reasonably be considered payment to protect the interests of one (or more) of the parties to the transaction;

that is, the preparation of the documents would become a representative act. Thus when this Court concluded that brokers could not charge a separate fee for preparing documents, it was not announcing a rule that the charging of a fee transforms legitimate conduct into illegitimate conduct. It was merely applying the general principle advanced by *amici*: that the record should reveal that the preparation of the documents by the non-lawyer party is in furtherance of the non-lawyer party's own interest in the transaction, and not on behalf of some other party or parties.

Here, the non-lawyer party's own personal interest in the transaction is undeniable, whether a fee is charged for that party's preparation of documents or not. The documents are essential to securing the Lender's interests in creating the borrower's legal obligation to repay and in ensuring that the Lender can move against the property to collect in the event that the borrower defaults. Unlike a broker, the documents being prepared define the rights of the Lender in its continuing relationship with the borrower. The plaintiffs have not even alleged that the documents prepared by the Lender serve anyone's interests except the Lender's, much less that those documents are being prepared to protect the plaintiffs in any way. The fact that the Lender recoups from the borrower its administrative costs of preparing the documents it needs to protect its own interests

does not even colorably suggest that the Lender was acting to protect the interests of any other party when it prepared the document.

What the documents at issue here do—protect the Lender—is precisely why it is clear that the Lender need not use an attorney to prepare them and also why it is clear that plaintiffs have no basis to complain that their preparation amounted to unauthorized legal representation. Put simply, that a separate fee is charged matters when a broker prepares documents because the broker’s temporary interest is *indirectly* advanced by the documents (the broker collects the commission only when the real estate transaction closes). But that a separate fee is charged does not matter when a lender prepares the documents because a lender’s continuing interest is *directly* protected by the documents themselves. *See Hulse*, 247 S.W.2d at 862 (noting that a broker may not separately charge for completing any standardized forms “unless he is himself one of the parties to the contract or instrument”). Whether a lender charges a fee or not, the preparation of the documents necessary to protect the lender’s own interests in its own loan transactions can never be “representative” conduct, and hence can never be the unauthorized practice of law.

This case is thus different from cases involving third party intermediaries to a transaction. In such third-party intermediary cases, this Court has emphasized two factors in evaluating whether the preparation of documents in

connection with a real estate transaction is the unauthorized practice of law. In *First Escrow*, this Court looked not only to the personal interest of the third party, but also to the fact that the completion of standardized forms was simple. 840 S.W.2d at 843-44 (citing *Hulse*, 277 S.W.2d at 860-61). *Amici* submit that a lender's direct interest in the loan, and the indisputable fact that the forms at issue protect the lender's interests in the transaction, suffices to establish that the unauthorized practice of law has not occurred. Nonetheless, *amici* agree with Midwest Bankcentre that the completion of the standardized forms at issue would satisfy the standard of simplicity previously considered by this Court, if this Court believes that factor applies here. And if this factor were to apply, *amici* also submit that this Court's "duty to strike a workable balance between the public's protection [from legally significant action undertaken by non-lawyers] and the public's convenience," *id.* at 844, would also support permitting lenders to prepare the documents at issue because, as noted above, there is no danger to the public in allowing lenders to prepare the documents necessary to protect the lender's own interests.

**B. The Considered Views of Various State Supreme Courts Support Concluding That When a Lender Charges to Complete Documents That Protect Its Own Interests in its Own Loans, it Has Not Engaged in the Unauthorized Practice Of Law.**

Courts in other jurisdictions have held that a lender does not engage in the unauthorized practice of law when it completes loan documents that protect its own interests in its own loans. This Court has, in the past, considered the views of other state supreme courts, *Hulse*, 247 S.W.2d at 858-60; *First Escrow*, 840 S.W.2d at 844-46, and doing so here fully supports permitting lenders to prepare the loan documents to protect their own interests in their own loans.

The Illinois Supreme Court has held that charging a fee for the preparation of mortgage documents does not convert otherwise lawful conduct into the unauthorized practice of law. *King v. First Cap. Fin. Servs. Corp.*, 828 N.E.2d 1155, 1167 (Ill. 2005). The *King* court determined that preparation of documents used to secure the lender's own interest in a mortgage fell within the "pro se exception" which "applies to the preparation of documents in situations where the party preparing the legal documents does so for his or her own benefit in a transaction to which the preparer is a party." *Id.* at 1163. The court determined that the fact that the lender charged a document preparation fee did not take the preparation of mortgage-related documents outside of the *pro se* exception because

the documents protected the lender's interests, not the borrower's. *Id.* at 1163, 1166. When the documents protect the preparer's direct interests in the transaction itself, the charging of a fee becomes irrelevant.

The Michigan Supreme Court has held the same. In *Dressel v. Ameribank*, 664 N.W.2d 151 (2003), the Michigan Court held that charging a document preparation fee does not transform otherwise lawful conduct of protecting one's own interests in a transaction into the unauthorized practice of law:

Plaintiffs do not assert that the bank's preparation of their mortgage document was in conjunction with anything other than an ordinary transaction in the normal course of the bank's business.

\* \* \*

The bank did not counsel plaintiffs with regard to the legal validity of the document or the prudence of entering into the transaction.... Accordingly, defendant was not practicing law when it completed the mortgage form at issue in this case.

Moreover, because defendant was not practicing law when it completed the mortgage, it was not engaged in the “law business.” It is immaterial that it charged a fee for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law.

*Dressel*, 664 N.W.2d at 157.

Other courts, while not directly speaking to the authority of a mortgage lender, acting *pro se*, to prepare its own loan documents, have made clear that the charging of a fee does not transform what is otherwise lawful conduct into the unauthorized practice of law. The Minnesota Supreme Court has rejected the notion that charging a fee is dispositive in a case involving the preparation of documents by a real estate broker.

Common sense suggests, however, that charging a fee for services which include the preparation of ordinary documentation for a real estate transaction does not convert a practice not otherwise unlawful into the unauthorized practice of law. [Defendant] could well have chosen to increase its rate of commission to reflect what would amount to the additional drafting fee and thereby hide the cost. That it instead opted for disclosure

and enumerated the routine services encompassed by the fee is not determinative....

To assert that whether conduct amounts to the unauthorized practice of law turns on what the actor calls the fee—or the mere designation of the charge as a “drafting fee”—is to exalt form over substance and to ignore the public welfare concerns.

*Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 869 (Minn. 1988).

The Supreme Court of Washington, too, rejected any emphasis on the charging of a fee: “This preoccupation with the fee is misplaced. We have firmly rejected the notion that a lay person’s authority to prepare legal instruments turns on whether a fee is charged.” *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 96 (Wash. 1999). The Supreme Court of Oregon also rejected a claim based on whether a fee was charged. *Oregon State Bar v. Sec. Escrows, Inc.*, 377 P.2d 334, 339 (Or. 1962) (finding that escrow agents were not engaged in the unauthorized practice of law for filling in mortgage documents and rejecting such “artificial or haphazard tests as ... payment”).

The views of these various state courts is well supported by common sense. A contrary rule would have potentially far-reaching consequences.

Businesses large and small routinely prepare their own contracts for use in their own transactions. It cannot be doubted that a business or individual has the right to forego the added expense of obtaining the advice of counsel when drafting routine contracts necessary for their conduct. *See Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771, 775 (Ill. 1966). How the parties to any such self-directed transaction choose to allocate the costs of preparing the documents cannot alter the parties' rights to contract without the assistance of an attorney. So, for example, a small software developer who sells his software might prepare his own exclusion of warranty agreement between himself and the buyer. The parties could choose not to involve lawyers in the transaction. If the developer charges a \$100 fee for the purchase of the software, the preparation of the exclusion of warranty agreement comfortably falls with the rights of the parties to contract without seeking the services of a lawyer, even though the document is certainly of such legal significance that one could not prepare it *for a third party* unless one was licensed to practice law. If, however, the software developer decides to break down the \$100 price into \$90 for the software and an additional \$10 for the preparation of the exclusion of warranty document, plaintiffs' rule would mean that the developer has now engaged in the unauthorized practice of law. Yet the software developer's conduct is the same in both cases, except for how the costs of the transaction are itemized. There is no reason in law or policy to prevent parties

to a contract from identifying rather than hiding how the various component costs of a legitimately unlayyered transaction are allocated.

**II. PROHIBITING MORTGAGE LENDERS FROM CHARGING A SEPARATE FEE FOR PREPARATION OF DOCUMENTS RELATED TO THEIR OWN LOAN WILL NOT SUPPORT THE PURPOSE OF PROHIBITING THE UNAUTHORIZED PRACTICE OF LAW, WHICH IS TO PROTECT THE PUBLIC FROM HARM.**

Concluding that a lender's preparation of documents for its own protection in connection with its own loans is the unauthorized practice of law would not advance the policy that the rule against the unauthorized practice of law is designed to advance. This Court regulates the practice of law "not to protect the Bar from competition but 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. This Court has discharged its duty to define the unauthorized practice of law mindful of the "unnecessary inconvenience and expense" to the public of requiring legal representation for routine transactions. *First Escrow*, 840 S.W.2d at 843. Holding that a lender's preparation of the documents at issue here is unlawful would not protect the public at all, and would actually cause harm to the public, in addition to imposing an unnecessary expense.

First, as noted above, because the documents at issue do not serve the interests of consumers at all, but rather protect a lender's own interests, the lenders

are not putting the public at risk when they prepare their documents. If they are prepared poorly, the lenders are harmed, not the borrower. Poor preparation of the documents may leave the loan ineligible for sale on the secondary market, or may hinder a lender's ability to move against the property in the event of default. When the public's legal rights are not at risk, the basic rationale behind the unauthorized practice of law is not even implicated.

Second, a ruling in favor of the plaintiffs here would not eliminate the administrative costs that a lender seeks to recover by charging the fee. Those costs are an unavoidable fact of the business of lending. This case is not about whether a lender has the right to recover those costs. Rather, it is about whether the recovery of those costs is going to be transparent to the borrowers. The current practice, challenged in this litigation, separately itemizes that cost, and thus enhances consumer understanding of the costs involved when choosing to use a particular lender. If this Court declares the current practice in violation of Missouri law, then lenders will likely recover these costs through less obvious means. A legal doctrine designed to promote consumer interests should not be applied to make the loan process *less* transparent to borrowers.

Far from benefiting consumers, the only individuals likely to benefit from plaintiffs' proposed rule are the attorneys that businesses may be forced to hire to participate in routine transactions like the loans at issue here. But, as noted

above, the rule against the unauthorized practice of law does not exist to protect lawyers' economic interests, but rather the consuming public's interests, and is applied mindful of the interests the public has in avoiding unnecessary expenses in routine transactions. *Hulse*, 247 S.W.2d at 857-58; *First Escrow*, 840 S.W.2d at 843.

The Missouri legislature has now made clear that a lender who charges a document preparation fee of less than two hundred dollars shall not be deemed to have engaged in the unauthorized practice of law. RSMo § 484.025. *Amici* submit that this legislative provision supports their view that a lender is entitled to recover the costs of preparing the documents necessary to protect its own interests in its own loans without engaging in the unauthorized practice of law. Given that the question before this Court involves consideration of consumer interests, *amici* further submit that this Court should respect the judgment of the legislature embodied in the recently enacted statute: that consumers benefit from a more transparent disclosure process in connection with home loans. Finally, *amici* note that this recent legislation specifically does not take a position on whether the charging of a fee that is *greater* than two hundred dollars would constitute the unauthorized practice of law. *Amici* submit that there is no principled basis to define the charging of a certain amount as lawful conduct, while holding that the

charging of an amount above such an arbitrary line is the unauthorized practice of law.

Finally, a rule producing reduced transparency for Missouri borrowers will potentially produce confusion for borrowers shopping for loans. This Court today has before it only the question whether Missouri law permits lenders to recover the costs of preparing the documents necessary to protect their own interests in connection with their own loans. This case as originally filed, however, asserted claims against numerous other lenders beyond Midwest Bankcentre, including various federally chartered institutions like the lender *amici* here. The claims asserted against the lender *amici* were dismissed on the ground that federal law permitted them to include a document preparation fee, and that such federal law preempted any contrary state law. While it is beyond the scope of this brief to explain fully the basis of that ruling, as the following summary explanation makes clear, that ruling is well grounded in federal court decisions and regulations.

“[B]ecause there has been a ‘history of significant federal presence’ in national banking,” any presumption against preemption of state law “is inapplicable.” *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). Lenders that operate under a federal charter as Federal Savings Associations (“FSAs”) or as

a national bank are subject to regulations promulgated by the Office of Thrift Supervision (“OTS”) or the Office of the Controller of the Currency (“OCC”).

The regulations of an administrative agency “have no less pre-emptive effect than federal statutes.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). With respect to FSAs, OTS expressly occupied the entire field of lending regulation in 12 C.F.R. § 560.2(a). OTS regulations enumerate certain “illustrative examples” of laws that are specifically preempted, including, “without limitation, state laws purporting to impose requirements regarding: ... Loan-related fees....” *Id.* § 560.2(b)(5). There is no doubt that the document preparation fees at issue here are loan related fees and thus protected by OTS regulations. And the OTS filed an *amicus* brief in the Illinois cases that produced the decision in *King* in which it expressly took the position that OTS regulations preempted a claim that charging a fee for the document preparation at issue here is the unauthorized practice of law. Likewise, the regulations promulgated by OCC expressly authorize national banks to charge non-interest fees, and the document preparation fees challenged here fall squarely within that authorization. 12 C.F.R. § 7.4002(a). The regulations leave to each bank the discretion to decide whether to charge such fees, “according to [the bank’s] sound banking judgment and safe and sound banking principles.” 12 C.F.R. § 7.4002(b)(2). OCC has the discretion to determine what constitutes unsound banking principles with respect to national

banks, and it has never found such fees to be inappropriate. The United States Court of Appeals for the Ninth Circuit has specifically held that “non-interest fees” authorized under § 7.4002 preempt state laws that would prohibit them. *Bank of Am.*, 309 F.3d at 564.

As a result, a ruling in plaintiffs’ favor here threatens to confront Missouri consumers with two distinct fee disclosure regimes. Federally chartered institutions would remain free to itemize their document preparation fees up to any amount while Missouri lenders could do so only up to two hundred dollars under the recently enacted RSMo § 484.025. Whether Missouri lenders were otherwise recovering any document preparation fee in excess of two hundred dollars would remain hidden. The ability to compare different loan offers accurately would actually be hindered because the more transparent disclosure of the federally chartered institution would not match in form the less transparent disclosure required by Missouri law as advocated by the plaintiffs. There is simply no reason for this Court to create such a dual regulatory regime that artificially alters the competitive landscape between Missouri lenders and their federally chartered counterparts and that promises only confusion rather than clarity for consumers in connection with the most substantial investment most of them will ever undertake.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the trial court and order that judgment be entered in favor of Midwest Bankcentre on the ground that it did not engage in the unauthorized practice of law when it prepared documents to protect its own interests in its own loans.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby states that the undersigned has:

1. pursuant to Rule 84.06(c), complied with all requirements of Rule 55.03;
2. pursuant to Rule 84.06(c) and Local Rule 360, complied with the applicable word limitation, in that this brief contains 6,866 words; and
3. pursuant to Rule 84.06(g), scanned the attached computer disk and certifies that it is virus-free.

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