

IN THE SUPREME COURT OF MISSOURI

No. SC 88167

CLARK E. EISEL, *et al., etc.*, Plaintiffs/Respondents,

v.

MIDWEST BANKCENTRE, Defendant/Appellant.

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

**BRIEF OF *AMICUS CURIAE* COUNTRYWIDE HOME LOANS, INC.
SUPPORTING APPELLANT AND URGING REVERSAL**

John M. Hessel, #26408
LEWIS, RICE & FINGERISH, L.C.
500 North Broadway, Suite 2000
St. Louis, MO 63102
(314) 444-7600

Counsel for Amicus Curiae Countrywide Home Loans, Inc.

Thomas M. Hefferon (*of counsel, not admitted*)
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001
(202) 346-4000

James W. McGarry (*of counsel, not admitted*)
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000
LIBA/1755637.2

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 3

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... 5

BACKGROUND 7

ARGUMENT..... 9

 I. THE PURPOSE OF UNAUTHORIZED LAW PRACTICE RULES –
 PROTECTING THE PUBLIC – IS NOT FURTHERED BY A RULING
 ADVERSE TO MIDWEST 11

 II. THE FOCUS OF THE FEE MISAPPREHENDS THE RELEVANT TEST
 AND THE PUBLIC POLICY AT ISSUE 14

 III. THE COURT SHOULD HAVE CONSIDERED AND WEIGHED A
 NUMBER OF FACTORS TO DETERMINE THE UNAUTHORIZED
 PRACTICE OF LAW ISSUE, NOT SOLELY WHETHER THE LENDER
 CHARGED A DOCUMENT PREPARATION FEE; AFTER APPLYING
 ALL FACTORS, IT SHOULD HAVE REVERSED THE CIRCUIT
 COURT’S LIABILITY FINDING..... 16

 A. The *Hulse* and *First Escrow* Multi-Factored Test 16

 B. The *Hulse* and *First Escrow* Factors Do Not Support the Conclusion
 that the Practice At Issue Here Was the Unauthorized Practice of
 Law..... 19

IV.	THIS COURT SHOULD FIND THAT THE LENDER MUST HAVE ACTED IN A “REPRESENTATIVE CAPACITY” ON BEHALF OF THE BORROWER IN ORDER FOR ITS ACTIVITY TO CONSTITUTE LAW BUSINESS OR THE PRACTICE OF LAW.....	27
V.	COUNTRYWIDE URGES THE COURT TO RECONSIDER WHETHER FILLING IN BLANKS ON FORMS CONSTITUTES THE LAW BUSINESS AT ALL	30
	CONCLUSION	33
	CERTIFICATE OF SERVICE.....	34
	RULE 84.06(c) CERTIFICATION	35

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>CASES:</u>	
<i>Cardinal v. Merrill Lynch Realty</i> , 433 N.W. 2d 864 (Minn. 1988)	26,31
<i>Curry v. Dahlberg</i> , 110 S.W.2d 742, 727 (Mo. 1937)	27
<i>Dressel v. Ameribank</i> , 664 NW.2d 151 (Mich. 2003).....	26,31
<i>Hulse v. Criger</i> , 247 S.W.2d 855 (Mo. banc. 1952)	<i>passim</i>
<i>In re First Escrow</i> , 840 S.W.2d 839 (Mo. banc. 1992).....	<i>passim</i>
<i>King v. First Capital Financial Services Corp.</i> , 828 N.E.2d 1155, 1161-62 (Ill. 2005)	26
<i>Liberty Mutual Ins. Co. v. Jones</i> , 130 S.W.2d 945 (Mo. 1939)	29,30
<i>McNabb v. Niagara Fire Ins. Co.</i> , 22 S.W.2d 364 (Mo.App. 1921).....	16
<i>Murray v. Fleet Mortgage Corp.</i> , 936 S.W.2d 212 (Mo.App. 1996).....	29
<i>Oregon State Bar v. Security Escrows, Inc.</i> , 377 P.2d 334 (Or. 1962)	26,31
<i>Perkins v. CTX Mortgage Co.</i> , 969 P.2d 93 (Wash. 1999)	26,31
<i>State Bar v. Arizona Land Title & Trust Co.</i> , 366 P.2d 1 (Ariz. 1961).....	10
<u>STATUTES & RULES:</u>	
Law Business Statute:	
R.S.Mo. § 484.010	<i>passim</i>
R.S.Mo. § 484.020	10
Missouri Rules of Civil Procedure:	
Rule 84.05	5

OTHER AUTHORITIES:

BLACK’S LAW DICTIONARY (7th ed. 1999)..... 29

Supreme Court Advisory Committee Formal Opinion No. 6 28

Supreme Court Advisory Committee Formal Opinion No. 38 28

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Missouri Rule of Civil Procedure 84.05(f)(2), Countrywide Home Loans, Inc. (“Countrywide”) files this Brief *Amicus Curiae* Supporting Appellant and Urging Reversal.

Countrywide is one of the country’s largest residential mortgage lenders, and has made tens of thousands of residential mortgage loans to Missouri consumers. As has been the practice in the residential lending industry for years, Countrywide, and other lenders throughout Missouri, have customarily completed form documents in connection with issuing mortgage loans to consumers. These forms include notes and deeds of trust, as well as numerous other administrative and informational documents necessary for mortgage lenders to conduct their business. As also has been the practice in the residential lending industry for years, Countrywide, like other mortgage lenders, charges or charged borrowers certain closing fees to recoup some of the costs it incurs in making loans. One such fee is commonly known as a “document preparation fee,” the charging of which is the subject of this appeal.

Countrywide believes that it can contribute to the Court’s analysis, and therefore offers this brief for several reasons. First, as just described, Countrywide makes many loans in Missouri. It believes it can provide assistance in explaining the reasons for the challenged conduct and whether the Court of Appeals’ ruling would have a positive or negative effect on lenders and consumers.

Second, Countrywide has unique knowledge and experience about the precise issue before the Court. This is because, in addition to its perspective as an active lender,

Countrywide was sued in a companion case for charging “document preparation” fees, and that case went to trial in May 2006 in the Circuit Court for St. Louis County. That trial included a full factual record – four days of testimony, rather than the stipulated-facts trial here – and expert testimony. Former Supreme Court Judge John C. Holstein testified as an expert and opined that this Court’s multi-factored test did not support a finding of the unauthorized doing of the law business. The trial also included testimony, contrary to that noted in the *Eisel* opinion, that the form legal documents – the promissory note, the deed of trust, and riders and addenda thereto – were drafted and approved by Missouri attorneys.

Countrywide is well situated for both reasons to identify the important public policy concerns surrounding the Court’s consideration of the issues in this appeal. The issues before the Court are of widespread importance, not only in the residential mortgage lending industry, but in other industries in which non-lawyer members could potentially be civilly or criminally charged with the same offense for similarly “preparing” certain documents. Indeed, the Court of Appeals transferred this case to this Court because of the overall importance of this issue. Despite the Missouri Assembly’s recent amendment to the unauthorized practice of law statute, there remain several active and important issues for resolution by this Court and several outstanding class action suits like this one on appeal. Countrywide submits this brief to assist the Court.

For further details of its interests, Countrywide refers the Court to its Motion for Leave to File Brief Amicus Curiae Supporting Appellant and Urging Reversal.

BACKGROUND

The case appealed from was originally part of a multi-defendant class action filed in the Circuit Court for St. Louis County. The original petition alleged that the lenders engaged in the unauthorized practice of law by preparing legal loan documents and charging a document preparation fee in connection with residential mortgage financing transactions, *Casey v. Accel Mortgage Services, Inc.*, Circuit Ct., St. Louis Co., No. 02CC-1055. Appellant Midwest Bank Centre (“Midwest”), Countrywide, and about twenty (20) other lenders were defendants in *Casey*.

After settlements and initial motion practice eliminated some defendants, classes were certified against five of the lenders. The case was administratively severed by the Circuit Court on January 7, 2005. The severance created distinct causes, each proceeding under the same Second Amended Petition. One of the causes was the underlying case appealed from by Midwest to the Court of Appeals, and subsequently transferred to this Court. Another was *Carpenter, et al. v. Countrywide Home Loans, Inc.*, Circuit Court, St. Louis Co., No. 02CC-1055B, in which Countrywide is the defendant.

The case Midwest appeals from was tried on stipulated facts. The trial thus did not include any witnesses – neither party presented any live fact testimony, and there were no experts.

Subsequent to the *Eisel* judgment, the case against Countrywide, the *Carpenter* case, was tried in May 2006 in Division 6 of the Circuit Court, St. Louis County, before the Honorable Gary M. Gaertner, Jr. The trial to the bench took four days and the parties were able to develop a complete, factual record. Eleven different witnesses testified and

thousands of pages of documents were marked as exhibits. (Judge Gaertner issued a final judgment in *Carpenter* on December 6, 2006, which was based upon the decision of the Court of Appeals below.)¹

The factual record in *Carpenter* included the testimony of the borrowers and by the individuals involved in “preparing” the legal and non-legal loan documents for Countrywide. There were also two liability experts. Judge Holstein opined that the facts elicited at the *Carpenter* trial did not support a finding that Countrywide had engaged in the unauthorized doing of the law business as alleged in the petition.

Countrywide also presented a combination of fact and expert testimony from John McNearney, a Missouri attorney who reviewed, revised and approved the form loan documents, the note and deed of trust, considered both in *Eisel* and in *Carpenter*. Mr. McNearney also testified as to the simplicity of filling in the blanks on these form loan documents.

The Eisels here, like the *Carpenter* plaintiffs, have asserted that the charging of a document preparation fee converted Midwest’s otherwise proper conduct into the unauthorized practice of law. Indeed, it is on this fundamental issue that the Court of Appeals’ decision turns (to the exclusion of the other factors this Court has identified as critical to the unauthorized practice analysis). On this exact point – the application of the multi-factored test – Countrywide has a well-developed factual record and specialized

¹ The case is currently involved in post-trial motion practice concerning the damage award of over \$6 million, with motions scheduled to be heard in January 2007.

Countrywide expects to appeal the adverse ruling on liability.

knowledge that it submits can aid the Court in drawing the appropriate legal and logical conclusion as to the propriety of Midwest's conduct.

Mortgage lenders are neither in the business of providing legal advice, nor in the business of filling in blanks on loan documents for a fee. They are in the business of making loans so that borrowers may purchase homes or refinance loans on residential property. The fact that lenders prepare loan documents, including the filling in of blanks on notes and deeds of trust approved for use in this state by a Missouri attorney, and pass a portion of their business costs onto borrowers in the form of a fully disclosed document preparation fee, does not mean that lenders are engaging in the practice of law.

ARGUMENT

The Missouri Assembly's definition of "practice of law" and the "law business" is set forth R.S.Mo. § 484.010.² 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

² The Assembly has defined the "practice of law" and the "law business" as distinct activities. *See* R.S.Mo. § 484.01.1-2. 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.

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

R.S.Mo. § 484.020 sets forth the persons who may engage in the practice of law and the law business, and also establishes penalties for violation of R.S.Mo. § 484.010.

Notwithstanding the above statutory definition, this Court has held that the judiciary alone “is necessarily the sole arbiter of what constitutes the practice of law.” *Hulse v. Criger*, 247 S.W.2d 855, 857 (Mo. banc. 1952); *see also In re First Escrow*, 840 S.W.2d 839, 843 n. 7 (Mo. banc. 1992) (“[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 noted 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 polestar in defining law business is its goal “to protect the public from being advised or represented in legal matters by incompetent or unreliable persons.” *Hulse*, 247 S.W.2d at 857-858. 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 849-850.

I. THE PURPOSE OF UNAUTHORIZED LAW PRACTICE RULES – PROTECTING THE PUBLIC – IS NOT FURTHERED BY A RULING ADVERSE TO MIDWEST.

Although the Eisels urge that lenders like Midwest are causing harm to the home-buying public by illegally “practicing law,” filling in blanks in form loan documents causes no actual harm to anyone. This lawsuit is simply not what the unauthorized practice rules are designed to accomplish. Judge Holstein’s testimony in *Carpenter* succinctly addresses this point:

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.

Transcript of Bench Trial, *Carpenter v. Countrywide Home Loans, Inc.*, Circuit Court, St. Louis Co., No. 02-CC-1055B (May 22-25, 2006) (“CW Tr.”) 469:3-18.³

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

The oft-stated 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 Midwest ever held itself out as legal counsel to the Eisels by proposing to sell legal services to them. The Eisels further admitted they never hired Midwest to act as their lawyer and they knew Midwest was not

³ *Amicus* refers the Court to the transcript of the *Carpenter* bench trial, which is available through the Circuit Court, St. Louis County. At the Court’s request, Countrywide will submit a copy of the transcript or relevant portions thereof.

representing them as legal counsel or otherwise in their loan transactions. Brief of Defendant/Appellant at 14. There was no sale of document services. There was a loan, and the documents were ancillary to it. Similar testimony was elicited from the representative plaintiffs in *Carpenter*.

Apart from the absence of tangible harm or risk of harm, this Court should be swayed to conclude the law was not violated because the public is adequately protected by the fact Midwest (and any other lender charging this fee) was a party to the transaction itself. In the *First Escrow* case, the Court first considered unauthorized practice in the context of mortgage lending. It exonerated the escrow company in that instance from any law violation so long as its work was supervised by some entity that was a party to the loan. That sole fact was thought to be sufficient to ensure that the public protection purpose of the law business statute was met. In this case (and in *Carpenter*, and other cases against other lenders), the public is adequately protected by the fact the lender is a party to the loan.

The decision in *Eisel*, which comes close to prohibiting lender document preparation fees *per se*, does not protect consumers in any event. Harm to the public does not arise from the fact a lender document preparation fee is charged.

Furthermore, this type of lawsuit is not equitable, and only serves to inconvenience the public. To the extent *Eisel* suggests that preparing legal loan documents could be the unauthorized practice of law, that result would be harmful to consumers. 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. The utility to the industry and consumers alike of having lenders, like Midwest, 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 Midwest’s practice.

II. THE FOCUS ON THE FEE MISAPPREHENDS THE RELEVANT TEST AND THE PUBLIC POLICY AT ISSUE.

The Court of Appeals’ 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? As discussed below, the cases take a multi-factored approach to the legal issue, guided by whether there is a substantial risk of harm to the public. The approach adopted by the Court of Appeals effectively ignores the actual conduct, and focuses exclusively on whether a fee was charged.

Countrywide submits that the Court of Appeals’ singular fixation on the fact of a fee should not be followed by this Court, for at least two reasons. First, the central conduct that Plaintiffs contend was unauthorized practice was the preparation of 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

Midwest'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.

Second, it is a reality that most lenders in Missouri (and in the country, for that matter) 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 lump them together or roll the cost into a higher interest rate 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 Court of Appeals' fee-focused analysis is to penalize lenders for itemizing their fees, a notion echoed by Judge Holstein in *Carpenter*:

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

CW Tr. 454:1-2, 8-13, 19-20. 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 short, the presence or absence of a document preparation fee should not be viewed as the test for whether a lender has engaged in the unauthorized doing of the law business. The test should be the same test this Court has announced, the multi-factored “ancillary” test from *Hulse* and *First Escrow*. As set forth below, the application of that test should have exonerated Midwest, and we turn to that analysis now.

III. THE COURT SHOULD HAVE CONSIDERED AND WEIGHED A NUMBER OF FACTORS TO DETERMINE THE UNAUTHORIZED PRACTICE OF LAW ISSUE, NOT SOLELY WHETHER THE LENDER CHARGED A DOCUMENT PREPARATION FEE; AFTER APPLYING ALL FACTORS, IT SHOULD HAVE REVERSED THE CIRCUIT COURT’S LIABILITY FINDING.

To determine whether a given practice amounts to the unauthorized doing of the law business, this Court established a multi-factored test in *Hulse*, as further interpreted by *First Escrow*. The Court must make a factual inquiry under the *Hulse* and *First Escrow* test, and no one factor is outcome determinative.

A. The *Hulse* and *First Escrow* Multi-Factored Test.

The seminal cases of *Hulse* and *First Escrow* established a test, known as the “ancillary” test, for deciding whether a company’s conduct amounted to the unauthorized doing of the law business or was merely ancillary to its main business. To apply this test, these cases suggested a variety of factors must be weighed.

In *Hulse*, this Court considered the activities of a licensed real estate broker, and whether or not his conduct constituted the unauthorized practice of law. The broker in *Hulse* prepared for persons other than himself documents relating to and affecting real estate and the title to real estate, including deeds, deeds of trust, promissory notes, leases, options to purchase, contracts of sale and agreements. *Hulse*, 247 S.W.2d at 856. 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. 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.* at 857.

In determining whether the broker committed the unauthorized practice of law, the *Hulse* Court created the following test:

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. To illuminate that standard, this Court set forth four factors, each “hav[ing] a bearing upon the determination of this question” in that case:

(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, as more fully discussed below, 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 facts and circumstances, 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.* Indeed, the broker whose conduct was challenged in *Hulse* had 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.* The Court, however, concluded a substantial penalty against the broker was not warranted, and only imposed a nominal fine of one dollar. *Id.* at 863.

The Court in *First Escrow* addressed a similar issue, and “expanded” the “ancillary” test by adding a fifth factor to the four in *Hulse* used to decide the test – whether the party whose conduct is challenged has a “direct financial interest in the transaction.” *First Escrow*, 840 S.W.2d at 840, 847. There, two escrow companies that provided real estate closing or settlement services were charged with the unauthorized practice of law. *Id.* The escrow companies completed pre-printed forms prepared or approved by Missouri attorneys (including deeds, promissory notes and deeds of trust) by communicating with the parties to the transaction to obtain the pertinent information, or by reviewing the purchase and sale agreement. *Id.* at 841. The escrow companies were

not parties to the documents they prepared, and they charged parties a flat fee at closing. *Id.* As a non-party to the transaction, the Court found that the escrow companies did not have “the requisite personal financial interest to safeguard the transaction.” *Id.* at 844. The Court concluded, however, that escrow companies may fill in the blanks on certain standardized form documents only if they do so under the direct supervision of, and as agents for, a party, like the mortgage lender, who has a direct financial interest in the transaction. *Id.* at 846-47.

B. The *Hulse* and *First Escrow* Factors Do Not Support the Conclusion that the Practice At Issue Here Was the Unauthorized Practice of Law.

As *Hulse* makes clear, the Court’s analysis is governed by the guiding principle of whether completing standard loan documents is ancillary to the lender’s main business or whether the lender is truly carrying on a separate business. *See Hulse*, 247 S.W.2d at 862. Clearly, a mortgage lender’s main business is loaning money so that borrowers may purchase or finance homes. Filling out the paperwork to effectuate those loans is, by its very nature, ancillary to the main lending business. On that fact alone, the Circuit Court and Court of Appeals should have entered judgment for Midwest.

The application of the five *Hulse* and *First Escrow* factors, based on facts from the stipulated Midwest trial, bears out the conclusion that the common lending industry practice of filling in blanks on form documents does not amount to the unauthorized practice of law, even if a nominal document preparation fee is charged. The conclusion

is further supported by the facts established in *Carpenter*, and by the expert testimony of Judge Holstein,⁴ on the similar issues raised in *Carpenter*:

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.

CW Tr. 446:10-15.

First, 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) that require no 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

⁴ Countrywide believes that, in addition to the Midwest appellate record, the expert testimony by former Supreme Court Judge John Holstein given during the *Carpenter* trial is highly instructive and will be helpful to the Court in its review of the application of those factors to Midwest’s conduct.

trusts).⁵ Although drafting the note or deed of trust from scratch might require a high degree of legal skill, Midwest was not accused of drafting the body of the mortgage documents but instead was only criticized for filling in blanks in those forms. As is obvious from the forms and as this record establishes, and as Judge Holstein opined in *Carpenter*, 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 employees.⁶

Second, the nature and custom of the lending business is to prepare and to use these standardized legal forms. The pre-printed legal loan document forms that Midwest used included, primarily, a deed of trust and a promissory note. These are the same standardized forms, promulgated by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), that nearly every lender, including Countrywide, uses to memorialize the fundamental legal terms of

⁵ As was the subject of testimony in *Carpenter*, 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 Midwest, 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.

⁶ The record in *Carpenter* included substantial testimony as to the processes for the actual preparation of the legal and non-legal documents themselves.

most mortgage loans. Industry practice and economic considerations compel use of these standardized legal forms. 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. They accomplish that by buying many closed loans, thereby allowing lenders to re-lend the funds to other consumers. Fannie Mae and Freddie Mac are the dominant players in this secondary mortgage market.

So that mortgage loans may be more easily bought and sold, Fannie Mae and Freddie Mac created standardized residential loan documents for use throughout the country. This standardization of basic note and mortgage loan provisions, and rights and remedies, 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. On the other hand, inconsistent terms that deal with the lender's remedies upon default, loan payment acceleration, foreclosure rights, and the like would erode the marketability of mortgage loans, and, hence, an efficient secondary market. A healthy secondary market drives down the costs of obtaining a loan for consumers. Therefore, both lenders and customers are benefited by the use of form notes and deeds of trust.

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. As discussed below, these form notes and deeds of trust were reviewed and approved for use in this state by a Missouri attorney, John McNearney.

It is also common and customary for lenders to charge a document preparation fee. This is demonstrated by the large number of defendants in the original *Casey* cause, and by the fact the Assembly has explicitly authorized the practice of charging such fees.

Third, 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 drafted the legal language in the notes and deeds of trust at issue) explained in *Carpenter*:

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.

CW Tr. 352:3-9.

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.

Nor does it serve the public interest to allow lenders to prepare documents but just not charge a separately denominated fee for it. As noted above, 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.

Fourth, lenders plainly have a direct financial interest in each transaction – they are parties to those transactions, and so have a compelling incentive to prepare the documents correctly for their own benefit. As Judge Holstein testified in *Carpenter* about the significance of this factor:

Q: Did you consider whether – or how did you consider whether Countrywide was in a representative relationship or a party? How was that relevant to your opinion?

A: Well . . . if you are a party, you have an interest in the transaction. And, by having that interest in the transaction, it makes you want to do things right.

CW Tr. 455:21-456:1. Common sense dictates that it was in Midwest's best interest to ensure that the legal loan documents were accurate and complete. In addition, as Judge Holstein opined and as explained more fully above, it was also in Midwest's best financial interest to prepare them correctly, as it marketed the loans to Fannie Mae, Freddie Mac or other investors:

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.

Id. at 456:7-20. Countrywide can speak from direct experience that it has a paramount interest in, and strives to, complete all loan documents correctly and accurately.

Fifth it is not contested that Midwest, Countrywide, and other lenders 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 below. *Eisel, et al. v. Midwest BankCentre*, at 7 (Mo.App. Nov. 28, 2006). 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 may 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 Midwest conducting a separate document preparation business.

Here, it is undisputed, and indisputable, that Midwest 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*.

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”).

Therefore, the application of all five factors from *Hulse* and *First Escrow* – as distinguished from judging the case based only on the fee – should result in only one conclusion: Midwest’s document preparation was not a separate business and thus it did not engage in the law business. The Court should so find, and reverse the decision of the Court of Appeals.

IV. THIS COURT SHOULD FIND THAT THE LENDER MUST HAVE ACTED IN A “REPRESENTATIVE CAPACITY” ON BEHALF OF THE BORROWER IN ORDER FOR ITS ACTIVITY TO CONSTITUTE LAW BUSINESS OR THE PRACTICE OF LAW.

Countrywide also urges reversal of the Court of Appeals’ decision because lenders cannot run afoul of the law business statute unless they are representing another, and the lender here plainly did not. As noted above, the Court’s duty in determining what conduct amounts to the unauthorized practice of law “is 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 857-858 (emphasis added), *Curry v. Dahlberg*, 110 S.W.2d 742, 747-48 (Mo. 1937). Thus, in order for the law business statute to even apply to a lender’s activities, the lender must have acted in a “representative capacity” on behalf of the borrower. This is evident from the plain

language of the statute, which applies to drawing of papers, documents or instruments affecting secular rights or doing acts “in a representative capacity,” or obtaining any property rights “for any person.” R.S.Mo. § 484.010.2.

This Court has confirmed that a representative relationship is a necessary element of any claim under R.S.Mo. § 484.010.2. The doing of “law business” is “the giving of legal advice, drawing legal documents, or securing property rights for others.” *First Escrow*, 840 S.W.2d at 843 n.7 (emphasis added). Furthermore, the Advisory Committee of the Missouri Bar has issued two opinions in accord with the view that a lender preparing its own loan documents 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 Midwest’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.*

Given this backdrop, the initial question for the Court in this case should be whether a lender acts in a representative capacity when preparing documents for its own loan transactions. The Court of Appeals failed to even address the representative

relationship requirement, but it is undisputed that the Eisels did not allege that they were advised or represented by Midwest.

As an ordinary debtor–creditor transaction, no special relationship can be inferred from the Eisels’ relationship with Midwest. 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. A “note” evidences the borrower’s indebtedness to the lender. BLACK’S LAW DICTIONARY at 1085 (7th ed. 1999). Similarly, a “deed of trust” secures the lender’s legal right to recourse in the property. BLACK’S LAW DICTIONARY at 423. Indeed, borrowers would rather not become legally obligated (through a note) or give security for the debt (through the deed of trust).

This Court has made clear in the past that a company preparing legal instruments for transactions to which it is a party does not engage in the practice of law. In *Liberty Mutual Ins. Co. v. Jones*, 130 S.W.2d 945 (Mo. 1939), 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.

Id. at 958. The logic of *Liberty Mutual* applies here.

When a lender's conduct in no way involves representing another, such as Midwest's, it does not constitute the practice of law, or the law business at all, and therefore does not come within the purview of the law business statute. To hold otherwise would subject any person or company to sanction for preparing any legal documents – for free or for a fee – for its own use.

V. COUNTRYWIDE URGES THE COURT TO RECONSIDER WHETHER FILLING IN BLANKS ON FORMS CONSTITUTES THE LAW BUSINESS AT ALL.

This Court need not even reach the Court of Appeals' application (or lack thereof) of the *Hulse* and *First Escrow* test to conclude that Midwest 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 urges this Court to consider whether filling in blanks on form notes and deeds of trust can be the practice of law or the law business at all.

Countrywide believes that in today's modern legal and lending markets, filling in blanks on these types of forms with objective information, such as name, address, interest rate and the like 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 (ret.) 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 849-850. “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. Midwest 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 v. Security Escrows*, 377 P.2d at 339 (same).

The Court of Appeals may not have considered this view because it erroneously thought 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 its opinion below,

the Court of Appeals stated 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.

To the contrary, the form notes and deeds of trust were approved by a Missouri attorney. As established in *Carpenter*, in connection with standardizing mortgage forms, Fannie Mae and Freddie Mac have conducted various instrument review projects and hired Missouri attorney John McNearney to assist them. Specifically, from 1998 to 2003, Fannie Mae and Freddie Mac engaged Mr. McNearney to review and approve their standard set of legal forms for compliance with Missouri law and Missouri conveyancing custom. Part of Mr. McNearney’s review included reviewing and/or revising the form notes and deeds of trust, which Fannie Mae and Freddie Mac adopted. Thus, the legal language on the form notes and deeds of trust was, in fact, drafted or approved by a Missouri attorney.

This fact only underscores that this case really involves only the non-legal work of filling in blanks. Because Countrywide considers persuasive the rationale of Chief Judge Robertson’s concurrence and the rationale of the Michigan, Washington, Minnesota and other Supreme Courts, it urges this Court to find that the activities undertaken by Midwest do not involve the law business at all.⁷

⁷ Midwest in its appellate papers raises an issue related to the constitutionality of the treble damages provision of the law business statute. Although Countrywide has no unique perspective on this issue that might be helpful to the Court, Countrywide notes

CONCLUSION

For these reasons, Countrywide respectfully suggests that the Court review and reverse the decision of the Court of Appeals.

Respectfully submitted,

John M. Hessel, #26408
LEWIS, RICE & FINGERSH, L.C.
500 North Broadway, Suite 2000
St. Louis, MO 63102
Telephone: (314) 444-7600
Facsimile: (314) 612-7735
Email address: jhessel@lewisrice.com

Attorneys for *Amicus Curiae*

Thomas M. Hefferon (*of counsel, not admitted*)
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
Telephone: (202) 346-4000

James W. McGarry (*of counsel, not admitted*)
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
Telephone: (617) 570-1000

Dated: January 8, 2007

that the procedural impediment to this argument cited by the Court of Appeals (a failure to preserve the issue below) should not be a reason for this Court to avoid the issue here. In *Carpenter*, the same constitutional challenge was properly preserved by Countrywide, thus the appellate courts will need to address this substantive issue in the near future, if not in connection with this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2007, two (2) copies of the Brief *Amicus Curiae* of Countrywide Home Loans, Inc. Supporting Appellant and Urging Reversal and a computer disk containing the Brief *Amicus Curiae* of Countrywide Home Loans, Inc. Supporting Appellant and Urging Reversal were hand delivered to:

Green Jacobsen & Butch, P.C.
Martin M. Green, Esq.
Joe D. Jacobsen, Esq.
David T. Butsch, Esq.
Jonathan F. Andres, Esq.
Allen P. Press, Esq.
7733 Forsyth, Suite 700
St. Louis, Missouri 63105
Attorneys for Plaintiffs/Respondants

Thomas A. Federer, Esq.
Federer & Federer, LLP
201 South Fifth Street
St. Charles, MO 63301
Attorneys for Plaintiffs/Respondants

The Stolar Partnership LLP
Charles Alan Seigel, Esq.
Harold L. Satz, Esq.
Doreen D. Dodson, Esq.
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101

The Barry Law Firm, P.C.
James T. Barry, Esq.
Gregory F. Herkert, Esq.
8000 Maryland, Suite 1060
St. Louis, Missouri 63105

Co-Counsel for Defendant/Appellant

John M. Hessel

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 7,104 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That the disk has been scanned for viruses and that it is virus free.

John M. Hessel

LIBA/1755946.2