

IN THE SUPREME COURT OF MISSOURI

CASE NO. SC88167

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

Plaintiffs/Respondents

vs.

MIDWEST BANKCENTRE

Defendant/Appellant,

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

APPELLANT'S SUBSTITUTE BRIEF

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FOR THE FIRST TIME IN ITS MOTION FOR NEW TRIAL, THE TRIAL COURT ERRONEOUSLY FAILED TO RECOGNIZE THAT SECTION 484.020 IS A PENAL STATUTE, PENAL STATUTES ARE THE EQUIVALENT OF THE IMPOSITION OF PUNITIVE DAMAGES, AND, THEREFORE, THEY REQUIRE A CULPABLE MENTAL STATE AS A PREREQUISITE TO THEIR ENFORCEMENT. SECTION 484.020 DOES NOT REQUIRE A CULPABLE MENTAL STATE, AND THE IMPOSITION OF TREBLE DAMAGES FOR THE VIOLATION OF THE STATUTE IS MANDATORY, THEREBY PRECLUDING A COURT FROM DETERMINING WHETHER A CULPABLE MENTAL STATE EXISTS, WHICH, IN TURN, CAUSES THE STATUTE TO BE UNCONSTITUTIONAL BECAUSE IT IMPOSES A PENALTY WITHOUT A CULPABLE MENTAL STATE, ARBITRARILY DEPRIVING AN ALLEGED VIOLATOR OF PROPERTY WITHOUT DUE PROCESS..... 27

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EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS VOLUNTARILY PAID THE FEES, AND, THEREFORE, UNDER THE VOLUNTARY PAYMENT DOCTRINE, THEY WERE NOT ENTITLED TO RECOVER THOSE FEES IN THIS ACTION. 72

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JURISDICTIONAL STATEMENT

On this appeal, Defendant/Appellant Midwest BankCentre (“Midwest”) appeals the trial court’s (Seigel, J., Circuit Court for St. Louis County, Missouri) judgment awarding Plaintiffs/Respondents Clark E. and Patricia S. Eisel (“Eisels”) and the members of their plaintiff class treble damages on their claim against Midwest on the basis that Midwest had engaged in the unauthorized practice of law in violation of Section 484.010 RSMo. L.F. Vol. IV, p. 433.

The trial court entered its final judgment against Midwest in the amount of \$1,190,137.20 on August 16, 2005. L.F. Vol. IV, pp. 435-438. The trial court denied Midwest’s motion for new trial on December 2, 2005. L.F. Vol. IV, p. 491. Midwest timely filed its Notice of Appeal to this Court pursuant to Mo. Const. Article V, Section 3, based on its assertion that the treble damages provision of §408.010 is unconstitutional under the Fourteenth Amendment of the United States Constitution. L.F. Vol. IV, p. 492.

The Eisels moved to transfer the appeal to the Court of Appeals, Eastern District, on the basis that this Court did not have exclusive jurisdiction. This Court granted the Eisels’ motion and transferred Midwest’s appeal to the Court of Appeals, Eastern District. Letter from Clerk of the Supreme Court to Clerk of the Missouri Court of Appeals, Eastern District, dated January 24, 2006.

On March 27, 2006, the Court of Appeals entered an Order directing Midwest and the Eisels to file memoranda addressing that Court’s jurisdiction to hear the present appeal in light of the procedural posture of this case. Order of Court of Appeals dated March 27, 2006. The case originated in the circuit court as a class action suit involving

multiple plaintiffs and multiple bank and mortgage company defendants. Order of Court of Appeals dated April 26, 2006. The circuit court granted the motions to sever of various defendants, including Midwest, and created five new cases from the original one, each new case bearing its own cause number and proceeding independently. *Id.* Midwest and the Eisels filed with the Court of Appeals their respective memoranda demonstrating that the circuit court's order severing the instant case from the original suit was sufficient to render the judgment entered in the present case final and appealable. *See* Appellant's Memo. and Respondents' Memo. filed in the Court of Appeals April 24, 2006. The Court of Appeals ordered that it would take the jurisdictional issue with the merits of the case. Order of Court of Appeals dated April 26, 2006. On August 21, 2006, the trial court issued a Rule 74.01(b) Order, stating that its judgment was final and that in the event it was not, there was no just reason for delay in an appeal of the judgment. Supplemental Legal File, p. 510.

On November 28, 2006, the Court of Appeals issued its Opinion in which it stated, "[w]e would affirm the trial court's judgment; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Rule 83.02. Opinion of the Court of Appeals, November 28, 2006, p. 1 ("Slip Op."). *See* Appendix, p. A23 for copy of the Court of Appeals' Opinion. The Court of Appeals found that all issues and claims as to the parties involved were disposed of at the trial level, and, therefore, jurisdiction before that Court was proper. Slip Op., p. 3; Appendix, p. A25. Consequently, this Court has jurisdiction over this appeal pursuant to the Court of Appeals' Order of transfer, entered November 28, 2006. Rule 83.02.

STATEMENT OF FACTS

Plaintiffs'/Respondents' Claims

This appeal arises out of a class action originally brought by Plaintiffs/Respondents Clark E. and Patricia S. Eisel (“Eisels”) and several other named plaintiffs against twenty-six lending institutions and related companies operating in the St. Louis area. L.F. Vol. I, pp. 62-88; Vol. II, p. 142. Defendant/Appellant Midwest BankCentre (“Midwest”) is one of the lending institutions which was named as a defendant in the original class action, and is the Defendant in this case, one of the cases severed by the circuit court from the original class action. L.F. Vol. I, pp. 62-65; Vol. II, pp. 139-142. The Eisels and the other class representatives alleged that the defendant lenders, including Midwest, made real estate financing or refinancing loans to the members of the class and, in connection with those loans, charged their borrowers a document preparation fee for the preparation of documents necessary to effectuate those loans. L.F. Vol. I, pp. 64-75; Vol. II, pp. 141-158. They further alleged that by charging a separate fee for the preparation of those loan documents, the defendant lenders, including Midwest, engaged in the unlawful practice of law or unlawful doing of law business in violation of §§484.010 RSMo., et seq. L.F. Vol. I, pp. 76-85; Vol. II, pp. 160-171. *See* Appendix, pp. A2-A3 for text of §§484.010 RSMo., et seq. They sought as damages a return of the document preparation fee charged to each class member and a

judgment for treble damages in the sum of three times the document preparation fee charged each class member. L.F. Vol. I, p. 85; Vol. II, p. 170.¹

Midwest And Its Procedures

Midwest is a Missouri state-chartered bank with offices located in St. Louis County. L.F. Vol. III, p. 363. Midwest's business includes making loans to customers to finance their purchases of residential properties and to refinance existing indebtednesses on residential properties. L.F. Vol. II, p. 314-315, ¶2 and Vol. III, p. 342, ¶2. Midwest is not licensed to practice law. L.F. Vol. III, p. 364.

Midwest contracts with three loan document software vendors which provide Midwest with the form documents it uses to document its mortgage loan transactions. L.F. Vol. III, p. 368, ¶18. Midwest does not draft the pre-printed text of those forms. *Id.* The document software vendors who supply Midwest with these forms obtain many of the forms from the Federal National Mortgage Association ("FNMA"), the Code of Federal Regulations ("CFR") and the Internal Revenue Service ("IRS"). *Id.* The loan document software used by Midwest duplicates the various FNMA, CFR and IRS documents verbatim and does not permit Midwest to make any changes to the pre-printed

¹ The Eisels and the other class representatives also brought a claim against the defendant lenders, including Midwest, under the Missouri Merchandising Practices Act, §§407.010, *et seq.* L.F. Vol. I, pp. 85-88. However, that claim was dismissed as to Midwest. L.F. Vol. I, p. 135. At trial, the Eisels acknowledged that they were not pursuing the claim against Midwest under the Merchandising Practices Act. L.F. Vol. III, p. 376, n. 2.

text within the document forms. L.F. Vol. III, pp. 369, 370, 371, ¶¶23, 27, 28. Furthermore, Midwest employees are instructed not to make changes to the pre-printed text within these document forms. Pltfs' Ex. 7, Deposition of Ken Dunlap taken July 21, 2005 ("Dunlap Depo 7/21/05"), p. 24.

Certain documents are common to all of Midwest's mortgage loan transactions; they include, among others, a promissory note and deed of trust, L.F. Vol. III, p. 366, ¶14, as well as a Good Faith Estimate, HUD-1 settlement statement and truth-in-lending disclosure. Dunlap Depo 7/21/05, pp. 20-21; Pltfs' Ex. 6, Deposition of Ken Dunlap taken February 25, 2003 ("Dunlap Depo 2/25/03"), pp. 25-26. Other documents could vary depending upon the type of loan involved. L.F. Vol. III, pp. 366-367, ¶15. Which document forms are used to document a particular loan is determined by the computer software supplied by Midwest's software vendors: a Midwest employee inputs the type of loan Midwest has agreed to make to a customer, e.g., a 30-year fixed rate mortgage loan, and the computer software prompts the employee through a series of screens what document forms to use. Dunlap Depo 7/21/05, pp. 21, 41-42. Midwest's employees have no discretion to pick and choose which documents to use to close a particular transaction. Id. at pp. 24-25.

The forms of the deeds of trust completed by Midwest's employees in these transactions, Exhibits MBC-33, 41, 63, 85 and 103, were reviewed by lawyers licensed to practice law in Missouri. L.F. Vol. III, pp. 369, 371-372, ¶¶21, 31, 32. Those deeds of trust contained the principle terms of each transaction, including, among others, the accompanying promissory note, escrowing requirements, property insurance

requirements, property maintenance requirements, and applicable riders. Exhibits MBC-41, 63, 85 and 103. The forms of the Truth in Lending Disclosures, HUD-1 Settlement Statements, RESPA Servicing Disclosures, Good Faith Estimates and Notices of Right to Cancel used in these transactions are required by the Federal government. L.F. Vol. III, p. 369, ¶24. The forms of the promissory notes used in these transactions either are uniform documents generated by FNMA lawyers, bearing a legend “MULTISTATE FIXED RATE NOTE-Single Family-Fannie Mae/Freddie Mae UNIFORM INSTRUMENT”, Exhibits MBC-39, 61, and 102, or a similar legend “MULTISTATE ADJUSTABLE RATE NOTE-3 YEAR ARM-Single Family-Fannie Mae/Freddie Mae Uniform Instrument”, Exhibit MBC-84, or they are generated by one of Midwest’s software vendors, Exhibit MBC-32, and are reviewed by lawyers licensed to practice in Missouri. L.F. Vol. III, pp. 369, 371-372, ¶¶21, 31, 32. Various forms of documents ancillary to the transactions memorialized by the deeds of trust, e.g., Initial Escrow Account Disclosure Statement (Ex. MBC-67), Mortgage Loan Commitment (Ex. MBC-69), Appraisal Disclosure (Ex. MBC-73), Notice of Assignment, Sale or Transfer of Servicing Rights (Ex. MBC-78), Occupancy Statement (Ex. MBC-80), First Payment Letter (Ex. MBC-82), Agreement to Provide Insurance (Ex. MBC-105), Borrower Authorization (Ex. MBC-47), Provider of Service Addendum (Ex. MBC-93), either were reviewed and approved by lawyers not licensed to practice in Missouri or are not reviewed by lawyers. L.F. Vol. III, p. 371, ¶¶29, 30.

Once the computer software generates the document forms to be used for a particular loan transaction, Midwest employees called loan processors and loan closers

complete the forms by filling in the blanks on the forms. Dunlap Depo 2/25/03, pp. 65-66. In order to qualify to become a loan processor or closer, one merely has to have a high school diploma and two years of banking experience. Dunlap Depo 7/21/05, p. 17. These clerical employees are trained to perform their duties “on the job”, watching more experienced employees work loan by loan. Id. at pp. 19-20. Loan processors and closers earn between \$25,000 and \$35,000 per year. Id. at p. 18.

Midwest’s clerical employees fill in the blanks on the various form documents using information contained in the loan file for that transaction. Dunlap Depo 7/21/05, p. 25. The borrower provides some of that information on the loan application, including the borrower’s name, address, telephone number and social security number. Id. at pp. 39, 40-41, 45. Additional information concerning the amount of the loan, the interest rate and the term of the loan is provided by the Midwest loan officer who negotiated the loan. Id. at pp. 39-40. Other information such as the legal description of the property that will secure the loan is provided by a title company. Id. at p. 40. Midwest’s employees complete the forms by inputting the above-mentioned data into the blanks as they appear on the computer screens; the rest of the text of the documents is pre-formatted. Id. at p. 39. Typical mortgage loan documents completed by Midwest’s employees are marked as Exhibits MBC-28 through MBC-127; the portions of those documents filled in by Midwest’s clerical staff are highlighted in yellow and blocked in black ink. L.F. Vol. III, p. 367, ¶16.

Midwest utilizes the standardized, pre-printed forms generated by its documents software because it re-sells some 80% of its mortgage loans on the secondary mortgage

market. Dunlap Depo 7/21/05, pp. 14, 25-26. That secondary market, composed of government-created entities, commonly referred to as Fannie Mae, Freddie Mac and Jennie Mae, as well as correspondent banks and investment banks, imposes strict requirements regarding how a loan must be documented in order to be re-sellable. Id. at pp. 13-16. Guidelines prescribed by the purchasers of mortgages in the secondary mortgage market such as Fannie Mae and correspondent banks dictate what documents must be completed for a loan if a lender like Midwest wants to be able to re-sell that loan in that market. Dunlap Depo 7/21/05, pp. 15-16. If the documents for a particular loan transaction do not contain the appropriate text, that loan cannot be resold on the secondary market. Id. at p. 24. The computer software used by Midwest produces the requisite standardized document forms. Dunlap Depo 2/25/03, pp. 68-69.²

Midwest charges its borrowers a fee, separate from any interest it may earn on the funds it loans to a borrower, in connection with the documentation and processing of the loans it makes. L.F. Vol. III, p. 365, ¶9; Dunlap Depo 2/25/03, p. 22. Generally, the fee

² The 20% of its loans that Midwest does not resell on the secondary mortgage market are retained by Midwest in its own portfolio and are classified as consumer loans. Dunlap Depo 7/21/05, p. 37. These consumer loans are not sold on the secondary market for various reasons, e.g., they may involve balloon notes, car loans, home equity loans, etc. Id. at p. 38. Even with these consumer loans, however, Midwest does not draft its own loan documents; it uses document forms generated by a loan document software program. Id. at pp. 38-39.

charged for mortgage loans was \$125.00 and for consumer loans was \$50.00. Dunlap Depo 2/25/03, p. 36. In the Stipulation of Facts filed at trial, this fee charged by Midwest in connection with the activity of its employees of filling in the blanks in the loan document forms is generically described as a “document preparation fee” or “processing fee”, L.F. Vol. III, p. 365, ¶9, and the words “completed” or “prepared”, or their derivatives, are synonymous and used interchangeably. L.F. Vol. III, p. 364, ftnt. 1. Prior to June 25, 2002, Midwest called this a “document preparation fee”; after that date it was called a “processing fee”. L.F. Vol. III, pp. 365-366, ¶11; Dunlap Depo 7/21/05, pp. 26-27. Regardless of the nomenclature, Midwest charged this fee to recoup a portion of the costs it incurred to complete the loan documents which memorialized each loan transaction as well as other costs associated with processing each loan. L.F. Vol. III, p. 365-366, ¶¶9, 11; Dunlap Depo 2/25/03, pp. 22-23; Dunlap Depo 7/21/05, p. 26-27. Those costs include allocated costs for, among other things, supplies, furniture, equipment, document software, staff salaries and benefits, administrative costs in staffing, and office space, as well as the direct costs associated with completing the loan document forms for each loan transaction. Dunlap Depo 2/25/03, pp. 22-23, 71-72, 79-80, 84; Dunlap Depo 7/21/05, p. 26-27. Midwest did a cost study in 1998 or 1999, several years before the present action was filed, and determined that it cost Midwest approximately \$185.00 to process one mortgage loan. Dunlap Depo 2/25/03, pp. 23, 72.

Midwest discloses this fee to all of its borrowers. Before each mortgage loan closing, the borrower receives and must sign and return to Midwest a Good Faith Estimate form. These Good Faith Estimate forms expressly identify the document

preparation fee or processing fee and the amount of the fee. L.F. Vol. III, p. 372, ¶35. At each loan closing, the borrower receives and is required to sign and deliver to Midwest a HUD-1 settlement statement that identifies the document preparation fee (usually on line 1105 of the statement) or the processing fee (usually on line 808 of the statement) and the amount of the fee. L.F. Vol. III, pp. 372-373, ¶36.

The Eisels' Transactions

On or about November 24, 2001 and November 29, 2001, Midwest made two mortgage loans to the Eisels. L.F. Vol. III, p. 364, ¶6. In connection with both of these loans, Midwest's clerical employees completed the form documents necessary to memorialize the transactions, filling in the blanks on those forms. *Id.* at ¶7.³ Before these loans were made, the Eisels received, signed and returned to Midwest Good Faith Estimates which informed them that Midwest was going to charge them a document preparation fee of \$125.00 for each of these loans. Exs. MBC-28, MBC-52. At the closings on both of these loans, the Eisels signed and delivered to Midwest HUD-1 settlement statements which identified and acknowledged various fees and charges the Eisels were to pay in connection with these loans, including a document preparation fee of \$125.00 for each loan. Exs. MBC-31, MBC-46. The Eisels paid this fee for both

³ The loan documents for these transactions were introduced at trial marked as Exhibits MBC-28 through MBC-60. The portions of these documents completed by Midwest's clerical employees are highlighted in yellow and blocked in black ink. L.F. Vol. III, pp. 364-365, ¶7.

loans. L.F. Vol. III, p. 364, ¶7. At the time the Eisels made these loans, they did not seek legal advice or counsel from Midwest, and they did not think Midwest was acting as their lawyer. Deft's Ex. A, Deposition of Clark E. Eisel taken on 7/3/03 ("Clark Eisel Depo"), p. 60; Deft's Ex. B, Deposition of Patricia S. Eisel taken on 7/3/03 ("Patricia Eisel Depo"), p. 91.

Procedural History Of The Class Action Suit

On March 19, 2002, Patricia Eisel, along with other named plaintiffs, individually and for a class of allegedly similarly situated individuals, initiated a class action suit against twelve named lending institutions operating in the St. Louis area, including Midwest, as well as a purported class "consisting of all other lenders doing business in the State of Missouri similarly situated...." L.F. Vol. I, pp. 62-65. On or about March 31, 2003, Mrs. Eisel, joined by her husband, Clark Eisel, along with other named plaintiffs, filed a Third Amended Petition, naming as defendants twenty-six lending institutions and related entities, including Midwest, as well as the above-mentioned purported class of lenders. L.F. Vol. I, p. 23; Vol. II, pp. 139-143.

On October 1, 2004, the circuit court entered its Order Granting Class Certification, certifying six plaintiff subclasses. L.F. Vol. III, pp. 357-359. One of those plaintiff subclasses included:

All persons who paid a document preparation fee to Midwest BankCentre in connection with a real estate financing transaction in the State of Missouri from April 18, 2000 to the present and all persons who paid a loan processing fee to Midwest BankCentre in connection with a real

estate financing transaction in the State of Missouri from June 25, 2002 to the present (the “Midwest Plaintiff Class”).

Id. at p. 359. The Order appointed the Eisels as the class representatives for the Midwest Plaintiff Class. Id. The Order also noted that by separate Order of the same date, Plaintiffs’ motion for certification of a Defendant class was denied. Id. at p. 358.

On January 7, 2005, the circuit court granted the Defendants’ Motions to Sever, and severed the action into five separate causes. L.F. Vol. III, p. 360. On January 25, 2005, the case brought by the Eisels against Midwest was assigned a new style and cause number, “Clark E. Eisel & Patricia S. Eisel v. Midwest BankCentre, Case #02CC-1055D” and assigned to the Hon. Mark D. Seigel. L.F. Vol. I, p. 52; Vol. III, p. 362.

On July 25, 2005, the case was tried in a bench trial. L.F. Vol. I, p. 58. The parties submitted to the trial court a Stipulation of Facts, L.F. Vol. III, pp. 363-374; *see* Appendix, pp. A6-A17, trial exhibits, deposition testimony and trial briefs as well as oral argument. Tr. 32, 43, 45, 46.

On July 29, 2005, the trial court entered its Order and Partial Judgment as follows:

On the claim of Plaintiffs Patricia Eisel and Clark Eisel, individually and on behalf of members of the Midwest Plaintiff Class for the unauthorized practice of law in violation of Section 484.010, RSMo., judgment is hereby entered in favor of Plaintiffs and the Midwest Plaintiff Class and against Defendant Midwest BankCentre in the principal sum of \$366,552.00, plus prejudgment interest in the amount of \$90,481.19, and,

pursuant to Section 484.020, RSMo., treble damages in the amount of \$733,104.00, aggregating the sum of \$1,190,137.20.

L.F. Vol. IV, p. 433. On August 16, 2005, the trial court entered final judgment “in favor of the plaintiffs class and against defendant in the sum of \$1,190,137.20.” L.F. Vol. IV, pp. 435-438; *see* Appendix, pp. A18-A21.

On September 15, 2005, Midwest filed its Motion for New Trial. In that motion, Midwest raised for the first time a challenge to the constitutionality of the treble damages penalty provision contained in §484.020, RSMo, along with its other grounds for a new trial. L.F. Vol. I, p. 60; Vol. IV, pp. 439-442. That motion was argued, submitted and denied on December 2, 2005. L.F. Vol. IV, p. 491; *see* Appendix, p. A22. The trial court denied Midwest’s constitutional attack upon §484.020 on the merits and rejected the other grounds asserted by Midwest in its motion. *Id.* Midwest thereafter timely filed its Notice of Appeal. L.F. Vol. IV, pp. 492-508.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN OVERRULING MIDWEST'S MOTION FOR NEW TRIAL BECAUSE SECTION 484.020 RSMo., THE STATUTE PURSUANT TO WHICH THE TRIAL COURT GRANTED THE EISELS JUDGMENT FOR TREBLE DAMAGES, IS UNCONSTITUTIONAL. ALTHOUGH THE TRIAL COURT PROPERLY IMPLICITLY CONCLUDED THAT IT COULD CONSIDER MIDWEST'S CONSTITUTIONAL CHALLENGE TO THE STATUTE AS PLAIN ERROR EVEN THOUGH MIDWEST RAISED THIS CHALLENGE FOR THE FIRST TIME IN ITS MOTION FOR NEW TRIAL, THE TRIAL COURT ERRONEOUSLY FAILED TO RECOGNIZE THAT SECTION 484.020 IS A PENAL STATUTE, PENAL STATUTES ARE THE EQUIVALENT OF THE IMPOSITION OF PUNITIVE DAMAGES, AND, THEREFORE, THEY REQUIRE A CULPABLE MENTAL STATE AS A PREREQUISITE TO THEIR ENFORCEMENT. SECTION 484.020 DOES NOT REQUIRE A CULPABLE MENTAL STATE, AND THE IMPOSITION OF TREBLE DAMAGES FOR THE VIOLATION OF THE STATUTE IS MANDATORY, THEREBY PRECLUDING A COURT FROM DETERMINING WHETHER A CULPABLE MENTAL STATE EXISTS, WHICH, IN TURN, CAUSES THE STATUTE TO BE UNCONSTITUTIONAL BECAUSE IT IMPOSES A PENALTY WITHOUT A CULPABLE MENTAL STATE,

**ARBITRARILY DEPRIVING AN ALLEGED VIOLATOR OF PROPERTY
WITHOUT DUE PROCESS.**

A. Procedural Attack

Hanch v. K.F.C. National Management Corp., 615 S.W.2d 28

(Mo. banc 1981)

City of Overland v. Wade, 85 S.W.3d 70 (Mo.App.E.D. 2002)

U.S. Const. Amend. XIV

§484.010, R.S.Mo.

§484.020, R.S.Mo.

B. Substantive Attack

Grier v. Kansas City, C.C. & St. J. Ry. Co., 228 S.W. 454 (Mo. 1921)

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)

II.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST'S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE THE COMPLETION OF THOSE FORM DOCUMENTS IS AN INTEGRAL AND ESSENTIAL PART OF MIDWEST'S BUSINESS AS A MORTGAGE LENDER, AND, THEREFORE, UNLIKE IN HULSE v. CRIGER, 247 S.W.2d 855 (Mo. banc 1952), MIDWEST'S CHARGE OF A SEPARATE FEE FOR SUCH ACTIVITY DOES NOT SUGGEST OR IMPLY THAT SUCH ACTIVITY IS SEPARATE OR DISTINCT FROM MIDWEST'S BUSINESS AS A MORTGAGE LENDER AND IS UNLAWFUL LAW BUSINESS.

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

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

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

Liberty Mutual Insurance Co. v. Jones, 130 S.W.2d 945 (Mo. banc 1939)

III.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST'S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE AS A PARTY TO EACH OF THOSE LOAN TRANSACTIONS, DIRECTLY RESPONSIBLE FOR THE DOCUMENTATION OF THOSE LOAN TRANSACTIONS, MIDWEST HAD A DIRECT PERSONAL INTEREST IN THOSE TRANSACTIONS, AND ITS CONDUCT WAS PERMISSIBLE UNDER THE *PRO SE* EXCEPTION TO THE PROHIBITION AGAINST ENGAGING IN UNLAWFUL LAW BUSINESS.

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

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

§484.010, R.S.Mo.

IV.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST’S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS VOLUNTARILY PAID THE FEES, AND, THEREFORE, UNDER THE VOLUNTARY PAYMENT DOCTRINE, THEY WERE NOT ENTITLED TO RECOVER THOSE FEES IN THIS ACTION.

Staples v. O’Reilly, 288 S.W.2d 670 (Mo.App. 1956)

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

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

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

ARGUMENT

I.

THE TRIAL COURT ERRED IN OVERRULING MIDWEST'S MOTION FOR NEW TRIAL BECAUSE SECTION 484.020 RSMo., THE STATUTE PURSUANT TO WHICH THE TRIAL COURT GRANTED THE EISELS JUDGMENT FOR TREBLE DAMAGES, IS UNCONSTITUTIONAL. ALTHOUGH THE TRIAL COURT PROPERLY IMPLICITLY CONCLUDED THAT IT COULD CONSIDER MIDWEST'S CONSTITUTIONAL CHALLENGE TO THE STATUTE AS PLAIN ERROR EVEN THOUGH MIDWEST RAISED THIS CHALLENGE FOR THE FIRST TIME IN ITS MOTION FOR NEW TRIAL, THE TRIAL COURT ERRONEOUSLY FAILED TO RECOGNIZE THAT SECTION 484.020 IS A PENAL STATUTE, PENAL STATUTES ARE THE EQUIVALENT OF THE IMPOSITION OF PUNITIVE DAMAGES, AND, THEREFORE, THEY REQUIRE A CULPABLE MENTAL STATE AS A PREREQUISITE TO THEIR ENFORCEMENT. SECTION 484.020 DOES NOT REQUIRE A CULPABLE MENTAL STATE, AND THE IMPOSITION OF TREBLE DAMAGES FOR THE VIOLATION OF THE STATUTE IS MANDATORY, THEREBY PRECLUDING A COURT FROM DETERMINING WHETHER A CULPABLE MENTAL STATE EXISTS, WHICH, IN TURN, CAUSES THE STATUTE TO BE UNCONSTITUTIONAL BECAUSE IT IMPOSES A PENALTY WITHOUT A CULPABLE MENTAL STATE,

ARBITRARILY DEPRIVING AN ALLEGED VIOLATOR OF PROPERTY WITHOUT DUE PROCESS.

Whether a statute is constitutional is a question of law. Kirkwood Glass Co., Inc. v. Director of Revenue, 166 S.W.3d 583, 585 (Mo. banc 2005). Questions of law are reviewed *de novo*. Id.

In its Motion for a New Trial, Midwest argued that §484.020⁴ is unconstitutional because it deprived Midwest of its constitutional right to due process of law. The Eisels made a twofold attack on this argument: one procedural, the other substantive. Neither one is persuasive.

A. Procedural Attack

The Eisels urged below the general rule that a constitutional challenge must be raised at the first opportunity and preserved at each stage of review. State ex rel. Tompras v. Bd. of Election Commissioners of St. Louis County, 136 S.W.3d 65, 66 (Mo. banc 2004). Based on this rule, the Eisels argued that since Midwest raised its attack upon the constitutional validity of §484.020 for the first time in its Motion for New Trial, Midwest waived this constitutional challenge, and, therefore, the trial court was precluded from even considering the challenge. The trial court implicitly rejected this argument and reached the substance of Midwest's constitutional challenge, albeit, it erroneously overruled that challenge. See Order and Judgment dated December 2, 2005. L.F. Vol. IV, p. 491; Appendix, A-22. The Court of Appeals, on the other hand, accepted

⁴ See Appendix, pp. A4-A5 for text of Section 484.020 RSMo.

the Eisels' argument and declined to review Midwest's constitutional challenge. Slip Op., p. 4; Appendix, p. A26.

Even though as a general rule a constitutional challenge must be raised at the first opportunity, this Court from time to time has granted appellate review, under Rule 84.13(c), a plain error rule, to determine whether an unpreserved claimed error based upon a constitutional challenge resulted in manifest injustice or miscarriage of justice. *E.g.*, Hanch v. K.F.C. National Management Corp., 615 S.W.2d 28 (Mo. banc 1981); State v. Groves, 646 S.W.2d 82 (Mo. banc 1983).

In Hanch, the Court considered a First and Fourteenth Amendment constitutional challenge to Missouri's service letter statute under the plain error doctrine. *Id.* at 33. The Court stated that since the claim was an "infringement upon the jealously protected right of free speech", a full adjudication on the merits would be in order. *Id.* The Court also noted that "recent attacks on the statute obviously stemmed" from a holding by a federal district court in Missouri that Missouri law as applied in service letter cases was unconstitutional. *Id.* The significance of the constitutional challenge before the Court was manifested not only by the "recent attacks" but also by the briefs of the parties and the fact that several amici briefs had been filed. *Id.* This enhanced the critical significance of the challenge at issue and was the apparent reason for the Court considering the challenge as plain error. Midwest's constitutional challenge here has equal critical significance, if, indeed, not more.

Similarly, in State ex rel. Petti v. Goodwin-Raftery, 190 S.W.3d 501 (Mo.App.E.D. 2006), the Court of Appeals recently considered a constitutional challenge

to a provision of a municipal charter which excluded amendments of the city's zoning ordinance from the referendum process otherwise prescribed by the charter even though this constitutional issue was not properly raised in the trial court and preserved for review. The Court of Appeals determined to "exercise our discretion" to address the issue, citing its earlier decision in City of Overland v. Wade, 85 S.W.3d 70 (Mo.App.E.D. 2002). Id. at 507, n. 4.

In City of Overland, the Court of Appeals heard a challenge to the constitutionality of a municipal ordinance which required property owners to mow the grassy right-of-way area abutting their property located between the sidewalk and the street. Although the constitutionality of the ordinance had not been raised in the trial court, the Court of Appeals determined to exercise its discretion to consider the constitutional claims "...for plain error pursuant to Rule 84.13(c). We will consider the constitutional claims to see if a manifest injustice or miscarriage of justice has occurred. Rule 84.13(c)." Id. at 71.

Midwest's constitutional challenge here that §484.020 deprived Midwest of its constitutional right to due process of law has critical significance equal to those in the above-cited decisions. Moreover, to state the obvious, any error here in not raising the constitutional challenge at the first opportunity creates the threshold for a determination by this Court of whether that failure would result in manifest injustice or miscarriage of justice.

Nevertheless, the Eisels argued to the Court of Appeals that Midwest's constitutional challenge should not be heard under the plain error doctrine because it "is not in the same league as the situations in the cases where appellate courts exercised their

discretion to consider” a belatedly raised constitutional challenge. Eisels’ Brief, p. 9. In support of this judgmental assessment, the Eisels argued that Midwest’s constitutional challenge “only involves money”, whereas those cases in which this Court and the Court of Appeals engaged in discretionary plain error review of constitutional challenges involved rights of more “significance.” *Id.* The Court of Appeals erroneously accepted this intrinsically flawed contention, noting that Hanch and Goodwin-Raftery, relied upon by Midwest, were “cases involving free speech and voting rights.” Slip Op., p. 4; Appendix, p. A26. Thus, the Court of Appeals concluded that “[n]o similar rights are implicated here” and that “no error exists affecting substantial rights....” *Id.*

In essence, the Court of Appeals, misguided by the Eisels’ argument, determined that Midwest’s claim of deprivation of its right to due process of law is somehow less “substantial” than the free speech and voting rights claims of the litigants in Hanch and Goodwin-Raftery, and thereby relegated Midwest’s constitutional claim to some second class status.

However, the United States Constitution does not prioritize or rank in some hierarchical order the rights afforded by it and which it protects, nor does the Constitution say that the right to due process of law has less stature, and, therefore, is entitled to less protection, than the right to free speech or the right to vote. On the contrary, the due process of law guaranteed by the Fourteenth Amendment is a fundamental right, and, to say the least, Midwest’s challenge based upon the deprivation of that fundamental right to due process is no less significant than the rights in issue in the previously cited decisions.

Additionally, the Eisels' argument that Midwest failed to timely raise its constitutional challenge overlooks and disregards the rationale behind the rule upon which the argument is based. As this Court has stated, the reason why a party is supposed to raise a constitutional challenge at the earliest opportunity "... is to prevent surprise to the opposing party and to permit the trial court an opportunity to fairly identify and rule on the issues." Tompras, supra at 66. Here, the Eisels have not claimed surprise. Admittedly, Midwest's constitutional challenge was first presented in its Motion for New Trial. However, once it was raised, the parties fully briefed and argued the issue before the trial court. The trial court had an abundant opportunity to consider thoroughly the challenge, and, indeed, it ruled upon the issue, denying Midwest's challenge on its merits. Significantly, this Court has recently stated that a belatedly raised constitutional challenge may be preserved so long as it was raised in sufficient time to allow the trial court to identify and rule on the issue and to give adequate notice to the opposing party. In the Matter of the Care and Treatment of Schottel, 159 S.W.3d 836, 841 n. 3 (Mo. banc 2005). In making this statement, the Court relied upon its earlier decision in Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996), the teaching of which on this issue it characterized in Care and Treatment of Schottel as "motion for new trial not too late where no surprise resulted". Id. Thus, the purposes behind the rule upon which the Eisels relied were met, and it is therefore proper for this Court to address Midwest's constitutional challenge.

In short, although Midwest did not raise its challenge that §484.020 deprived Midwest of its constitutional right to due process until its Motion for New Trial, this

Court from time to time has exercised its discretion and reviewed belatedly raised constitutional challenges under the plain error doctrine. Notwithstanding the Eisels' argument and the Court of Appeals' conclusion to the contrary, Midwest's claim of deprivation of its constitutional right to due process of law is of critical significance equal to those constitutional claims that have been reviewed by the Court under the plain error doctrine. Moreover, in this case the rationale behind the general rule requiring a party to raise a constitutional challenge at its earliest opportunity has been satisfied; the Eisels have not claimed they were surprised by Midwest's constitutional challenge to §484.020, and the trial court had a full opportunity to consider the briefs and arguments of the parties and rule on the issue. Therefore, it is proper for the Court to consider Midwest's constitutional claim.

Furthermore, Midwest's claim that it has been deprived of its constitutional right to due process of law, presented in the context in which it has been raised, has significance and importance equal with, if not more than, the constitutional challenges asserted in the cases characterized by the Eisels, and, in turn, the Court of Appeals. This is the first time such a challenge to §484.020 has been made. In addition, the legal file in this appeal reflects that this case is just one of several with identical issues pending, showing a broad-based attack on the essential operation of mortgage lenders. These lenders ensure the existence of a financial base for the housing industry vital to a viable community and economy.

Finally, §484.020, the challenged statute, is not simply a prosaic or usual statute defining and regulating legal relations; it is a statute specifically designed by the General

Assembly to assist this Court in regulating the practice of law by protecting the public from those not competent to engage in that practice. It, thus, is of critical and significant interest to the public generally and the legal profession's standing and relation to the public. It defines, on behalf of the Court, not only a critical but an essential relationship between the legal profession and the public, which, if misconstrued and misapplied, can and will do fatal damage to that relationship.

The significance and importance of the need to define and delineate properly the relationship between the public and the legal profession is underscored by the very procedure by which this Court historically has considered cases concerning the unauthorized practice of law and this statute. The Court has long and uniformly held that it is the final arbiter as to what constitutes the unauthorized practice of law. In re First Escrow, 840 S.W.2d 839, 843 n. 7 (Mo. banc 1992); In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978); Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo. banc 1961); Hulse v. Criger, 247 S.W.2d 855, 857-858 (Mo. banc 1952). The fact that the decisions in Thompson, Hoffmeister and Hulse were rendered *en banc* during a period when the Court usually sat and decided cases in divisions reflects and emphasizes this Court's recognition that cases involving the alleged unauthorized practice of law implicate this Court's oft-stated duty to define and regulate such activities in order to protect the public, and, conversely, to allow members of the public to exercise their inherent freedom, unrestricted, to engage in commercial activities that need no professional legal advice to implement properly. By their very nature, then, these cases defining the critical societal

interface between the legal profession and the public historically have presented questions of general interest and importance. The present appeal is no different.

In their Motion to Retransfer this appeal to the Court of Appeals, the Eisels have urged that this appeal does not present a question of general interest or importance, because in the time since the trial court entered its judgment the General Assembly enacted §484.025, which provides:

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

The Eisels argue with little force or explication that in light of this new statute, a decision by the Court in this case will “only resolve issues involving past conduct” and “will have little, if any, impact on future conduct”. Respondents’ Motion to Retransfer to the Missouri Court of Appeals, p. 5.

The Eisels’ argument conveniently ignores the Court’s well-recognized role and function as the final arbiter of what constitutes the practice of law, both authorized and unauthorized, and what commercial activities non-lawyers may engage in, unrestricted, that need no professional legal advice to implement properly. As noted above, the Court’s exercise of that role and function implicating the Court’s duty to strike a workable balance between the public’s protection and the public’s convenience, historically, has been recognized implicitly, if not explicitly, by the Court to concern

issues of general interest and importance, warranting the consideration of and resolution by the Court *en banc*.

The Eisels' argument also turns a blind eye to the fact that Midwest was only one of some twenty-six mortgage lenders and related entities which were sued in the initial stages of the class action that gave rise to this appeal. This was a broad-based assault upon an essential operation of these mortgage lenders. A number of those cases remain pending in the circuit court. So it is disingenuous for the Eisels to suggest that the enacting of §484.025 has done away with the importance of having this Court resolve the issues raised in this appeal.

Moreover, the shielding effect of §484.025 is limited in any event, and, therefore, the Eisels' argument is really a red herring. As discussed in more depth *infra*, the General Assembly may only assist the Court by providing penalties for the unauthorized practice of law; it is the Court which has the inherent power to define and declare what is the practice of law. Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952); Hoffmeister, *supra* at 11; In re First Escrow, 840 S.W.2d 839, 843 n. 7 (Mo. banc 1992). Thus, while §484.025 may provide residential mortgage lenders with protection from the treble damage penalty imposed by §484.020 so long as the document preparation fee they charge remains less than \$200, it leaves open the door on potential Bar actions, injunction suits and similar proceedings such as those brought in Hulse and First Escrow. As the Court noted in Hoffmeister, *supra* at 11:

We have at times recognized and used the statutory definition (§484.010)...; we may undoubtedly do so reserving the right, however, at

all times to fix our own boundaries and declare our own restrictions in all matters other than a prosecution under the statute.

Furthermore, since the statute specifically addresses only residential loans, it provides no protection to lenders who charge a separate fee for completing documents memorializing commercial real estate loans. Also, the statute protects residential mortgage lenders only to the extent the document preparation fee they charge remains less than \$200. However, the costs of loan documentation inevitably will rise, and so will the cost-driven pressure to increase fees beyond the statutorily approved limit.

Therefore, the Eisels' suggestion that this appeal will only resolve issues involving past conduct is self-serving and short-sighted. Midwest has asserted that §484.020 is unconstitutional because it deprived Midwest of its fundamental right to due process of law. This is the first time such a challenge to the statute has been presented. Moreover, this case is just one of several with identical issues pending, reflecting a broad-based assault on the mortgage lending business, an industry that is vital to our community and our economy. Furthermore, the challenged statute has been designed by the General Assembly to assist the Court in regulating the practice of law in order to protect the public from those not competent to engage in that practice; it, thus, defines, on behalf of the Court, a critical and essential relationship between the public and the legal profession. Properly viewed in the context in which they are presented, the issues involved are

of general interest and importance, and they should be resolved by the Court in this appeal.

Unquestionably, then, the procedural posture and critical significance of Midwest's constitutional challenge presents a compelling, if not unassailable, reason for this Court to use its authority and exercise its discretion under Rule 84.13(c) to consider the trial court's erroneous ruling on the merits of this constitutional challenge as plain error.

B. Substantive Attack

Section 484.020 RSMo. is a penal statute. Penal statutes are the equivalent of the imposition of punitive damages and, therefore, require a culpable mental state as a prerequisite to the enforcement of the statutes. Section 484.020, however, does not require a culpable mental state, one of the threshold due process requirements, and the imposition of treble damages for violation of the statute is mandatory. A court is, thus, precluded from determining whether a culpable mental state exists, which causes the statute to be unconstitutional because it imposes a penalty without a culpable mental state, arbitrarily depriving an alleged violator of property without due process.

This Court has repeatedly emphasized that “the judicial department is necessarily the sole arbiter of what constitutes the practice of law.” Hulse, supra at 857. Within the judicial department, this Court is the final arbiter. It is the Supreme Court’s duty to determine “what constitutes the practice of law, both authorized and unauthorized.” First Escrow, supra at 842. By this determination, the Court regulates the practice of law to protect the public from those not competent to provide acceptable legal services. The General Assembly may only assist the Court by providing “penalties” for the unauthorized practice of law. Hulse, supra at 857 (“Statutes may aid by providing machinery and criminal penalties, but may not extend the privilege of practicing law....”); Hoffmeister, supra at 11 (“...the legislature may...aid the court by providing penalties for unauthorized practice....”); First Escrow, supra at 843, n. 7 (“...the General Assembly may only *assist* the judiciary by providing penalties for the unauthorized practice of law....”) (emphasis the Court’s).

Consistent with and tracking these pronouncements of the Court, §§484.010 and 484.020 assist the Court both by defining the unauthorized practice of law and unauthorized law business and subjecting those engaging in this unauthorized conduct to treble damages. These treble damages are simply a legislative device to aid the Court in enforcing its regulatory duty to protect the public from unlicensed lawyers. The treble damages, in the words of the Court, provide a penalty for the unauthorized practice of law. *Id.* In short, §484.020 is a penal statute.

Moreover, the legislative language of §484.020 demonstrably reflects the penal nature of the statute. It is not designed to indemnify the aggrieved party by enforcing restitution and making him whole by providing him with compensatory damages for his loss; rather, it provides for trebling those damages, effecting punishment and penalty. The penalty imposed against the violator predominates; reparation to the aggrieved party commensurate with his loss is secondary, at best. The statute speaks of its violation in classical penal terms – the violator “shall be guilty of a misdemeanor and upon conviction shall be punished by a fine.” (emphasis added). Indeed, the concept of treble damages, itself, encompasses and reflects the traditional areas of punishment – retribution and deterrence. *Grier v. Kansas City, C.C. & St. J. Ry. Co.*, 228 S.W. 454, 459 (Mo. 1921) (“Again, there are many statutes providing for the recovery of penalties by civil action where the penalty recoverable is dependent upon the actual loss sustained. Such, for example, are statutes allowing double or treble damages for injuries resulting from various torts. Such additional damages, being in excess of compensation, are penalties, regardless of the euphonious terms by which they may be designated.”) Nor does the fact

that the statute contemplates recovery by an individual as well as a public prosecutor preclude the statute from being a penal statute. *See Collier v. Roth*, 468 S.W.2d 57, 60 (Mo. App. 1971). Furthermore, Missouri courts have routinely described or characterized statutes that impose multiple damages for violations as penal statutes. *E.g. Grier, supra; Mikulich v. Wright*, 85 S.W.3d 117, 119-120 (Mo.App. 2002); *Collier v. Roth, supra; Powell v. St. Louis Dairy Co.*, 276 F.2d 464, 467 (8th Cir. 1960) (interpreting Missouri law). The circuit court's express conclusion that "the remedy afforded within Section 484.020 RSMo. is a penalty" is consistent with and follows these Missouri cases. L.F. Vol. I, p. 134. Finally, Plaintiffs acknowledged that §484.020 is a penal statute. Memorandum In Opposition to Defendants' Statute of Limitations Defense, p. 15, filed August 15, 2002, Cause No. 02CC-001055. L.F. Vol. I, p. 125.

Penal statutes are the equivalent of the imposition of punitive damages. The trial court erroneously rejected this proposition, and, hence, Midwest's constitutional challenge, stating that it "... has found no Missouri case that equates punitive damages to penalties similar to the treble damages mandated in V.A.M.S. §484.020, thereby necessitating a finding of culpable mental state." Order and Judgment dated December 2, 2005. L.F. Vol. IV, p. 491; Appendix, p. A22. However, as this Court has stated, the word "penalty", "...in both its popular and legal significations, is synonymous with 'punishment'. In neither does it connote any idea of compensation." *Grier, supra* at 457. The Court went on to refer expressly to the penalty assessable under the statute in question in that case as "punitive damages". *Id.* at 460. And in *Carney v. Chicago, R.I. & P. Ry. Co.*, 23 S.W.2d 993, 1003 (Mo. 1929), the Court, citing *Grier*, termed the

plaintiff's statutory action to recover for the wrongful death of his son as “. . . for a penalty in the way of punishment for an act of negligence causing the death of a child [citation omitted], and it is a penalty created by statute.” In short, Missouri courts have expressly recognized that in everyday English and in legal jargon the word “penalty” is “synonymous” with “punishment”.

This synonymous meaning between “penalty” and “punishment” in Missouri courts is no different than the substantive synonymous meaning in other jurisdictions which expressly and implicitly recognize that “penalty” is equivalent in meaning to a “punishment”. See District Cablevision L.P. v. Bassin, 828 A.2d 714, 726-27 (D.C. 2003) (“When the award of multiple damages is intended to serve penal purposes, it is a substitute for punitive damages, and the same or similar proof requirements usually must be satisfied”); Barth v. Canyon County, 918 P.2d 576, 581 (Idaho 1996) (“In the cases where treble damages are a penalty, the Court insists that the plaintiff show that the defendant acted maliciously, wantonly, or oppressively (i.e., in bad faith) before the Court will award treble damages”); see also Maxwell v. Samson Resources Co., 848 P.2d 1166, 1171-72 (Okla. 1993) (discretionary treble damages imposed under “sweetheart gas bill” permissible only upon showing of wrongful intent or motive); 22 Am.Jur.2d, Damages §619 (citing Barth, *supra*).

Simply stated, law, logic and common sense dictate that the treble damages penalty provision in §484.020 is equivalent to and synonymous with punitive damages.

Since punitive damages are assessed for punishment and not reparation, an element of conscious wrongdoing is always required. It is not so much the commission

of the intentional tort but the defendant's culpable state of mind which prompted the commission that is the essential basis for a punitive damage award. Fabricor, Inc. v. E.I. DuPont de Nemours & Co., 24 S.W.3d 82, 97 (Mo.App. 2000). The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with a reckless indifference to the rights of others. That historically and traditionally has been and continues to be the expressly stated law of punitive damages in Missouri. *See, e.g.*, Burnett v. Griffith, 769 S.W.2d 780, 787-789 (Mo. banc 1989); Bean v. Branson, 266 S.W. 743, 744-745 (Mo.App. 1924). In short, punitive damages may not be awarded without the existence of a defendant's culpable mental state.

Because the imposition of a monetary penalty, like an award of punitive damages, punishes unlawful conduct, it is an exercise of state power and must therefore comply with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See* Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 434-35 (1994). Due process exacts some requirements. Safeguards must be established to reflect the purpose of punitive damages as retribution and deterrence and to prevent an award that is arbitrary. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991). The obvious and essential safeguard to an award of punitive damages is a prerequisite culpable mental state. Burnett, supra. If a culpable mental state is not required, its absence violates due process. Haslip, supra.

The treble damages provision of §484.020.1, however, does not require a culpable mental state, and the imposition of treble damages for violation of the statute is mandatory. The statute provides that a violator "...shall be subject to be sued for treble the amount which shall have been paid [to the violator...and if the victim fails to sue

within a prescribed time period for the treble damages] then the state of Missouri *shall* have the right to and *shall* sue for such treble amount....” (Emphasis added). This language dictates that the court requested to enforce the statute has no discretion to refuse to impose the treble damages whether or not there is evidence demonstrating the alleged violator’s culpable mental state. The Eisels acknowledged this. Plaintiffs’ Trial Brief, p. 14. (“The only prerequisite for recovery of treble damages is a violation of [§484.020]. Nothing more is required.”). L.F. Vol. III, p. 388. The court is, thus, precluded from holding a hearing to determine whether the alleged violator had the prerequisite culpable mental state prior to imposing treble damages. By foreclosing the court from determining whether a culpable mental state exists, the treble damage provision of the statute is unconstitutional because it imposes a penalty without a culpable mental state, arbitrarily depriving an alleged violator such as Midwest of property without due process. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S.1, 18-22 (1991). Lacking a culpable mental state as a prerequisite to an award of punitive damages, §484.020 requires neither the essential conduct nor standard for the imposition of punitive damages, a fatal defect that violates due process.

Alternatively, if the statute can be construed so that it does not require a court to impose treble damages against a violator, i.e., the statutory phrase “shall be subject” is by a strained construction interpreted to mean “may be subject”, then the trial court erred when it ordered Midwest to pay treble damages, a penalty in the nature of punitive damages, because there was no evidence which demonstrated that Midwest had a

culpable mental state at the time it engaged in the activities which gave rise to the Eisels' claims.

II.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST'S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE THE COMPLETION OF THOSE FORM DOCUMENTS IS AN INTEGRAL AND ESSENTIAL PART OF MIDWEST'S BUSINESS AS A MORTGAGE LENDER, AND, THEREFORE, UNLIKE IN HULSE v. CRIGER, 247 S.W.2d 855 (Mo. banc 1952), MIDWEST'S CHARGE OF A SEPARATE FEE FOR SUCH ACTIVITY DOES NOT SUGGEST OR IMPLY THAT SUCH ACTIVITY IS SEPARATE OR DISTINCT FROM MIDWEST'S BUSINESS AS A MORTGAGE LENDER AND IS UNLAWFUL LAW BUSINESS.

Since the issue presented in this Point was resolved in a bench trial, the trial court's judgment will be affirmed unless there is no substantial evidence to support the judgment, it is against the clear weight of the evidence or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); McClain v. Papka, 108 S.W.3d 48, 51-52 (Mo. App. E.D. 2003).

This case centers on the activities of Midwest's employees in completing standardized, pre-printed forms used to document and memorialize its borrowers'

obligations in connection with the mortgage loans it makes. The issue in this case turns on whether those activities constitute engaging in unlawful “law business”. Application of the Court’s analysis and reasoning in Hulse and First Escrow to the facts in this case dictates and compels the logical and common sense conclusion that Midwest’s employees were not engaged in unlawful “law business.”

In Hulse and First Escrow, this Court concluded that real estate brokers and escrow agents who fill in blanks on standardized, pre-printed forms are not engaged in the doing of unlawful law business: “. . . 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 and that [a broker] is not engaging in unlawful practice of law to prepare them under such circumstances.” Hulse, 247 S.W.2d at 861; “[t]his conclusion is implicit in Hulse, which held that the completion of standardized forms *by brokers* under the circumstances stated in that case is not unlawful practice of law.” First Escrow, 840 S.W.2d at 842-843 (emphasis the Court’s).

Midwest’s employees did no more, and arguably less, than the employees of the real estate brokers and escrow agents involved in Hulse and First Escrow.

All that Midwest’s clerical employees did with the standardized forms used in each of the transactions in this case was enter information to fill in blank spaces on those forms. They did not determine what information needed to be entered into the blank

spaces on the forms, nor did they determine what forms were to be used.⁵ Dunlap Depo 7/21/05, pp. 15-16, 21, 39-42, 45. Midwest's clerical employees had no such discretion and were not permitted to exercise such judgment. All of that was dictated by the requirements and promptings of the computer software they used to complete the forms. Dunlap Depo 7/21/05, pp. 21, 41-42. This was clerical work learned by watching others do it. No legal skills or training were necessary. No legal skills or training were used. Midwest's employees simply transcribed onto the standardized forms information from customers' loan applications like the names and addresses of the borrowers; they inserted the interest rate and the term of the loan from information supplied by other bank employees; and they copied the legal description of the property involved from a title commitment supplied by a title insurance company. Dunlap Depo 7/21/05, pp. 21, 39-42, 45. Once this transaction-specific, non-legal information was inputted, they pushed the appropriate keys of their computer to cause the loan documentation software to calculate the payments the borrower would have to make, a calculation based upon a mathematical formula that very few lawyers know, much less understand, and to generate the completed documents for signing.

The Court of Appeals said the forms completed in the foregoing fashion by Midwest's clerical employees are not reviewed or approved by Missouri lawyers. Slip

⁵ In contrast, in Hulse, the real estate broker involved acknowledged that based on the information provided to him for any given transaction, he determined which "blank form or forms to be used." Hulse, supra at 847.

Op., p. 2 n. 2; Appendix, p. A24. The Court of Appeals misread the record. The forms of the deeds of trust, Exhibits MBC-33, 41, 63, 85 and 103, the critical core document in each of the mortgage loan transactions involved in this case, were reviewed by Missouri lawyers, and the Eisels so stipulated at trial. L.F. Vol. III, pp. 369, 371-372, ¶¶21, 31, 32. Those forms of the deeds of trust contained the principal terms of each transaction, including, among others, the accompanying promissory note, escrowing requirements, property insurance requirements, property maintenance requirements, and applicable riders. Many of the other key forms completed for each transaction include Truth-in-Lending Disclosures, HUD-1 Settlement Statements, RESPA Servicing Disclosures, Good Faith Estimates and Notices of Right to Cancel. These forms are required by the federal government. L.F. Vol. III, p. 369, ¶24.

The above-described activities of Midwest’s clerical employees, filling in blanks in the standardized documents in question, cannot logically or reasonably be construed to constitute the “law business.” Indeed, the Court in First Escrow acknowledged that, by implication, Hulse authorized lenders to complete closing documents. First Escrow, supra at 847. (“... Hulse authorized realtors, and by implication lenders and title insurers, to complete closing documents. . . .”).

The Eisels understandably shifted the focus of their claim away from the undisputed character of the activities of Midwest’s clerical employees to the fact that Midwest charged its borrowers a separate fee for the processing of their loans and the filling out of the documents that memorialized those loans. Stripped to its essentials, the Eisels’ argument is: Midwest engaged in the unauthorized law business because it

charged a separate fee for filling in the blanks of the standardized, pre-printed forms used to document their loans. (“Simply stated, lenders may not charge for the preparation of legal documents.”) L.F. Vol. III, p. 377. Indeed, the import of the Eisels’ central premise is that *anytime* any non-lawyer such as Midwest charges a separate fee for completing standardized documents, that conduct constitutes unlawful “law business” as defined in §484.010.1.

However, neither in Hulse or First Escrow nor in any other decision has this Court laid down the unyielding rule suggested by the Eisels. The Eisels ignore and disregard the rationale of those cases and, in turn, misinterpret the decisions of this Court as essentially foreclosing the need or opportunity for any further analysis once it is shown that a separate fee was charged. If, in fact, the Court in Hulse had intended to embrace the position now urged by the Eisels, i.e., anytime a non-lawyer charges a separate fee to complete a legal document such conduct constitutes unlawful law business and a violation of §484.010, it would have been simple enough for the Court to have said just that. Instead, the Court concluded that additional analysis is necessary to determine “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.” Hulse, supra at 862. Indeed, the Court went further and formulated a factorial test for making such a determination; whether or not a separate charge is made is only one of the factors the Court said must be considered. Id.

The Eisels understandably take their position because a meaningful analysis of the circumstances surrounding Midwest’s conduct *vis-à-vis* the reasoning and decisions in

Hulse and First Escrow demonstrates the present case is significantly different and distinguishable from those cases, and the rationales underpinning the holdings in those cases do not apply here. This Court in Hulse and First Escrow expressly stated that the mere filling in of blanks in standardized, pre-printed mortgage forms and related documents is not the unlawful practice of law or unlawful “law business” under §484.010. Hulse, supra at 861; First Escrow, supra at 842-843. Common sense and logic dictate that if an activity such as filling in blanks on a standardized form is not the unlawful “law business”, the charging of a fee for that activity cannot transmogrify that activity into the unlawful “law business”. This common sense logic is neither aberrant nor atypical. This reasoning was, for example, expressly used by the Supreme Court of Michigan in Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003).⁶

Admittedly, in Hulse, the Court did conclude that when a real estate broker charges a fee, separate from his/her commission, for completing standardized form sale contracts, deeds and deeds of trust, the charging of that fee would convert the broker’s

⁶ The statute in question in Dressel prohibited corporations “to make it a business to practice as an attorney-at-law, for any person other than itself....” Dressel, supra at 154. In disposing of the issue of whether the defendant bank engaged in the unlawful practice of law by charging a fee for the completion of standard mortgage documents, the Court stated the defendant “was not practicing law when it completed the mortgage forms....” Id. at 157. “It is immaterial that it charged for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law.” Id.

otherwise lawful conduct into the unlawful practice of law or law business. Hulse, supra at 861. The Court’s explanation for that result was that charging a fee for the preparation of such instruments “...would not be any part of [the broker’s] business as a real estate broker but would be placing the emphasis upon conveyancing as a practice of law instead of on his services as a broker....” Id.

Whatever logic may exist in that reasoning, the reasoning can only mean that in “placing the emphasis upon conveyancing”, the broker’s charging of a separate fee for filling in the blanks on the forms effectively divorces this activity from the broker’s real business of bringing parties together to sell and buy property, the business for which the broker receives a commission, and that, in turn, precludes the possible conclusion that this activity is only ancillary and incidental to the broker’s real business. This meaning is reflected in the express language used by the Court:

... 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. We think the preparation of these instruments in closing transactions in which a real estate broker is acting as broker *is so closely related to the transaction and the business of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. ... However, he cannot properly make separate charges, in addition to his commission, for preparing any instruments* or engage in the field of conveyancing and drafting

contracts or other legal instruments for the public generally, with or without separate charge. *Such conduct would not be any part of his business as a real estate broker but would be placing emphasis upon conveyancing as a practice of law instead of on his services as a broker; and it would also violate the provisions of RSMo 1949, Chap. 484, V.A.M.S.*

Id. at 861 (emphasis added).

Assuming that the Court's reasoning is acceptable logic, the conduct of Midwest, at issue in the present case, in the context of the banking industry in which it occurred, is not merely a difference in degree from the broker's conduct in Hulse, it is a complete difference in kind. Conveyancing was not the broker's business in Hulse; the broker's business was bringing a buyer and seller together for which he receives a commission. However, in the present case, making *and* documenting the mortgage loans it makes *is* Midwest's business. There is no separate business. The present case is, thus, clearly distinguishable from Hulse and First Escrow, and the reasoning used in Hulse, and by implication accepted in First Escrow, cannot be applied sensibly here.

As the present record clearly shows, one of the principal businesses in which Midwest engages as a commercial bank is the mortgage loan business, the making of loans secured by real estate. Documentation of the terms of the borrower's obligation to repay a loan in the form of a promissory note and of the granting of security for that loan in the form of a deed of trust is not merely ancillary or incidental to the business of a lender such as Midwest -- it is an integral and essential part of that business. This

documentation is imperative to ensure Midwest's ability to enforce the repayment of these loans, and, if necessary, to foreclose on the properties that serve as security for these loans. Moreover, as part of its mortgage loan business, Midwest re-sells in the secondary mortgage market some 80% of the loans that it makes. There can be no dispute that in order to be able to re-sell these loans in that market, Midwest must document the loans in a manner which meets the stringent requirements of that market.⁷

The clerical activities of Midwest's employees at issue in the present case are similar to those of the insurance claim adjusters considered by the Court in Liberty Mutual Insurance Co. v. Jones, 130 S.W.2d 945 (Mo. banc 1939). The issue in Liberty Mutual was "whether a lay claim adjuster may *select* the appropriate form of release from the several prepared by counsel for the company, fill in the blanks, have the instrument executed by the claimant, pay the amount already agreed upon, and close the case." Id. at

⁷ A leading treatise has noted: "One of the important side effects of the secondary mortgage market is the creation of uniform documentation for mortgage lending in all parts of the country. Individual lending institutions are anxious to create their mortgages through documentation forms that will be acceptable for ready resale on the secondary market. Over the years, FNMA and FHLMC have drafted approved documentation forms. They vary from state to state only to the degree necessary to comply with local real estate laws. Virtually all institutional loans are now made on those approved uniform documents." Powell on Real Property, §37.05[5] (Michael Allan Wolf ed., Mathew Bender).

957-958 (emphasis the Court's).⁸ The Court answered this question affirmatively, concluding that the “performance of such simple, routine services requiring only a slight knowledge of the law does not constitute law practice or business.” Id. at 958. In so doing, the Court reasoned:

If [the claim adjusters] 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.*

Id. (emphasis supplied). The functions performed by Midwest's clerical employees as they filled in the blanks on forms necessary to memorialize and document the loans made to the bank's borrowers are comparable to the clerical functions performed by the claims adjusters in Liberty Mutual. Just as those functions were held by the Court in Liberty Mutual to be “a part of the regular business of their employer”, so, too, are the activities of Midwest's clerical employees “a part of the regular business” of Midwest.

In short, the clerical functions performed by Midwest's employees of filling in the blanks on the standardized, pre-printed forms used to document the loans it makes are not

⁸ The functions of Midwest's clerical employees are even one step removed from those of the claim adjusters in Liberty Mutual; as previously noted, Midwest's employees do not select the forms used to document the loans made by Midwest.

activities detached from the lending business of Midwest. Those activities are an integral and necessary part of that business. Therefore, Midwest's charging of a fee to recoup some of its costs associated with those activities does not place an "emphasis upon conveyancing as a practice of law", Hulse, supra, instead of Midwest's activities as a lender.

Moreover, as expressly stated in First Escrow, the decision in Hulse, was "strongly influenced" by two factors: (1) the transactions involved were simple enough that standardized forms would suffice for the completion of those transactions; and (2) the broker had sufficient identity with the seller he represented to safeguard proper completion of the transaction. First Escrow, supra at 844, *citing* Hulse, supra at 861. Thus, another compelling distinction between First Escrow and the present case is that Midwest, as a *party* to all of the loans it makes, has sufficient liability interest in those transactions to safeguard the proper completion of those transactions. It is, after all, liable for what it does as a bank, *qua* bank, to insure the proper completion of the forms for those transactions. Moreover, Midwest has its own interest in properly completing the forms -- to be able to enforce the repayment of the loans it makes. Furthermore, because Midwest re-sells in the secondary market most of the mortgage loans it makes, it must continuously, properly complete the FNMA forms it uses to document those loans in order to assure the eligibility of its loans for re-sale in that market.

Finally, in the context of the facts in Hulse, the Court applied four factors to resolve what it believed to be the critical issue of whether the broker's activity of completing the standardized forms involved was ancillary and essential to his brokerage

business or a business being carried on by the broker separate from his brokerage business, and, hence, whether the broker was engaged in the unlawful law business: (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. Hulse, supra at 862. The Court stated that these four factors “...all have a bearing upon the determination of this question”, id., but the Court refrained from saying that any one of the factors is singularly determinative of the issue.

Applying those factors to the facts in this case, the mortgage loan documents completed by Midwest’s employees are simple, not complex, standardized forms. In Hulse, the Court found that the completion of commonly used, standardized, pre-printed form deeds of trust and other transactional documents “for usual transactions requires only ordinary intelligence rather than legal training.” Id. at 861. The Court reaffirmed that conclusion in First Escrow, noting “...the relatively simple nature of the task of filling in form documents...” First Escrow, supra at 844. Plaintiffs have acknowledged the similarity of the forms in this case to those involved in Hulse, and, hence, the relative simplicity of those forms. L.F. Vol. III, p. 379 (“The broker [in Hulse] prepared documents similar to those admittedly prepared by Midwest in this case....”).

The nature and customs of the banking business, and, specifically, the mortgage loan portion of that business, have already been discussed at some length. It is a business which requires Midwest to document the loans it makes for a number of reasons, including to assure the repayment of those loans and the enforceability of Midwest’s security interest in the event of a borrower’s default and to enable Midwest to re-sell its

loans in the secondary mortgage market. Thus, Midwest's loan documentation activities are not a separate business detached from, or even incidental and ancillary to, its mortgage loan business. Rather, those activities are integral and essential to that business. Nor does it appear that Midwest uniquely engages in these activities. The Eisels are among several named plaintiffs who initiated class actions against some twenty-six other lenders in the St. Louis metropolitan area, accusing them of engaging in the same unlawful law business.

The convenience to the public in having lenders like Midwest complete loan documents is manifest. The documents are filled out quickly and correctly by a party to the transaction, Midwest, which has a direct financial stake in assuring the promptness and accuracy of completed documents. This serves to speed the loan process along efficiently and economically. The loan documentation process also enables Midwest and banks like it to re-sell mortgage loans in the secondary mortgage market, which, in turn, has helped support the nation's economy, to the benefit and convenience of the public. Indeed, in First Escrow the Court recognized "...the convenience of the completion of certain standardized form documents ..." by the escrow companies. First Escrow, supra at 846. The documents involved in First Escrow are similar to those involved in this case.

Midwest did charge a separate fee for completing the forms necessary to document the mortgage loans it makes to its borrowers and to process those loans. The work for which Midwest charged this fee is an essential part of its activities as a mortgage loan lender. Contrariwise, in Hulse the Court found that the fee charged by the broker was for

a service which the Court differentiated from the services he performed as a broker. Hulse, supra at 862 (“...his separate additional charges...in transactions in which he was acting as broker tend to place emphasis on conveyancing and legal drafting as a business rather than on his business of real estate broker.”). Quite simply, Midwest charged the fee to its borrowers in a context that is different than the one that was presented in Hulse, and, therefore, the result in this case should be different.

Applying the factorial analysis prescribed by this Court in Hulse, compels the same conclusion stated above: Midwest did not engage in the unlawful law business, and the trial court and the Court of Appeals erred in concluding otherwise.

In reaching its erroneous conclusion, the Court of Appeals noted that in Hulse this Court determined that a broker may not charge a separate fee for completing forms. Slip. Op., p. 6. From this characterization, the Court of Appeals then states as its initial premise, “[w]e read this to imply that charging a separate fee transforms an otherwise permitted activity into an unlawful one.” Id. In other words, the Court of Appeals reads Hulse to say that *anytime* a non-lawyer charges a separate fee for performing an otherwise permitted activity, the charging of the fee, in and of itself, renders the activity unlawful.

The Court of Appeals simply misreads Hulse. Nothing in Hulse, implicitly or explicitly, states or suggests such a result. To the contrary, if the Court had intended that as the holding or teaching of Hulse, there would have been no need for the Court to explain that the separate fee charged by the real estate broker tended “to place emphasis on conveyancing and legal drafting as a business rather than on his business as a real

estate broker.” Hulse, supra at 863. So, too, there would have been no need for the Court to promulgate the factorial analysis it articulated in Hulse and reiterated in First Escrow. Instead, the Court need only have said that because the broker charged a fee for filling out the documents, he engaged in unlawful law business, without any further explanation or analysis. Inasmuch as the Court in Hulse did provide an explanation and analysis which makes clear that the charging of a separate fee is only one factor to be considered, it is plain that the premise of the Court of Appeals’ opinion is faulty.

The Court of Appeals compounded its error by relying upon a statement in a footnote in First Escrow, “[both] Hulse and our opinion today bar service providers from charging a fee for preparing legal documents....” Slip Op., p. 7; Appendix, p. A29, citing First Escrow, supra at 843, n. 7. The Court of Appeals interpreted the phrase “service providers” within the quoted statement to include residential mortgage lenders such as Midwest, along with real estate brokers such as the one involved in Hulse and escrow agents such as those involved in First Escrow.⁹ In doing so, the Court of Appeals was mistaken.

⁹ The Eisels argued to the Court of Appeals that the phrase “service providers”, which appeared in footnote 7 of First Escrow, was defined in footnote 10 of that decision to include “brokers, title companies and lenders”. Eisels’ Brief, p. 22. Nothing in footnote 10 says this Court adopted “brokers, title companies and lenders” as the definition of the phrase “service providers” as it appears in footnote 7 of First Escrow. Footnote 10 was nothing more than a survey of what courts in other jurisdictions, as of the date of that

The Court of Appeals’ interpretation of the quoted language from footnote 7 of First Escrow would effectively override and eviscerate the analytical approach this Court took in Hulse. In Hulse this Court identified as its “guiding principle” the need to determine “under the circumstances” whether “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.” Hulse, supra at 862. To that end, the Court promulgated a factorial test with which to make that determination. Id. Both the language and approach of Hulse bespeak an intent by the Court to examine and analyze the “circumstances” surrounding allegations of unlawful law business on a case-by-case basis. Admittedly, the footnote’s blanket reference to “service providers” is broad and all-encompassing. If, however, it is an acceptable and meaningful label, under the interpretation given it by the Court of Appeals, those purportedly falling within its reach are foreclosed from obtaining a review of the “circumstances” under which they prepare or complete documents of legal significance for no more reason than they may be categorized as “service providers”. That result would run directly counter to the analytical approach adopted by this Court in

decision, had concluded regarding what functions various types of businesses could perform in settling real estate transactions. The footnote is certainly not the holding in First Escrow. Indeed, to the extent it even mentions “lenders”, it cannot be more than what it was, a survey of decisions from other jurisdictions, because First Escrow did not involve the conduct of a lender – the issue was not before the Court in that case.

Hulse, particularly so, because not all “service providers” and their “circumstances” were before the Court in Hulse and First Escrow.

Even if the Court of Appeals’ interpretation of footnote 7 in First Escrow is acceptable, Midwest’s business as a mortgage lender cannot be classified as that of a “service provider”. In common parlance, “service” means “performance of labor for the benefit of another, or at another’s command”, and “provide” means “to supply” or “to furnish”. Webster’s New International Dictionary. Thus, a “service provider” is one who supplies or furnishes labor performed for the benefit of another, or at the command of another. While a real estate broker provides labor for a client, attempting to bring a buyer and seller together, and an escrow agent provides labor for a customer, organizing and conducting a real estate closing, a residential mortgage lender does not provide its customers with a “service”, i.e., labor for the benefit of the customer. Rather, the mortgage lender offers and provides to its customers various types of financings or loans in exchange for security in the form of real estate upon various terms and conditions. *See, Powell on Real Property, supra*, §37.05[1]; Restatement of the Law of Property 3d, Mortgages, §1.1. These financings or loans are essentially the lender’s products, analogous to the various shirts offered for sale at a store. Accordingly, Midwest’s role or function is not that of a “service provider”, assisting the parties to the transactions at issue, as were the real estate broker and escrow agents in Hulse and First Escrow. Midwest’s factual and legal relations to the Eisels were neither similar nor comparable to the relations the broker and escrow agents in Hulse and First Escrow had with the other parties in those cases. Midwest was a party to the transactions involved here.

Consequently, Midwest stands on entirely different footing than the broker in Hulse and the escrow agents in First Escrow. To the extent the Court of Appeals concluded otherwise and regarded Midwest as a “service provider” like the broker in Hulse and the escrow agent in First Escrow, this was error.

The foregoing errors of the Court of Appeals, cumulatively, lead that court to erroneously conclude:

“...charging a fee for document preparation, which includes a deed of trust, converts a service provider’s work from...acting as a mortgage lender into ‘an essential part of another business’ in contravention of Hulse. Consequently, because Midwest charged a separate fee for creating deeds of trust and loan documentation, it engaged in a separate business detached from its mortgage lending, constituting the unauthorized law business.”

Slip Op., p. 7; Appendix, p. A29.

In reaching this conclusion, the Court of Appeals misperceived the nature of Midwest’s business as a residential mortgage lender. Inherent and implicit in the very title accepted and used by the Court of Appeals to describe Midwest’s business, a “*mortgage lender*,” it is obvious and necessarily understood that Midwest makes loans secured by mortgages or deeds of trust on real property that serves as the collateral for such loans. Thus, the deeds of trust and related loan documentation that Midwest, *as a “mortgage lender”*, completes to memorialize and secure the loans it makes are by definition an essential and integral part of its mortgage lending business. Without such documentation, Midwest could not enforce repayment of these loans or, if necessary,

foreclose on the properties that serve as collateral for these loans. Likewise, without such documentation, Midwest could not re-sell these loans in the secondary mortgage market. Consequently, the Court of Appeals' conclusion that by charging a separate fee "for creating deeds of trust and loan documentation, [Midwest] engaged in a separate business detached from its mortgage lending" is neither sensible nor logical. Indeed, this conclusion artificially and inaccurately cleaves Midwest's mortgage loan business into two separate businesses. However, Midwest's mortgage lending business is unitary and indivisible in nature; the documentation component of that business is an essential part of and inseparable from the rest of that business. Quite simply, there can be no *mortgage lending business* without the mortgages and related documentation for the loans that are made. So as a matter of logic and common sense, Midwest's charging of a separate fee to cover a portion of the cost of the documentation activity cannot and did not detach that activity from its mortgage loan business. The Court of Appeals erred in concluding otherwise.

Summing up, the fact that Midwest charged a separate fee to complete the documentation of the loans it made in an effort to recoup a portion of the costs it incurred in connection with that documentation activity is not, as the Eisels and the lower courts would have the Court believe, the end of the analysis; rather, it is only the beginning. The key in that analysis is whether the preparation or completion of the documents in a transaction is itself an activity separate and distinct from the principal business for which money is charged. Making that determination is the very purpose of the factorial test enunciated by the Court in Hulse, "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 is really ancillary to and an essential part of another business.” Hulse, supra at 862. Midwest did not complete the documents at issue to make money on an activity separate and distinct from its mortgage lending business; Midwest completed the documents as an essential and inseparable part of its mortgage lending business. Therefore, Midwest did not engage in unlawful law business.

III.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST’S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE AS A PARTY TO EACH OF THOSE LOAN TRANSACTIONS, DIRECTLY RESPONSIBLE FOR THE DOCUMENTATION OF THOSE LOAN TRANSACTIONS, MIDWEST HAD A DIRECT PERSONAL INTEREST IN THOSE TRANSACTIONS, AND ITS CONDUCT WAS PERMISSIBLE UNDER THE *PRO SE* EXCEPTION TO THE PROHIBITION AGAINST ENGAGING IN UNLAWFUL LAW BUSINESS.

Since the issue presented in this Point was resolved in a bench trial, the trial court’s judgment will be affirmed unless there is no substantial evidence to support the judgment, it is against the clear weight of the evidence or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); McClain v. Papka, 108 S.W.3d 48, 51-52 (Mo. App. E.D. 2003).

Even if the previously described clerical activities in which Midwest’s employees engaged while processing and documenting mortgage loan transactions could somehow be construed as “law business” within the meaning of §484.010, that conduct was

permissible because Midwest had a “personal interest” in those transactions and, thus, fell within the “*pro se* exception” to the prohibition against engaging in the unlawful law business.

As previously noted, in First Escrow the Court stated that its earlier decision in Hulse rested on two grounds, the second of which was that the real estate broker in Hulse “had sufficient identity of interest with the seller he represented to safeguard the proper completion of the transaction”; therefore, when the broker filled in blanks on standardized forms, he was not engaged in the unlawful law business. First Escrow, *supra* at 844. In its subsequent analysis, the Court in First Escrow amplified this point, noting that it would be “imprudent” to allow individuals without legal training to complete certain standardized forms “who have no independent financial interest in the transaction.” *Id.* at 846. The Court went on to conclude that escrow closing companies could complete standard form real estate documents without violating the prohibition against engaging in unlawful law business so long as they did so under the supervision of, and as agents for, entities or individuals who could otherwise meet the “personal interest test”. *Id.* The Court defined that test by noting that allowing a non-lawyer to complete standardized real estate forms is justified “... only when that person’s own financial interest and corresponding liability in the transaction creates an additional safeguard ensuring that the tasks will be performed correctly.” *Id.*

In this case, Midwest clearly meets the Court’s “personal interest test.” Midwest was a party to all of the loan transactions involved, directly responsible for the documentation of those transactions, and, hence, directly liable for any mistakes in that

documentation. Moreover, as the lender in each of these transactions, Midwest had a direct financial interest in the proper documentation of each transaction in order to assure its ability to enforce its borrowers' repayment obligations. Midwest had an additional direct financial interest in the proper documentation of these loans in order to be able to re-sell them in the secondary mortgage market. Thus, the "additional safeguard" which the Court in First Escrow required was in place in this case, and Midwest met the Court's "personal interest test". Consequently, the clerical activities of its employees in filling in blanks on standardized loan documents did not constitute the unauthorized law business.

The fact that Midwest charged a fee for those activities merely to recoup a portion of the costs of those activities does not change the result. In King v. First Capital Financial Services Corp., 828 N.E.2d 1155 (Ill. 2005), the Illinois Supreme Court was faced with the same issue that is before this Court: whether a mortgage lender that uses non-lawyers to complete standardized loan documents engages in the unauthorized practice of law when the lender charges the borrower a fee for completing those documents. Id. at 1161. That court answered the question in the negative. Id. at 1167. In reaching that result, the Illinois court relied on what it termed the "*pro se* exception". Id. at 1163. That exception applies to situations where the party preparing the documents does so for his or her own benefit in a transaction to which the preparer is a party. Id. The Illinois court concluded that because the defendant lenders were parties to the loan transactions involved, their completion of the forms used to document those transactions fell within this *pro se* exception. Id. The Illinois court's *pro se* exception is little more than a variant of this Court's exception based upon a "personal interest test".

In reaching its decision that the *pro se* exception insulated the lenders from liability, the court in King noted that the plaintiffs in that case did not claim that they received legal services from the lenders or that the lenders had held themselves out as providing legal services in connection with the loan transactions. Nor did the plaintiffs contend that they suffered any harm as a result of the lenders' preparation of the mortgages and notes involved in those transactions or that those mortgages and notes were improperly prepared. Neither did the plaintiffs argue that they believed the lenders were acting as their attorneys or advising them on legal matters in any way. Id. at 1163.

These same predicate facts are also present in this case. The Eisels have not alleged that Midwest held itself out as providing legal services; they merely aver that by charging a document preparation fee to its borrowers, Midwest engaged in the practice of law and the doing of law business. L.F. Vol. II, p. 165-d, ¶111. The Eisels have acknowledged that they suffered no harm as a result of Midwest's preparation of the documents involved in this case. Clark Eisel Depo, p. 58-59; Patricia Eisel Depo, pp. 54-55. And they have admitted that they did not think Midwest was acting as their attorneys or advising them on legal matters. Clark Eisel Depo, p. 60; Patricia Eisel Depo, p. 91; Deft's Ex. C, Plaintiff Clark E. Eisel's Answers to Defendant Midwest BankCentre's First Interrogatories as to the Merits to Representative Clark E. Eisel, Answer to Interrogatory No. 6 ("I do not contend that Midwest Bank [sic] advised or counseled me."); Deft's Ex. D, Plaintiff Patricia S. Eisel's Answers to Defendant Midwest BankCentre's First Interrogatories as to the Merits to Representative Patricia S. Eisel,

Answer to Interrogatory No. 6 (“I do not contend that Midwest Bank [sic] advised or counseled me.”).

The plaintiffs in King argued, however, that once the defendant lenders charged a fee for completing the loan documents, they could no longer assert that they were acting on their own behalf because a *pro se* litigant does not receive payment from another for its legal services. Id. at 1166. The Illinois Supreme Court rejected this contention, explaining that “...the documents prepared for use in the closing transactions were for the benefit of defendants...Although the documents provided an incidental benefit to plaintiffs in the sense that their preparation was necessary to the completion of their transactions, it cannot be said that the primary benefit went to plaintiffs.” Id.

Whether using either the “personal interest test” articulated by this Court in First Escrow or the Illinois Supreme Court’s “*pro se* exception” nomenclature or characterization, the examination is much the same: does the party completing the documents have a sufficient financial interest, by way of financial benefit and/or liability, to safeguard that the tasks will be completed correctly? If the answer to that question is “yes”, then the activities of completing standardized loan forms do not constitute the unlawful law business; and as the Illinois Supreme Court reasoned and held in King, charging a fee for those activities does not change the nature of them so that they become the unlawful law business. It was error for the trial court to conclude otherwise.

The Court of Appeals, nevertheless, affirmed the trial court’s judgment on the grounds that “[p]ossessing a financial stake in the outcome of a contract or loan does not defeat the fact that a non-lawyer charging a fee for document production constitutes the

unauthorized law business.” Slip Op., pp. 7-8; Appendix, pp. A29-A30. This conclusion reflects and is an extension of the Court of Appeals’ misperception that Hulse held in blanket fashion that anytime a non-lawyer charges a separate fee for the completion of pre-printed forms, that constitutes unlawful law business. This Court in Hulse neither explicitly nor implicitly reached such a broad and unyielding holding. To the contrary, as previously discussed, this Court stated as “the guiding principle” that a determination must be made “whether under the circumstances the preparation of the papers involved in the business being carried on or whether this really is ancillary to and an essential part of another business.” Hulse, *supra* at 862. In order to make that determination, the Court enunciated a factorial test, only one factor of which is “whether or not separate charges are made”. *Id.* The Court of Appeals, however, placed singular and exclusive importance on that one factor and, in effect, determined that Midwest’s charging of a separate fee *precludes* the possible (and correct) conclusion that its completion of the standardized, pre-printed mortgage forms necessary to memorialize and document the loans it made were “ancillary to and an essential part” of Midwest’s residential mortgage lending business rather than “the business being carried on”. Based on this misreading of Hulse, the Court of Appeals affirmed the trial court’s judgment. Consequently, the Court of Appeals failed to analyze properly Midwest’s position that it had a direct personal interest in each of the transactions involved in this appeal and that its conduct was permissible under the *pro se* exception to the prohibition against engaging in unlawful law business.

IV.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE EISELS AND HOLDING THAT WHEN MIDWEST’S CLERICAL EMPLOYEES FILLED IN THE BLANKS ON PRE-PRINTED, STANDARDIZED FORMS USED TO DOCUMENT THE RESIDENTIAL MORTGAGE LOANS MADE BY MIDWEST TO THE EISESL AND THE MEMBERS OF THE PLAINTIFF CLASS AND MIDWEST CHARGED A SEPARATE FEE THEREFOR, MIDWEST ENGAGED IN UNLAWFUL LAW BUSINESS IN VIOLATION OF SECTION 484.010 RSMo., BECAUSE THE EISELS AND THE MEMBERS OF THE PLAINTIFF CLASS VOLUNTARILY PAID THE FEES, AND, THEREFORE, UNDER THE VOLUNTARY PAYMENT DOCTRINE, THEY WERE NOT ENTITLED TO RECOVER THOSE FEES IN THIS ACTION.

Since the issue presented in this Point was resolved in a bench trial, the trial court’s judgment will be affirmed unless there is no substantial evidence to support the judgment, it is against the clear weight of the evidence or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); McClain v. Papka, 108 S.W.3d 48, 51-52 (Mo. App. E.D. 2003).

The voluntary payment doctrine provides that “...in the absence of fraud or duress, a payment, even of an illegal demand, voluntarily made with full knowledge of the facts cannot be recovered.” Staples v. O’Reilly, 288 S.W.2d 670 (Mo.App. 1956). The doctrine has been a recognized part of Missouri jurisprudence at least since 1863. *See* Claflin v. McDonough, 33 Mo. 412, 415 (1863). (“The rule of law if well

established, both in England and in this country, that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back....”). *See also* National Enameling & Stamping Co. v. City of St. Louis, 40 S.W.2d 593, 595 (Mo. 1931); American Motorists Insurance Company v. Shrock, 447 S.W.2d 809, 811 (Mo.App. 1969); Watkins v. Floyd, 492 S.W.2d 865, 872 (Mo.App. 1973) (payments made with full knowledge of all the facts, “even in equity and good conscience, cannot be recovered.”); Jurgensmeyer v. Boone Hospital Center, 727 S.W.2d 441, 444 (Mo.App. 1987). The doctrine applies in this case, and bars the Eisels from recovering the fees they paid to Midwest.

The Eisels paid Midwest the document preparation fees or processing fees at issue in this case voluntarily. They have not alleged, nor do the stipulated facts evidence, that they paid the document preparation fees or processing fees under duress or as a result of any fraudulent conduct on the part of Midwest. According to the undisputed evidence, the Eisels received from Midwest Good Faith Estimates approximately six months before they closed on both of their loans which expressly disclosed that Midwest would charge a document preparation fee in conjunction with those loans. *See* Exs. MBC-28 and MBC-52. Indeed, testimony of Patricia Eisel clearly indicates that she knew she was paying the document preparation fee at the time she signed her mortgage loan. Patricia Eisel Depo, p. 103. She and her husband voluntarily paid the fee.

The Eisels did not contend otherwise in the trial court, relying instead upon the bare allegation that Midwest’s charging of these fees constitutes unlawful law business. *See* Plaintiffs’ Third Amended Petition, ¶111, L.F. Vol. II, p. 165-d. By failing to plead

any allegations to show fraud or duress in their payment of the fees in question, the trial court was entitled to and should have presumed that the Eisels made payment of those fees as volunteers, Jurgensmeyer, supra at 444 (“[b]y failing to plead any allegations to show fraud or duress in the payment made to the hospital, it can only be concluded that Jurgensmeyer made payment as a volunteer”), and, therefore, they were not entitled to recover them in this action.

Even had the Eisels’ pleadings contained the requisite allegations of fraud or duress, there was no evidence which would have borne out such averments. The Stipulation of Facts submitted by the parties at the time of trial is devoid of any statement that would support such allegations, had they been made. Moreover, as noted previously, documents supplied by Midwest to the Eisels before and/or at the loan closings fully disclosed to them that Midwest was charging the fees in question and Mrs. Eisel acknowledged that she knew she was paying the fee when she signed the loan documents. Hence, there was no fraud.

Likewise, there is no suggestion that the Eisels were under any duress when they paid the subject fees. The Stipulation of Facts contains no indication that Midwest compelled or coerced the Eisels to pay the fees. The mere fact that Midwest charged the fees and that the Eisels paid them in order to receive their loans does not amount to duress. *See* National Enameling, supra at 595-596 (payment of excessive water charges by manufacturer that needed water to continue business held voluntary, not a product of duress and not recoverable).

Furthermore, even if the Eisels had “needed” to close on their loans from Midwest because of other exigencies, such as the need to close on the purchase of a new home in order to be able to vacate a residence they had sold to another party, these circumstances would not have amounted to duress. Schmalz v. Hardy Salt Co., 739 S.W.2d 765, 768 (Mo.App. 1987) (“Financial necessity of a party, not caused by the other party to a contract, does not constitute duress.”).

In short, under the pleadings and the evidence, the Eisels voluntarily paid the fees in question. Therefore, under the voluntary payment doctrine they were not entitled to recover those fees in this action and the Court erred in entering judgment in favor of them.

This conclusion is buttressed by the Illinois Supreme Court’s recent decision in King v. First Capital Financial Services Corporation, supra. In King, the defendant lenders argued that the voluntary payment doctrine barred the plaintiff borrowers’ claims for recovery of the document preparation fees the lenders had charged. Id. at 1170. The Illinois Supreme Court agreed with the lenders. Id. The court noted that the charge for the fees was expressly set forth on the closing statements. Id. at 1172-1173. The court further noted that the plaintiffs had not pleaded or proved that they were compelled to either pay the fee or forego their loan transactions. Id. at 1173. Hence, the court concluded:

Reduced to its essence, plaintiffs’ argument is that the preparation of loan documents by nonlawyers is illegal. However, the voluntary payment doctrine applies in the very circumstance where the payment sought to be

recovered was illegally obtained by the defendant. Plaintiffs cannot avoid application of the doctrine by merely alleging that defendants engaged in the unauthorized practice of law. Id.

The same is true in this case. The Eisels have merely alleged that Midwest's charging of document preparation fees and processing fees constitutes unlawful law business. That bare allegation is insufficient as a matter of law to circumvent the voluntary payment doctrine, and the trial court erred in concluding otherwise.

In indicating that it would affirm the trial court's judgment, the Court of Appeals concluded that the voluntary payment doctrine does not apply to cases brought pursuant to §484.020. For support it quoted a single sentence from the opinion in Bray v. Brooks, 41 S.W.3d 7, 13 (Mo.App.W.D. 2001): "[t]he activities prohibited by [Section] 484.010 are not subject to waiver, consent or lack of objection by the victim." In Bray, however, the defendant did not assert the voluntary payment doctrine as a defense, nor did the Court in Bray say that §484.020 abrogates the voluntary payment doctrine in cases where the statute is applicable. So Bray is factually distinguishable and inapposite. Moreover, the court in Bray offered no citation of authority or reasoning to support its bare statement. This is understandable, as that statement is so overbroad and all-encompassing as to be abstract and meaningless. Furthermore, the express terms of §484.020 do not support such a conclusion. Nor is Midwest aware of any legal principle that would support such a conclusion.

It is irrefutable that Midwest fully disclosed to the Eisels and the other members of the plaintiff class the fact that they were being charged the fees in issue. Midwest was

open and candid about the fees; the fees were explicitly set forth not once, but twice, on the Good Faith Estimate and on the HUD-1 Settlement Statement used in every transaction involved in this case. The voluntary payment doctrine is founded on principles of equity. American Motorists Ins. Co., supra at 812. As noted previously, the doctrine says that if a payment, even of an illegal demand, is made voluntarily with full knowledge of the facts, that payment cannot be recovered. Staples, supra. Here, the Eisels and other class members had full knowledge of the facts--they knew Midwest was charging these fees--and they voluntarily paid them. Therefore, the doctrine bars the Eisels and the other members of the plaintiff class from any recovery in this case. The single bare sentence in Bray does not alter this result.

Nevertheless, the Court of Appeals extrapolated from the sentence quoted from Bray its conclusion that the voluntary payment doctrine cannot benefit Midwest in this case. The Court stated its rationale for that determination as follows:

To hold otherwise, that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized law business and be barred from recovery due to having made a voluntary payment, would be illogical and inequitable.

Slip Op., p. 8; Appendix, p. A30.

In essence, the Court of Appeals would write out of existence the voluntary payment doctrine, at least in the context of claims of unauthorized law business. The Court of Appeals would “unburden” a party from recognizing an activity as unauthorized law business and permit that individual to reclaim a payment for that activity made

voluntarily on the grounds that he or she did not realize the activity was illegal. As a general principle, however, persons are conclusively presumed to know the law. Missouri Highway and Transportation Commission v. Myers, 785 S.W.2d 70, 75 (Mo. banc 1990). This presumption is “as old as the law itself”. Hartley Realty Co. v. Casady, 332 S.W.2d 291, 294 (Mo.App. 1960). It “is necessary not because all persons do know the law, but because it would be a defense which everyone could raise and which it would be impossible to disprove.” Id. Thus, if the Court of Appeals’ view of the voluntary payment doctrine prevailed, the doctrine would soon disappear, as parties would simply assert in response that they did not “recognize” the illegality of the demand they paid.

The Court of Appeals’ view of the doctrine contravenes well-established precedents. The case law is clear that the voluntary payment doctrine does not permit someone who fails to understand or recognize their legal rights to recover a payment voluntarily made:

The rule of law is well settled that where money has been voluntarily paid with full knowledge of the facts it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying – which is to say, under a mistake of law.

American Motorists Ins. Co., supra at 811. This Court long ago recognized as a “well-established principle” the foregoing rule, quoting with approval from a California Supreme Court decision:

The illegality of the demand paid constitutes of itself no ground for relief.... If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character.

National Enameling, *supra* at 595, *quoting* Brumagim v. Tillinghast, 18 Cal. 265 (1861).

Similarly, the Court of Appeals' rationale that it would be "inequitable" to apply the voluntary payment doctrine to the Eisels ignores the very principles of equity upon which the doctrine is founded. As was stated in American Motorists Ins. Co.:

Plaintiff argues that equity should intervene in its favor and require defendant to return the money because "in equity and good conscience (it) should be returned." We reject that proposition because the rule of law that there can be no recovery of money voluntarily paid with full factual knowledge is founded upon and incorporates within itself the very principles of equity plaintiff insists should govern our decision. In evolving the rule the courts have laid down the requirement that if a person would resist an unjust demand he must do so at the threshold of the matter; that if he intends to litigate the question he must make his defense in the first instance—not later, after paying the money and bidding the course of uncertain future events. The underlying reason for those requirements is that it would be inequitable to give such person the privilege of selecting

his own time and convenience for litigation short of the bar of the statute of limitations, and thereby subject the payee to the uncertainties and casualties of human affairs likely to affect his means of defending the claim.

American Motorists Ins. Co., supra at 812.

In short, the voluntary payment doctrine bars the Eisels and the other members of the Midwest Plaintiff Class from recovering the fees they voluntarily paid to Midwest, and the Court of Appeals erred in ruling to the contrary.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court should be reversed, the claims against Midwest should be dismissed with prejudice, and Midwest should recover its costs expended.

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Furthermore, the undersigned certifies that: (1) Appellant's Substitute Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 18,762 words in Appellant's Substitute Brief); (2) the name and version of the word processing software used to prepare Appellant's Substitute Brief is Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.

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