

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL.,)
BASS PRO OUTDOOR WORLD, LLC, et al.)
)
Relators,)
) Case No.: SC91658
vs.)
)
HONORABLE MICHAEL J. CORDONNIER,)
)
Respondent.)

RESPONDENT'S BRIEF

Oral Argument Requested

Respectfully submitted,

HUSCH BLACKWELL LLP
Bryan O. Wade, #41939
Ginger K. Gooch, #50302
Jason C. Smith, #57657
jason.smith@huschblackwell.com
ginger.gooch@huschblackwell.com
bryan.wade@huschblackwell.com
901 St. Louis Street, Suite 1800
Springfield, MO 65806
Phone: (417) 268-4000
Fax: (417) 268-4040

HUSCH BLACKWELL LLP
James D. Griffin, #33370
james.griffin@huschblackwell.com
4801 Main Street, Suite 1000
Kansas City, MO 64112
Phone: (816) 983-8000
Fax: (816) 983-8080

Attorneys for Respondents

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STATEMENT OF FACTS

I. Procedural History

A. Relators' Original Petition Requesting a Class Limited to Missouri Transactions and the Motion to Transfer Venue

Relators filed their Class Action Petition in this case against defendant Bass Pro Outdoor World, LLC (“Outdoor World”) in the Circuit Court of St. Charles County on January 21, 2009 (the “Original Petition”) (Rels’ Br. A51). The Original Petition asserted that Relators were residents of Franklin County, Missouri (Rels’ Br. A51). Relators proposed in the Original Petition to represent a class “consisting of all persons or other entities who were charged and who paid a Document Preparation Fee to Defendant in Missouri in connection with their purchase, lease or servicing of a boat or other personal property from Defendant” (Rels’ Br. A54). Relators claimed that the proposed class consisted of “thousands of Customers who purchased or leased from Defendant in the State of Missouri” (Rels’ Br. A54).

Relators asserted five class claims in the Original Petition: (I) damages for violation of RSMo. § 484.010; (II) damages for violation of RSMo. § 407.010; (III) money had and received; (IV) negligence per se; and (V) negligence (Rels’ Br. A55-60). Relators also asserted a claim (Count VI) for “rescission/revocation” of their boat purchase due to certain alleged defects (Rels’ Br. A60-61). Relators did not seek class treatment of Count VI (Rels’ Br. A60-61).

On January 30, 2009, Relators amended their Class Action Petition by interlineation (Rels' Br. A779-80). Relators asserted in their Amendment by Interlineation that "all transactions which form the basis of Plaintiffs' class action cause of action herein occurred within the State of Missouri" (Resp's Br. A1).

Outdoor World filed its Motion to Transfer Venue and Suggestions in Support of Motion to Transfer Venue on or about March 11, 2009 (the "Venue Motion") (Rels' Br. A63-74). Outdoor World argued in the Venue Motion that a forum selection clause in the purchase agreement through which Relators purchased their boat required this case to be litigated in Greene County, Missouri (Rels' Br. A63-74). Outdoor World highlighted that the forum selection clause applied to claims related to the "repair and/or maintenance of the vessel" (Rels' Br. A64, A71-72). Outdoor World did not reference or analyze the purchase agreement's choice-of-law clause anywhere in the Venue Motion.

Relators filed their Legal Memorandum in Opposition to the Venue Motion on or about April 6, 2009 (Resp's Br. A3-9). Relators argued that the terms of their purchase agreement with Outdoor World should not be enforced because the purchase agreement was an "adhesion contract" (Resp's Br. A4).

On April 15, 2009, the Circuit Court of St. Charles County entered an Order reading: "Defendant's Motion to Transfer Venue is Sustained. Venue is transferred to Greene County, Missouri" (Rels' Br. A88-89). The Circuit Court of St. Charles County did not make any factual or legal findings related to its Order or offer any further explanation for its decision.

B. Relators' Second Amended Petition Adding TMBC, LLC as a Defendant and Requesting a Nationwide Class

Relators filed their Second Amended Class Action Petition on or about May 28, 2009 (the "Second Petition") (Rels' Br. A629-643). Relators added TMBC, LLC ("TMBC") as a defendant in the Second Petition (Rels' Br. A629). Relators also requested in the Second Petition, for the first time, that the class include not only those who were charged Document Preparation Fees within the State of Missouri, but also those whose transactions were "governed by Missouri law" as a result of "agreements containing a Missouri choice of law provision" (Rels' Br. A631).

Outdoor World and TMBC filed their Motion to Limit Discovery to Missouri Transactions and Suggestions in Support on November 6, 2009 (the "Motion to Limit Discovery") (Rels' Br. A75-87). Outdoor World and TMBC argued that discovery should be limited because Missouri law did not apply to transactions that occurred in other states for various reasons (Rels' Br. A75-87). Outdoor World and TMBC did not reference or analyze the purchase agreement's forum selection clause anywhere in the Motion to Limit Discovery.

C. Relators' Third Amended Petition Adding Tracker Marine Retail, LLC as a Defendant and Respondent's Class Certification Order

Relators filed their Third Amended Class Action Petition on January 28, 2010 (the "Third Petition") (Rels' Br. A644-660). Relators added Tracker Marine Retail, LLC as a defendant in the Third Petition (Rels' Br. A644). All counts on

which Relators seek class certification in their Third Petition are premised on allegations that defendants charged fees for the preparation and/or processing of documents in connection with “the purchase and/or lease of a boat, boat trailers, boating accessories, motors, all terrain vehicles (“ATVs”), and/or other goods” (Rels’ Br. A644-659).

On July 8, 2010, Relators filed their First Amended Motion for Court Order Certifying Nationwide Class Action and Appointing Class Counsel (Rels’ Br. A90-178). Respondent granted Relators’ Motion on January 24, 2011 (Rels’ Br. A251-52).

Relators subsequently filed their Petition for Permission to Appeal Order Granting Class Certification in the Missouri Court of Appeals, which the Court of Appeals denied on February 22, 2011 (Rels’ Br. A275).

Relators filed their Petition for Writ of Prohibition and Mandamus in this Court on April 1, 2011 (Rels’ Br. A276-282). In their Petition, Relators stated, without qualification, that “Respondent, in certifying a class action, abused its discretion” (Rels’ Br. A277).

II. TMBC’s Dealership Locations and Business Practices

TMBC operates boat dealerships in 28 states and two Canadian provinces (Resp’s Br. A91). As Relators point out, those states include Missouri, Alabama, Florida, Indiana, Colorado, New York, Kansas, Texas, Ohio, Kentucky, Georgia, and Oklahoma (Rels’ Br. A1-50).

Each retail location where TMBC does business is licensed and regulated by the state where it is located, and TMBC's dealerships comply with the laws of the states where they are located for purposes of their transactions (Resp's Br. A91). In some states where TMBC operates dealerships, TMBC is specifically allowed to charge documents fees (Resp's Br. A91). In some states where TMBC does business, TMBC is required to collect the fees associated with licensing and registering boats and then directly arrange and pay for such licensing and registration with the appropriate authorities or agencies on behalf of its customers (Resp's Br. A91). The laws relating to the titling and registration of boats differ for each state (Resp's Br. A65-66, A91).

ARGUMENT

I. Standard of Review for All Points

A plaintiff bears the burden of proof of establishing the requirements for maintaining a class action under Rule 52.08 of the Missouri Rules of Civil Procedure. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 878 (Mo.banc 2008); *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 379 (Mo.App. 2005). “A class certification hearing is a procedural matter in which the sole issue is whether plaintiff has met the requirements for a class action.” *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo.banc 2007).

“This Court reviews an order granting or denying class certification for abuse of discretion.” *Id.* An abuse of discretion concerning class certification occurs only when a “ruling is so arbitrary and unreasonable as to shock one’s sense of justice and indicate a lack of careful consideration. It cannot be said that the trial court abused its discretion where reasonable persons could differ with the propriety of its ruling.” *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 221 (Mo.App. 2007) (quoting *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo.App. 2000) (citations and internal quotation marks omitted in original)).

Because judicial estoppel is an equitable doctrine to be applied in the trial court’s discretion, decisions on whether to apply judicial estoppel are also reviewed for abuse of discretion. *Kane v. Nat’l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008).

II. Respondent Correctly Refused To Certify A Nationwide Class, Because Common Issues Do Not Predominate, In That Judicial Estoppel Does Not Apply to Require Application of Missouri Law to Relators' Nationwide Class Claims.

(Responds to Point II)

New Hampshire v. Maine, 532 U.S. 742 (2001)

Owens v. ContiGroup Cos., 2011 WL 1118665 (Mo.App. Mar. 29, 2011)

18B Wright & Miller, Fed Prac. & Proc. § 4477 (2d ed. 2002)

Relators argue that defendants are “judicially estopped” from asserting that Missouri law does not apply to Relators’ class claims on a nationwide basis. Relators claim that defendants cannot contest nationwide application of Missouri law because of a previous position taken in this lawsuit on a motion in response to the Original Petition and unrelated to class certification, but which Relators nonetheless assert is “exactly what judicial estoppel prohibits.” (Rels’ Br. 17). Relators argue that Respondent abused his discretion in refusing to apply judicial estoppel.

Relators’ argument is not supported by the facts or the law. Judicial estoppel does not apply in this case. Relators have not established—because they cannot establish—*any* of the factors requiring the application of judicial estoppel. Further, even if they had, judicial estoppel does not apply because defendants’ allegedly inconsistent positions were both taken within the same lawsuit.

A. Standard for Application of Judicial Estoppel

Courts generally apply three factors when determining whether to apply judicial estoppel:

First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled" A third consideration is whether the party . . . would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations omitted).

Courts around the country, including Missouri courts, have followed the *New Hampshire* judicial estoppel framework. See, e.g., *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo.App. 2007); *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 140 (Mo.App. 2011).

In applying these three factors, courts routinely hold that judicial estoppel must be applied "with caution," and only "in the narrowest of circumstances." *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996); *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004) (judicial estoppel "should be applied with caution"); *Bradford v. Wiggins*, 516 F.3d 1189, 1194 n.3 (10th Cir. 2008) (judicial estoppel should be applied "narrowly and cautiously"); *G.M. Morris Boat Co. v.*

Bishop, 631 S.W.2d 84, 88 (Mo.App. 1982) (equitable estoppel, of which judicial estoppel is one form, “will not be lightly invoked”). Judicial estoppel must be applied “cautiously” and “narrowly” because of the “harsh results attendant with precluding a party from asserting a position that would normally be available to the party.” *Bradford*, 516 F.3d at 1194 n.3; *Lowery*, 92 F.3d at 224; *Spann v. DynCorp Tech. Servs., LLC*, 403 F.Supp.2d 1082, 1086 (M.D.Ala. 2005); *Davis v. McCarter*, 569 F.Supp.2d 1201, 1203 (D.Kan. 2008).

Here, the positions taken by defendants are not inconsistent because the underlying legal and factual contexts of the positions differed greatly, there is no evidence to suggest that the Circuit Court of St. Charles County or Respondent accepted Outdoor World and defendants’ allegedly inconsistent positions such that any court was misled, and defendants do not derive an unfair advantage nor do Relators suffer an unfair detriment if defendants are not judicially estopped. Judicial estoppel therefore does not apply, and Respondent did not abuse his discretion in entering the Class Certification Order.

B. Because the Allegedly Inconsistent Positions Taken By Defendants Involved Different Facts, Different Issues, and a Different Legal Context, They Are Not Clearly Inconsistent and Irreconcilable.

Inconsistency is “the basic element” involved in any claim of judicial estoppel. 18B Wright & Miller, Fed Prac. & Proc.. § 4477 (2d ed. 2002). It is not sufficient that the inconsistency be arguable; rather, the positions taken must be

“clearly” inconsistent. *New Hampshire*, 532 U.S. at 750. Relators acknowledge that judicial estoppel only prevents parties from making “clearly inconsistent judicial representations.” (Relators’ Brief 11).

Courts must “carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction.” *Rodal v. Anesthesia Group, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004); *see also Fletcher*, 337 S.W.3d at 143 (“not all inconsistent positions in litigation constitute ‘clearly inconsistent’ positions”). Any “doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits.” 18B Wright & Miller, *Fed Prac. & Proc.* § 4477 (2d ed. 2002) (citing *Franco v. Selective Ins. Co.*, 184 F.3d 4, 8-9 (1st Cir. 1999)).

1. The Positions Taken By Defendants Involved Different Facts

Because the inconsistency required to apply judicial estoppel must be “clear” and “irreconcilable,” the allegedly inconsistent positions must be based on the same facts. *See Himel v. Continental Ill. Nat’l Bank*, 596 F.2d 205, 210 (7th Cir. 1979) (“judicial estoppel precludes a party from advocating a position inconsistent with one previously taken with respect to the *same facts* in an earlier litigation”) (emphasis added) (internal quotes omitted); *Donovan v. U.S.P.S.*, 530 F.Supp. 894, 902 (D.C.D.C. 1981) (same); *Holmes Group, Inc. v. Federal Ins. Co.*, 2005 WL 4134556 (D.Mass. 2005) (“[A]n essential element of judicial

estoppel [is] a common set of facts”) (internal quotes omitted); *Schor v. Abbott Labs.*, 378 F.Supp.2d 850, 853 n.2 (N.D. Ill. 2005) (“judicial estoppel prevents a party that has taken one position in litigating *a particular set of facts* from later reversing its position”) (emphasis added); *Van Deurzen v. Yamaha Motor Corp.*, 688 N.W.2d 777, 780 (Wis.App. 2004) (the application of judicial estoppel requires that “the facts at issue are the same”).

Here, in addition to the different language and scope of the two clauses, the factual allegations made by Relators differed fundamentally when the allegedly inconsistent statements were made. Outdoor World’s venue argument was made in response to Relators’ Original Petition (as amended by interlineation), at which time Relators (Missouri residents) were asking for a Missouri class action for transactions that took place entirely within Missouri. Relators indeed expressly limited their Amendment by Interlineation to transactions which “occurred within the State of Missouri.” (Resp’s Br. A1). Of course only Missouri law could have applied to Relators’ unauthorized practice of law claims based on the allegations at that time. The choice-of-law clause was not at issue in any way and was not even referenced in Outdoor World’s filings. Outdoor World could not have foreseen that the choice-of-law clause would ever be at issue and could not have intended to mislead anyone about the application of the different choice-of-law language.¹

¹ Many courts have imposed the additional requirement that the party to be judicially estopped must have acted with the intent to mislead. *E.g.*, *McNemar v.*

It was only later that Relators amended their petition, requesting a nationwide class, and raising for the first time the question of whether the choice-of-law clause applied to the unauthorized practice of law in other states. Because Outdoor World's original statement was made in the context of a venue question in a Missouri-only class action, it cannot be interpreted to be identical and irreconcilable with a statement made in the context of a choice-of-law question in a nationwide class action.

It is in this respect that Relators' reliance on *Fletcher* is misplaced. In *Fletcher*, a candidate for public office (Fletcher) claimed that he met certain

Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996) (part of threshold inquiry for application of judicial estoppel is whether party to be estopped "assert[ed] either or both of the inconsistent positions in bad faith- i.e., with intent to play fast and loose with the court"); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358, 362 (3d Cir. 1996) (judicial estoppel doctrine "not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts"; inconsistency "must be attributable to intentional wrongdoing"); *In re Cassidy*, 892 F.2d 637, 642 (7th Cir. 1990) (judicial estoppel should be applied to "intentional self-contradiction"); *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) (judicial estoppel "looks toward cold manipulation and not an unthinking or confused blunder").

residency requirements because he had resided in Kansas City for a period of several years. Conversely, Fletcher had repeatedly and expressly stated in court filings that he was “domiciled in California” for the exact same time period. The Western District Court of Appeals found, based on these facts, that Fletcher’s representations were clearly inconsistent and applied judicial estoppel to stop his candidacy. 337 S.W.3d at 141. Central to this holding was the fact that “a person can have but one domicile,” but that Fletcher had represented under oath that he resided (was domiciled) in both California and Missouri during the exact same time period. *Id.* at 141-42. In other words, the underlying factual background (Fletcher’s actual place of residence) was the same at all times, but Fletcher’s representations were inconsistent.

The other cases cited by Relators fare no better, for not one of them involved a situation where, as here, the underlying facts fundamentally changed between the allegedly inconsistent statements. This is a critical omission from Relators’ analysis—an omission that precludes the application of judicial estoppel under established case law.

2. The Positions Taken By Defendants Involved Different Issues and a Different Legal Context.

The “legal context” under which the allegedly inconsistent positions were taken must also “be the same.” *Harrison v. Labor & Indus. Review Comm’n*, 523 N.W.2d 138, 141 (Wis.App. 1994); *see also D&H Therapy Assocs. v. Murray*, 821

A.2d 691, 693-94 (R.I. 2003); *Olmsted v. Emmanuel*, 783 So.2d 1122, 1126 (Fla.App. 2001) (for judicial estoppel to apply, “the same issues must be involved”); *Wright v. City of Dallas*, 1994 WL 416754 at *5 (Tex.App. 1994) (not designated for publication) (to invoke judicial estoppel, the parties must “show that the condemnation suit actually litigated the same issue as in our present case”).

The case of *O-Ton-Kah Park Property Owner's Ass'n, Inc. v. State Dept. of Natural Resources*, 604 N.W.2d 34, 1999 WL 714868 (Wis.App. 1999) (unpublished opinion) (may be cited for precedential value), illustrates the requirement of a common legal context. In *O-Ton-Kah*, a property owner's association applied for a pier permit from the Department of Natural Resources (“DNR”). In prior litigation regarding a related issue (the “*Stoesser* litigation”), the association had argued that it did not have the right to erect a pier. *Id.* at *1. The DNR argued that the association was judicially estopped from arguing entitlement to a pier because it had affirmatively stated in a brief in the *Stoesser* litigation that it did not have the right to erect a pier. *Id.* at *2. The court disagreed, holding that the *Stoesser* court “did not consider the (exact) issue,” and that the association therefore “did not convince the *Stoesser* court of any position regarding pier rights.” The court held that application of judicial estoppel was therefore “inappropriate.” *Id.*

Similarly, Outdoor World did not claim in the Venue Motion that the choice-of-law clause applied to non-contract claims and therefore Outdoor World

did not convince the Circuit Court of St. Charles County of any position regarding the purchase agreement's choice-of-law clause. Rather, Outdoor World only argued that the forum selection clause found in the purchase agreement should apply—and by its terms it explicitly did apply to Count VI's claim for rescission/revocation of Relators' boat purchase due to certain alleged defects. Defendants' subsequent argument of which Relators complain was that the differently-worded choice-of-law clause found in the purchase agreement should not apply to Relators' then-nationwide class claims. Due to their refusal to acknowledge the difference between these legal contexts, Relators incorrectly argue that these two positions are “clearly inconsistent” and accuse defendants of “playing fast and loose with the judiciary.”²

While both are located in the purchase agreement, the forum selection clause and the choice-of-law clause are different. The choice-of-law clause provides: “THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI.” The forum selection clause provides: “The venue for any action or proceeding arising from this Agreement

² The question would be very different if in one case defendants argued that the choice-of-law clause applied to the unauthorized practice of law but in this case took the opposite position. But defendants have never taken the position that document fees or the unauthorized practice of law are governed by Missouri law, no matter where the dealer is located.

(including any claim, action or proceeding relating to any service, repair and/or maintenance of the vessel, whether made prior or subsequent to the delivery of the Bill of Sale) shall be in Greene County, Missouri.”

In their choice-of-law briefing, defendants argued that the narrow choice-of-law clause does not contain the “concise language” required by *Service Vending Co. v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764 (Mo.App. 2002) and *Jitterswing, Inc. v. Francorp, Inc.*, 311 S.W.3d 828 (Mo.App. 2010) in order for it to apply to Relators’ non-contractual class claims. In Outdoor World’s Motion to Transfer Venue, it argued that the forum selection clause applies to Relators’ claims, and in particular Count VI. These two arguments are not clearly inconsistent as the language and scope of the choice-of-law clause and forum selection clause are different and allow for different interpretations.

This was particularly true when Outdoor World filed its Venue Motion. *Jitterswing* had not been issued at that time, and this Court had not (and still has not) opined on the application of the term “arising from” in a forum selection or choice-of-law clause. Given that numerous courts around the country have held that “arising from” is an indication of breadth in such provisions,³ Outdoor

³ See, e.g., *Merchant E-Solutions, Inc. v. Community State Bank*, 2008 WL 509329 (N.D. Cal. 2008) (concluding that the term “arising out of” was broad enough to encompass a claim for declaratory relief); *Buffet Crampon S.A.S. v. Schreiber & Keilwerth*, 2009 WL 3675807 (N.D. Ind. 2009) (clauses using language such as

World's suggestion that Relators' claims (including Count VI) arose from the purchase agreement and defendants' subsequent suggestion that Relators' class claims did not are not clearly inconsistent. In these varying legal contexts, and considering the different legal issues involved, judicial estoppel simply cannot apply.⁴ See 18B Wright & Miller, Fed Prac. & Proc. § 4477 (2d ed. 2002) ("application of judicial estoppel to the law elements of prior positions must take care to recognize that seeming inconsistencies may be explained by the different legal standards that may masquerade under similar legal expressions. Positions

"arising from" are broad); *America's Collectibles Network, Inc. v. Chase Paymentech Solutions, LLC*, 2008 WL 4546251 (E.D. Tenn. 2008) ("relating to or arising from" are "broad terms").

⁴ If defendants had stated that the unauthorized practice of law claims in other states were not covered by the purchase agreement's choice-of-law clause as opposed to stating that they did not "arise from" the purchase agreement, there would not even be an issue about judicial estoppel. However, that is the import of the argument that the unauthorized practice of law claims did not arise from the contract for purposes of the choice-of-law analysis. This emphasizes the importance of the requirement that the legal and factual contexts of the statements must be exactly the same—a question of semantics should not deprive a party of having a claim decided on the merits.

taken under one body of law may not be inconsistent with positions taken under a different body of law”).

3. Outdoor World Cannot Be Estopped With the Choice-of-Law Analysis Under Section 187 of the Restatement (Second) Conflict of Laws

Nothing said by Outdoor World in the Venue Motion is inconsistent with, or has anything to do with, the choice-of-law analysis under Section 187 of the Restatement (Second) Conflict of Laws. As described in Point III below, under Section 187, even assuming claims based on the unauthorized practice of law arise from the purchase agreement, the choice-of-law clause will not be applied if the “application of the law of the chosen state would be contrary to a fundamental policy” of a state law that would otherwise apply. Fundamental policies are found in state constitutions, statutes, and regulations. If, as here, application of a choice-of-law clause would violate fundamental policies, it cannot be enforced even if the choice-of-law clause otherwise covers the issue.

No statement in Outdoor World’s Venue Motion implicates this analysis in the slightest. Outdoor World never made any representation in the Venue Motion about what is and is not a fundamental policy in other states. A forum selection clause requires no such analysis, as the judge in the forum with proper venue must make an independent assessment of the choice-of-law issues. Thus, Outdoor World’s venue position cannot—as a matter of law—be inconsistent with any position defendants took with respect to the Section 187 analysis. In other words,

even if this Court finds that any defendant is judicially estopped from arguing that the choice-of-law language is narrow and does not apply by its terms to the unauthorized practice of law claims, the Section 187 analysis is not affected and serves as an independent basis not to disturb Respondent's certification decision.

C. Relators Similarly Have Not Met Their Burden of Establishing That the Circuit Court of St. Charles County "Accepted" Outdoor World's Position in the Venue Motion or That Respondent Accepted Defendants' Allegedly Inconsistent Position, and Therefore No Evidence Exists That Any Court Was Misled.

Under the second judicial estoppel factor, "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Fletcher*, 337 S.W.3d at 140; *New Hampshire*, 532 U.S. at 750-51. The United States Supreme Court has explained the significance of the success factor as follows: "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.* (internal quotes omitted); *see also Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) ("The requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position. Absent judicial acceptance of the

inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists”); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (a prerequisite to the application of judicial estoppel is that the party to be estopped must have “convinced the court to accept its position in the earlier litigation”).

The cases cited by Relators do not discuss what constitutes “acceptance” of a party’s position. However, the case law is clear that “acceptance” requires that the previous court “rely” on the allegedly inconsistent assertion in making its decision. *Interstate Fire & Cas. Co. v. Underwriters*, 139 F.3d 1234, 1239 (9th Cir. 1998); *see also Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 1998) (“Judicial estoppel applies to protect the integrity of the courts—preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it”); *Guidance Endodontics, LLC v. Dentsply Intern.*, 2010 WL 4054115, *15 (D.N.M. 2010) (the position previously taken must have been “the basis for (the) ruling”) (emphasis added); *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859-860 (Del. 2008) (“Judicial estoppel operates only where the litigant contradicts another position that the litigant previously took *and* that the Court was successfully induced to adopt in a judicial ruling”) (emphasis in original).

The question thus becomes what it means for a court to “rely” on a party’s position. Although it appears that no Missouri case has expressly considered this issue, courts in other jurisdictions have. In *Teledyne Industries, Inc. v. N.L.R.B.*,

911 F.2d 1214, 1218 (6th Cir. 1990), for example, the Sixth Circuit Court of Appeals refused to apply judicial estoppel because the court order at issue lacked any findings of law or fact to suggest that the court actually relied on the statement at issue. Similarly, in *United Steelworkers of Am. v. Retirement Income Plan*, 512 F.3d 555, 563-64 (9th Cir. 2008), the court found that judicial estoppel did not apply because “the district court never *held*” the allegedly inconsistent position urged by the party. (emphasis in original).

Indeed, courts regularly hold that a party seeking to invoke judicial estoppel must provide “evidence” or a “showing” of why a court ruled the way it did to establish the required “acceptance” of the allegedly inconsistent position. See *Mulvaney Mech., Inc. v. Sheet Metal Workers*, 288 F.3d 491, 504-05 (2d Cir. 2000), *vacated on other grounds* in 288 F.3d 491 (2d Cir. 2002), (“Judicial estoppel is inappropriate without a showing that the prior tribunal adopted the original representations”); see also *Allied Tube & Conduit Corp. v. John Maneely Co.*, 125 F.Supp.2d 987, 999-1000 (D.Ariz. 2000) (declining to apply the doctrine of judicial estoppel as a bar because the party asserting the doctrine had “not offered evidence” that the court in the prior proceedings had actually adopted the prior assertion or conclusions at issue).

In re Miller, 154 B.R. 987 (Bankr. N.D.Fla. 1993), is particularly instructive on this point. *Miller* involved the dischargeability in bankruptcy of a husband’s \$75,000 obligation to his former wife arising from the dissolution of

their marriage. The wife took the position that the obligation was in the nature of “alimony, maintenance or support,” and therefore nondischargeable. The husband claimed that the wife was judicially estopped because of statements she made to the contrary in earlier state court proceedings. The husband cited several instances wherein the wife characterized the \$75,000 obligation as property division including a deposition and several affidavits and pleadings submitted in a civil contempt proceeding brought by the wife for support arrearage, a proceeding in which the wife apparently prevailed. The court found that judicial estoppel did not apply, holding:

In this case [husband’s] argument is fatally flawed in that he has failed to satisfy the elements necessary to invoke judicial estoppel.

In short, [husband] has failed to demonstrate that any of the conflicting statements were ever relied upon by the state court in any material respect when making its civil contempt determination.

Id. at 991.

On the contrary, speculation about why a court ruled the way it did simply is not sufficient to find that the court “accepted” an assertion for purposes of applying the judicial estoppel doctrine. *See In re Coastal Plains, Inc.*, 179 F.3d 197, 207 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000) (judicial estoppel does not apply where it is not possible to determine whether the initial court relied on a previous inconsistent statement in rendering its decision), *see also United*

States v. Levasseur, 846 F.2d 786, 794 (1st Cir. 1988), *cert. denied*, 488 U.S. 894 (1988) (rejecting “pure surmise” about what prior court might have accepted as a basis for judicial estoppel).

Three rules thus emerge from these cases to prove the required “acceptance” of a party’s allegedly inconsistent position: (1) simply making an inconsistent statement is not enough; (2) there must instead be “evidence” or a “showing” that a court actually based its decision on or relied on the allegedly inconsistent statement; and (3) it is the party seeking to invoke judicial estoppel that bears the burden of providing the required evidence. These rules are of course in line with the well-established stringent application of judicial estoppel.

Relators’ judicial estoppel claim utterly fails under this framework. Although Relators argue that Outdoor World “succeeded in persuading the court to accept its earlier position,” and “received the benefit” of the earlier position, Relators offer no evidence or a showing of the earlier court’s reliance.

Relators do not offer this evidence because it does not exist. The Circuit Court of St. Charles County analyzed the forum selection clause (which is different than the choice-of-law clause) and the facts presented to it and determined that the forum selection clause applied to at least some portion of Relators’ original, Missouri-only petition. The Circuit Court of St. Charles County did not issue any findings or an opinion to suggest why it ruled; its Order simply stated: “Defendant’s Motion to Transfer Venue is Sustained. Venue is

transferred to Greene County, Missouri” (Rels’ Br. A89). This Order, which Relators have not challenged, is not evidence of judicial acceptance of defendant Outdoor World’s allegedly inconsistent position in light of the separate and independent factual basis (Count VI’s rescission/revocation claim) that supported the court’s ruling. Thus, unless Relators are engaging in “mind reading” of the Circuit Court of St. Charles County, their judicial estoppel argument is supported by nothing more than their own self-serving speculation that the court “accepted” Outdoor World’s position.

Nor do Relators establish that Respondent accepted defendants’ allegedly inconsistent position in refusing to certify a nationwide class. Respondent did not explain why he limited the Class Certification Order to Missouri transactions and, as described below, the analysis under Section 187 of the Restatement provides an independent basis not to apply Missouri law to Relators’ class claims. There is no evidence that Respondent limited the class due to the statement made by Outdoor World about whether non-contract claims arise from the purchase agreement.

Under established case law, Relators’ speculation about why the Circuit Court of St. Charles County and Respondent ruled the way they did simply is not enough to establish reliance on Outdoor World and defendants’ positions. Relators have not met their burden of establishing judicial acceptance of an allegedly inconsistent position. Relators can hardly claim that Respondent abused his discretion absent that evidence.

D. Defendants Will Not Derive an Unfair Advantage and No Party Will Suffer an Unfair Detriment If Defendants Are Not Estopped.

The final factor to consider in applying judicial estoppel is whether a party will derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. at 750-51. Relators notably provide no analysis in either their cases or their argument of what constitutes an “unfair advantage” or an “unfair detriment.” Relators nevertheless claim that this factor is satisfied because defendants have been “rewarded for contradictory representations related solely to their current financial interests” (Relators’ Brief 17). Relators also argue (presumably as an unfair detriment) that “out-of-state purchases (sic) face the irreparable harm of having no practical remedy given (a) the amount of individual money at issue, and (b) that many customer claims will likely be barred by the statute of limitations” (Rels’ Br. 16). This makes no sense and is also untrue. A nationwide class will be certified or not, but the statements made by Outdoor World in connection with Venue Motion, and the venue decision, have no impact on the class certification decision.

Judicial estoppel is imposed to prevent “successful assertion of inconsistent positions (which) may impose multiple liability on an adversary or defeat a legitimate right of recovery.” 18B Wright & Miller, Fed Prac. & Proc. § 4477 (2d ed. 2002). The purpose of judicial estoppel is therefore to prevent a party from gaining something as a result of inconsistent positions. The purpose is not to create additional rights for the adverse party.

These purposes are not served by applying judicial estoppel here. As defendants are not pursuing any claims in this case, there is no possibility that multiple liability will be imposed on Relators or any other party if defendants are not judicially estopped. Further, no legitimate right of recovery will be defeated for either Relators or any other class members. Relators did not seek an extraordinary writ to prohibit the transfer of this case to Greene County, *see State ex rel. Missouri Public Service Comm'n v. Joyce*, 258 S.W.3d 58 (Mo.banc 2008), or ask any court to reconsider the venue ruling, and have not otherwise suggested that the Circuit Court of St. Charles County's Order on the Venue Motion was improper. Further, Respondent considered class certification (and will consider the merits) just as the Circuit Court of St. Charles County would have. There is no reason to believe, and Relators do not argue, that the Circuit Court of St. Charles County would have made a different ruling about class certification.

Before Relators can claim that out-of-state purchasers have suffered an unfair detriment, there must first be an independent, legally-cognizable basis for a nationwide class action. If Relators' only basis for a nationwide class action is judicial estoppel, then those out-of-state purchasers had no legitimate right to classwide certification. In other words, out-of-state purchasers had to first have a right to be a part of Relators' requested class in order to have suffered an unfair detriment. If there is no independent basis for a nationwide class action, then even accepting all of Relators' other arguments as true, no one has been disadvantaged, and Relators cannot invoke judicial estoppel to create additional rights.

E. Judicial Estoppel Does Not Apply Because Defendants' Allegedly Inconsistent Positions Were Taken Within the Same Lawsuit.

Under Missouri law, judicial estoppel “applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time.” *Shockley v. Dir*, 980 S.W.2d 173, 175 (Mo.App. 1998) (quoting *Jensen v. Jensen*, 877 S.W.2d 131, 135 (Mo.App. 1994))(emphasis added). In the recent case of *Owens v. ContiGroup Cos.*, 2011 WL 1118665 (Mo.App. Mar. 29, 2011), the court considered whether judicial estoppel applies to allegedly contradictory positions taken before a trial court within the same judicial proceeding. The court held that the judicial estoppel doctrine prevents litigants from “deriving a benefit by taking contradictory positions at different judicial *proceedings*.” *Id.* at *7 (emphasis in original). The court found “unpersuasive” the arguments that judicial estoppel should apply to positions taken within the same litigation, concluding that “where, as in the case at bar, there has been no outcome but rather a single case in process, judicial estoppel should not be used to hamstring the judge’s discretion.” *Id.*; see also, e.g., *Fletcher*, 337 S.W.3d at 143 (judicial estoppel prevents parties from taking clearly inconsistent positions in “two separate legal actions”); *Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo.App. 1998) (judicial estoppel prevents litigants from taking a position “in one judicial proceeding” and later taking a contrary position “in a second proceeding”). These decisions are confirmed by at

least one noted treatise, which suggests that any judicial estoppel analysis must “come to terms with the well-entrenched principle that modern procedure welcomes inconsistent positions in the course of a single litigation.” 18B Wright & Miller, *Fed Prac. & Proc.* § 4477 (2d ed. 2002).

And these holdings make good policy sense. In the course of a single lawsuit, a court’s rulings are subject to both its own further review and appellate review. Thus, a decision (such as the Circuit Court of St. Charles County’s Order on the Venue Motion) may be reconsidered or ultimately reversed. If judicial estoppel were applied in such a case, a party would then be estopped from asserting a position inconsistent with one that was not even ultimately successful. Such a result would fly directly in the face of the purposes of the judicial estoppel doctrine. *See In re Parker*, 204 Fed.Appx. 598, 600 (9th Cir. 2006), *cert. denied* 552 U.S. 940 (2007) (necessarily requiring separate lawsuits in noting that a position may “ultimately (be) rejected on appeal,” and in such a case a “party may advance an alternative theory in future proceedings with no risk of inconsistent court determinations”); *Coal Res., Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 773 (6th Cir. 1989) (refusing to apply judicial estoppel to a party who asserted inconsistent positions in separate trial because the first trial verdict was reversed on appeal thus did not satisfy the success requirement).

The *Owens* court was therefore correct in finding “unpersuasive” the arguments that judicial estoppel should apply to positions taken within the same litigation. As in *Owens*, the allegedly inconsistent positions taken by Outdoor

World and defendants were all part of a “single case in process.” This alone precludes the application of judicial estoppel.

F. Relators’ Own Statements Confirm That Judicial Estoppel Does Not Apply.

In response to Outdoor World’s Venue Motion, Relators argued that the terms of their purchase agreement with Outdoor World should not be enforced because the purchase agreement was an “adhesion contract.” In their writ application filed in this Court, Relators made the straightforward, stand-alone statement that “Respondent, in certifying a class action, abused its discretion.”

Under Relators’ myopic judicial estoppel theory, which ignores the context of a party’s argument, these statements should now preclude Relators from requesting a class action in this case based on the purchase agreement’s choice-of-law provision. Following Relators’ logic, because they argued that the purchase agreement is unenforceable, and because they have stated that Respondent erred in certifying this case as a class action, they are barred from arguing otherwise and estopped from pursuing a class action.

This of course illustrates why judicial estoppel does not apply to Outdoor World and defendants’ arguments. In complex litigation involving hundreds of pages of briefing, one can almost always find statements which, if read in isolation, could be viewed as inconsistent. That is why application of the judicial estoppel doctrine requires an analysis of the context, underlying facts, and

background of a party's argument, for the positions taken must be "clearly inconsistent" and "irreconcilable."

III. Respondent Correctly Refused To Certify A Nationwide Class, Because Common Issues Do Not Predominate, In That Parties May Not Contract As To The Legality of Document Preparation Fees And Application Of The Missouri Choice-of-Law Provision Would Violate The Fundamental Policies Regulating the Practice of Law And Dealerships In Each TMBC Dealership Location.

(Responds to Point III)

State ex rel. American Family Mutual Ins. Co. v. Clark, 106 S.W.3d 483

(Mo.banc 2003)

Eisel v. Midwest BankCentre, 230 S.W.3d 335 (Mo.banc 2007)

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo.banc 1992)

Brack v. Omni Loan Co., 80 Cal. Rptr.3d 275 (Cal.App. 2008)

Section 187 of the Restatement (Second) Conflict of Laws

Section 301.558, RSMo.

Section 484.020, RSMo.

Turning to the merits of Relators' nationwide class claims, Relators next argue that Respondent erred in limiting his Class Certification Order to Missouri transactions because "defendant's (sic) choice of law clause...promises and requires application of Missouri law." This argument lacks merit because the claims on which Relators seek nationwide certification—all based on whether document fees amount to the unauthorized practice of law—involve issues where

the laws vary greatly by state, and which are governed by fundamental policies of other states where defendants do business. The narrow choice-of-law provision cannot trump those fundamental policies. Relators have accordingly failed to establish that the Class Certification Order “shocks one’s sense of justice” or “indicates a lack of careful consideration,” such that Respondent abused his discretion.

A. Absent Application of the Contractual Choice-of-Law Clause, Common Issues Do Not Predominate, In That the Laws of the States Where TMBC Does Business Vary Widely on the Legality of Document Preparation Fees.

A multistate class action is the exception rather than the rule. *State ex rel. American Family Mutual Ins. Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo.banc 2003), involved a putative class of automobile policy holders who purchased policies from American Family in 14 states. Following an eight-day hearing, the trial court certified the class. On a petition for writ of prohibition, this Court first noted that “many courts that have addressed the issue conclude that the application of varying state laws not common to the class precludes class certification.” *Id.* at 486-87. This Court then noted that the laws of the states applicable to the proposed class “certainly vary,” to the extent that a “kaleidoscope of rules” was at play:

When class claims are governed by the laws of multiple states, it becomes more difficult for the class to show that questions of law common to the class exist

The record below establishes no Missouri interest in the application of the insurance law of foreign states to their own citizens, neither does the record establish how the application of the laws of fourteen states would be “common” to the class.

Id. at 486, 487.

This Court concluded that the trial court abused its discretion in certifying a class of insureds whose contracts were subject to the laws of states other than Missouri. *Id.* at 487.

As more fully described in Sections C1-C3 below, state laws vary greatly on the question of whether charging document preparation fees amounts to the unauthorized practice of law. Although this Court, in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo.banc 2007), held that the charging of document fees constitutes, in certain circumstances, the unauthorized practice of law, this is far from a universal rule. Because the laws of all states where TMBC⁵ does

⁵ Defendants contend that only defendant TMBC was involved in the transactions at issue, including charging and collecting the document preparation fees. TMBC operates stores in various jurisdictions (Rels’ Br. A1-50), and each store is licensed to do business in the jurisdiction in which it is located and complies with the statutes and regulations of the licensing state (Resp’s Br. A91).

business must be applied, there is little question that a “kaleidoscope of rules” is at play, precluding nationwide class certification under *American Family*.

B. The Choice-of-Law Clause Does Not Apply to Determine Whether Document Preparation Fees Amount to the Unauthorized Practice of Law in that the Legitimacy of Such Fees Is Not Subject to Contract.

The choice-of-law clause provides: “GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI.” (Rels’ Br. A2) (emphasis added). Although Relators argue that this clause is “broad,” Relators do not cite a single Missouri case supporting their argument that this language should be construed to cover all claims, contractual and non-contractual, of every potential class member. This is for the simple reason that Missouri law does not support Relators’ position, and the choice-of-law clause should not be construed to apply to non-contract claims of potential class members.

In *Service Vending Co. v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764 (Mo.App. S.D. 2002), the court refused to enforce a forum selection clause designating Arkansas as the forum “In the event litigation arises between Wal-Mart and [SVC] due to this Agreement” in a suit for tortious interference with business expectancy:

Existence of a forum selection clause in a contract that requires contractual disputes to be litigated in Arkansas courts does not require tort claims between the parties to be litigated in that jurisdiction absent concise language to that effect. A forum

selection clause in a contract does not control the site for litigation of a tort claim simply because the dispute that produced the tort claim would not have arisen absent the existence of the contract.

Id. at 767, 768-69.

Jitterswing, Inc. v. Francorp, Inc., 311 S.W.3d 828 (Mo.App. 2010), is in accord. The court refused to enforce a forum selection clause designating Illinois as the forum for “any dispute arising under this Agreement” in a statutory tort claim under Section 484.020 for the unauthorized practice of law. The court held that the clause “is not specific enough to encompass the tort claim for practice of law without a law license.” *Id.* at 831.

Although *Service Vending* and *Jitterswing* involved forum selection clauses, the analysis is the same for choice-of-law clauses. See *Farmers Exch. Bank v. Metro Contracting Servs, Inc.*, 107 S.W.3d 381, 393 (Mo.App. 2003) (choice-of-law clause providing “The law of the state of Missouri will govern this agreement” applied to underlying breach of contract dispute but not to postjudgment dispute concerning attachment of note proceeding).

These holdings are in line with cases from around the country holding that a choice-of-law clause like the one at issue is “narrow” and applies only to express contract claims. See *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1298, 1300 (11th Cir. 2003), *cert. denied*, 541 US. 1037 (2004) (provision stating that “This Release shall be governed and construed in accordance with the laws of the State of Delaware” was “narrow” and did not

apply to claims for products liability and fraud); *Rayle Tech, Inc. v. DeKalb Swine Breeders, Inc.*, 133 F.3d 1405, 1409-10 (11th Cir. 1998) (explaining that a provision stating that a contract was “governed by” Illinois law did not incorporate Illinois tort law); *Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) (provision that an “Agreement shall be governed by, and construed in accordance with, the internal laws of the State of New York” dealt “only with the construction and interpretation of the contract” and did not apply to the plaintiff’s fraud and misrepresentation claims); *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (contract “governed by and construed in accordance with the laws of the Commonwealth of Massachusetts” did “not dispositively determine that law which will govern a claim of *fraud* arising incident to the contract”); *Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc.*, 94 F.Supp.2d 589, 593 (E.D.Pa. 1999) (choice-of-law provision stating “This Agreement shall be governed by the laws of the State of Delaware” applied only to breach of contract claims); *Klock v. Lehman Bros. Kuhn Loeb, Inc.*, 584 F.Supp. 210, 215 (S.D.N.Y. 1984) (“a contractual choice of law provision governs only a cause of action sounding in contract”) (emphasis added); *Sunbelt Veterinary Supply, Inc. v. Int’l Bus. Sys. U.S., Inc.*, 985 F.Supp. 1352, 1354 (M.D.Ala. 1997) (a clause stating that a contract would be “governed by and construed under” California law was not broad enough to apply to tort claims); *Burger King Corp. v. Austin*, 805 F.Supp. 1007, 1012 (S.D.Fla. 1992) (“claims arising in tort are not ordinarily controlled by a contractual choice of law provision”).

Further, in *Major v. McCallister*, 302 S.W.3d 227 (Mo.App. 2009), the court applied a Colorado forum selection clause to plaintiff's claims for fraud, negligence, and breach of the Merchandising Practices Act because each count alleged that defendant "breached its website representations" so that plaintiff's claims "hinge upon and allege violations of ServiceMagic's website promises to prescreen any professionals." *Id.* at 231-32. The court concluded that "whether a forum selection clause that by its terms applies to contract actions also reaches non-contract claims 'depends on whether resolution of the claims relates to interpretation of the contract.'" *Id.* at 231 (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988)).

In this case, the choice-of-law clause does not reach potential class member claims for two reasons. First, no interpretation of a contract is required. The "document fee" at issue is a dollar figure inserted in a form. There is no language to interpret or construe. Thus, the choice-of-law clause does not apply under *Major*. Second, none of Relators' claims are contract claims covered by the contractual choice-of-law clause, and there is no "concise language" applying the clause to non-contract claims. Counts I and II of the Third Petition are statutory tort claims, just like in *Jitterswing*. Counts IV and V (now dismissed) were negligence claims, directly in accord with the tort claim in *Service Vending*. Count III is for "money had and received." However, a claim for money had and received is not a contract claim, but rather is "founded upon a contract implied in law." *Pitman v. City of Columbia*, 309 S.W.3d 395, 402 (Mo.App. 2010)

(emphasis added); *see also Bennett v. Tower Grove Bank & Trust Co.*, 325 S.W.2d 42, 47 (Mo.App. 1959); *Kimbrough v. Gross*, 268 S.W.2d 56, 58 (Mo.App. 1954); and *United States Fid. & Guar. Co. v. Mississippi Valley Trust Co.*, 153 S.W.2d 752, 757 (Mo.App. 1941) (all distinguishing between an action for money had and received, which is based on a contract implied by law, and a suit for breach of an express contract). *See also Allstate Imaging, Inc. v. First Indep. Bank*, 2010 WL 1524058, *2 (E.D. Mich. 2010) (holding that choice-of-law clause covering “the Agreement” applied only to breach of contract claim and not claims for conversion, unjust enrichment, innocent misrepresentation, negligence, fraud in the inducement, account stated, and **money had and received**, which “do not relate to enforcement of the Agreement.”) (emphasis added).

Here, because Count III’s claim for money had and received similarly does not relate to enforcement of the purchase agreement, the choice-of-law clause does not apply. The purchase agreement expressly provides for the payment of the document fees at issue. Yet Relators seek a refund of those payments. Neither Count III nor any of Relators’ other claims are based on the purchase agreement. To the contrary, to even bring their causes of action, Relators must disclaim the purchase agreement. In choosing money had and received as their cause of action, Relators necessarily disclaimed the purchase agreement and choice-of-law clause contained therein. Relators’ claim for money had and received is a not a contract claim subject to the choice-of-law clause.

The cases on which Relators rely, all from outside of Missouri, do not dictate a different result. Relators cite *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999), but the choice-of-law clause there broadly provided for “the application of Virginia law in the interpretation of this agreement *and the rights and obligations of the parties hereunder.*” (emphasis added). Similarly, the clause in *Corestates Bank, N.A. v. Signet Bank*, 1996 WL 482909 (E.D. Pa. 1996), covered “the rights and obligations of the parties hereunder . . . including all matters of construction, validity and performance.” Relators also rely on *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148 (Cal. banc 1992), which involved causes of action for breaches of contract, good faith and fair dealing, and fiduciary duties under a shareholders’ agreement. *Id.* at 1150. Two dissenters would not have applied the choice-of-law provision to the breach of fiduciary duty claim, with one dissenter faulting the majority for its “unsound” decision “without citing any authority.” *Id.* at 1156. Further, in *Nedlloyd*, resolution of all claims hinged on interpretation of provisions of the shareholders’ agreement. That is not the case here, where no language concerning “document preparation fees” is in dispute or requires interpretation in any way.

Under Missouri law, because none of Relators’ claims requires interpretation of the contract, and because there is no “concise language” otherwise, the choice-of-law clause applies only to claims based on the purchase agreement. The causes of action alleged by Relators are not such claims. The only document fees “governed by Missouri law” and at issue in this case are those

charged and collected on transactions occurring within Missouri. Respondent did not abuse his discretion in limiting the Class Certification Order accordingly.

C. Even if the Court Accepts Relators' Interpretation of the Choice-of-Law Clause, Respondent Did Not Abuse His Discretion, In That Certification of a Nationwide Class Would Impermissibly Undermine the Fundamental Policies of Other States.

All counts on which Relators seek class certification in their Third Petition are premised on allegations that TMBC engaged in the unauthorized practice of law when it charged fees for the preparation and/or processing of documents in connection with “the purchase and/or lease of a boat, boat trailers, boating accessories, motors, all terrain vehicles (“ATVs”), and/or other goods” (Rels’ Br. A644-659).

Because each state where TMBC does business has a fundamental interest in regulating both the practice of law and dealerships, and because the laws vary greatly under Section 187 of the Restatement (Second) Conflict of Laws, Missouri law cannot be exported to those states. While each state has a great interest in regulating the practice of law and the operation of licensed dealerships within its borders, no state has an interest in regulating (or the power to regulate) the practice of law and the operation of dealerships outside of its borders. Respondent therefore correctly limited Relators’ requested class to Missouri transactions even if the choice-of-law provision is applied to Relators’ non-contract claims (based on interpretation or judicial estoppel).

1. Whether Charging for Document Fees Amounts to the Unauthorized Practice of Law Varies By Jurisdiction.

The Missouri law of unauthorized practice of law cannot be applied to transactions occurring at dealerships located and licensed in other states. Each state where TMBC does business has its own comprehensive scheme regulating the practice of law within its borders, and the regulatory schemes vary by state. Under established Missouri law and the law of other jurisdictions, no state has the power to regulate the practice of law outside of its borders. *See Jitterswing*, 311 S.W.3d at 830-31 (questioning whether an Illinois court would have jurisdiction to decide a case involving the unauthorized practice of law under Section 484.020). *See also Janson v LegalZoom, Inc.*, 727 F.Supp.2d 782, 787 (W.D. Mo. 2010) (refusing to apply a broadly worded California venue provision to a Missouri case because “forcing litigation in a foreign forum under these circumstances would run contrary to a state’s interest in resolving matters tied closely to the unauthorized practice of law within its borders”).⁶

Eisel makes this clear. In *Eisel*, this Court considered document fees charged by a bank. This Court held that it is the “sole arbiter of what constitutes

⁶ Both *Jitterswing* and *Janson*, refused to apply forum selection clauses based solely on an analysis of the interests of the states in regulating the practice of law, and without reference to Section 187.

the practice of law,” and that laws governing the unauthorized practice of law within the State of Missouri cannot be waived. 230 S.W.3d at 338-339.⁷

The Supreme Court of Illinois has similarly concluded that the “power to regulate and define the practice of law is (its) prerogative,” that its laws governing the unauthorized practice of law within the State of Illinois may not be waived, and that the charging of document preparation fees is *not* the unauthorized practice of law. *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1164 (Ill. 2005).

Although this Court made clear in *Eisel* that, within Missouri, Section 484.020 cannot be waived, varied, or otherwise set aside, Relators are asking the Court to do exactly that in the reverse. Suppose an Illinois corporation had set up a Missouri-licensed boat dealership in Cape Girardeau and charged document preparation fees based on an Illinois choice-of-law provision. Under *Eisel* and *Jitterswing*, a Missouri court would apply Missouri law to decide the question of whether charging a document fee is the unauthorized practice of law within Missouri. The same rule should apply to other states. Based on *King*, Illinois

⁷ Specifically, this Court held that “the activities prohibited by section 484.020 are not subject to waiver, consent or lack of objection by the victim.” *Id.* at 339. The “fundamental policy” analysis in Section 187 of the Restatement (Second) Conflict of Laws does not differ based on which party benefits from the application of the law of the state with a fundamental policy, or which party is “the victim.”

would apply its own law regarding the unauthorized practice of law to Illinois licensed dealers no matter what the parties agree by way of choice-of-law provision.

Many states (in addition to Illinois) where TMBC stores are located and licensed have specifically found that charging and collecting document preparation fees does not amount to the unauthorized practice of law:

- In Ohio, there is no common law action for unjust enrichment or money had and received where recovery is ultimately sought for the unauthorized practice of law based on document preparation fees charged in connection with a mortgage loan because the Supreme Court has exclusive jurisdiction to first determine what activities are the unauthorized practice of law. *Greenspan v. Third Fed. Sav. & Loan Ass'n*, 912 N.E.2d 567, 570-72 (Ohio 2009). *See also* Board on Unauthorized Practice of Law of the Supreme Court of Ohio, Advisory Opinion UPL, 2008-02 (completion of legal documents in connection with a closing is not the unauthorized practice of law).
- Under Florida law, there is no private right of action to recover document fees paid in real estate transactions because the Florida Supreme Court has exclusive jurisdiction over the practice of law. *Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n*, 152 So.2d 723 (Fla. 1963). This has been applied to

disallow a claim for unjust enrichment and money had and received. *Gonczy v. Countrywide Home Loans, Inc.*, 217 Fed. Appx. 928 (11th Cir. 2008). *See also Goldberg v. Merrill Lynch Credit Corp.*, 981 So.2d 550, 552 (Fla.App. 2008) (affirming dismissal of class action document fee case and concluding “[n]o case has approved of using the alleged unauthorized practice of law as a sword prior to a determination by the Supreme Court of Florida that the services actually constitute the unauthorized practice of law. We are not compelled to be the first.”).

- Under Colorado law, the charging of a fee which includes a fee for preparation of documents relating to a motor vehicle sale is not the unauthorized practice of law. *Newman v. Ed Bozarth Chevrolet Co., Inc.*, 714 F. Supp.2d 1114, 1115-16 (D. Colo. 2009).
- In Indiana, the charging of a document preparation fee for mortgage documents is not actionable as the unauthorized practice of law. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602 (Ind. 2007).
- Under Michigan law, the charging of a separate fee for the preparation of mortgage documents by a bank is not actionable as the unauthorized practice of law. *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003).

- In New York, charging a document fee for filling out documents in a transaction is not the unauthorized practice of law. *Fuchs v. Wachovia Mortgage Corp.*, 838 N.Y.S.2d 148 (N.Y. 2007).
- In Virginia, preparation of documents in connection with a transaction is not the unauthorized practice of law. *Virginia v. Jones & Robins, Inc.*, 41 S.E.2d 720 (Va. 1947).
- Under Tennessee law, the act of filling out blanks on form documents in connection with the purchase of a vehicle and charging a fee therefor does not amount to the unauthorized practice of law. *Flanary v. Carl Gregory Dodge, LLC*, 2008 WL 2434196 (Tenn.App. 2008).

Relators have cited no case exporting the regulation of the practice of law from one state to another through the use of a choice-of-law provision. No such authority exists, and the reason is clear: just as lawyers obviously cannot contract for the state's law that applies to them and their clients, non-lawyers cannot contract for which jurisdiction's law will govern whether their actions are the unauthorized practice of law. There is no exception to this rule based on which party would benefit from the application of a particular state's law. To hold otherwise would require disregard of *Eisel* and like cases from other jurisdictions, such as *King*, and would introduce unpredictability into choice of law for the unauthorized practice of law.

2. Each Jurisdiction's Scheme Regulating the Practice of Law Is Fundamental Policy.

Numerous jurisdictions with licensed TMBC stores share Missouri's view, expressed in *Eisel*, that regulation of the business or practice of law, and the legal rules that govern it, is fundamental policy of each state's sovereignty.

In Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Mississippi, Ohio, Oklahoma, Pennsylvania, and Tennessee, the judiciary's power to regulate the practice of law is rooted in the state constitution.⁸ See *In re Creasy*, 12 P.3d 214, 216 (Ariz. 2000) ("This court has long recognized that under article III of the constitution 'the practice of law is a matter exclusively within the authority of the Judiciary. . . . This constitutional power to regulate the practice of law extends to non-lawyers as well as attorneys admitted to bar membership."); *Denver Bar Ass'n v. Public Utils. Comm'n*, 391 P.2d 467, 470 (Colo. banc 1964) ("This Court has the exclusive power to define and regulate the practice of law by virtue of this constitutional provision; there is no authority in these respects in the legislative or executive departments.");

⁸ Each state's constitution is fundamental policy. See *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000) (concurring opin.) ("no more appropriate place to glean a state's fundamental policies than its state constitution."); *Jeffries v. Woodruff County*, 205 S.W.2d 194, 196 (Ark. 1947) (Arkansas fundamental policies determined from constitution, statutes, and court decisions).

Goldberg v. Merrill Lynch Credit Corp., 981 So.2d 550, 552 (Fla.App. 2008) (“Section 15, Article V of Florida’s Constitution bestows ‘exclusive jurisdiction’ on the Supreme Court ‘to punish for contempt anyone indulging in the unauthorized practice of law.’”) (citing *Dade-Commonwealth Title Ins. Co. v North Dade Bar Ass’n*, 152 So.2d 723, 724 (Fla. 1963)); *Carpenter v. State*, 297 S.E.2d 16, 17 (Ga. 1982) (“Matters relating to the practice of law . . . are within the inherent and exclusive power of the Supreme Court of Georgia. . . . The enactment by the General Assembly, therefore, of legislation purporting to govern matters within the exclusive jurisdiction of the judicial branch, is violative of the 1976 Constitution, and hence void.”) (citing Art. I, Sec. II, Para. IV, Constitution of Georgia of 1976); (*People ex rel. Chicago Bar Ass’n v. Goodman*, 8 N.E.2d 941, 944 (Ill. 1937) (“The power to regulate and define the practice of law is a prerogative of the judicial department as one the three divisions of the government created by article 3 of our Constitution.”); *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602 (Ind. 2007) (“Pursuant to the Indiana Constitution, this Court has original jurisdiction over ‘the unauthorized practice of law.’ It is the responsibility of this Court to oversee the admission and discipline of attorneys and to determine what acts constitute the practice of law.”) (quoting Ind. Const. art. 7, § 4); *State ex rel. Indiana State Bar Ass’n v. Diaz*, 838 N.E.2d 433, 435 (Ind. 2005) (“This Court has original and exclusive jurisdiction over matters involving the unauthorized practice of law.”); *State ex rel. Stephan v. Williams*, 793 P.2d 234, 239 (Kan. 1990) (“The Kansas Supreme Court has the inherent

power to prescribe conditions for admission to the bar, and to define, supervise, regulate and control the practice of law under Article 3, Section 1 of the Kansas Constitution.”); *Disaster Restoration Dry Cleaning, L.L.C. v. Pellerin Laundry Machry. Sales Co.*, 927 So.2d 1094, 1102 n.5 (La. 2006) (“The power to regulate the practice of law in every aspect properly belongs to this Court and is reserved for it by the constitutional separation of powers”) (citing LSA-Const. art. II, § 1); *Attorney Gen. v. Waldron*, 426 A.2d 929, 934 (Md.App. 1981) (“Cognizant of the constitutionally imposed responsibility with respect to the administration of justice in this State, this Court has heretofore recognized and held that the regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct are essentially judicial in nature and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State.”); *Darby v. Mississippi State Board*, 185 So.2d 684, 688 (Miss. 1966); (“Section 8682 simply provides that the designated acts under the defined circumstances constitute the unlawful practice of law, but it does not encroach on the constitutional power of the judiciary to determine that other acts may also do so. Such statutes are not a complete enumeration. The courts have inherent authority, independent of statute, to decide what acts constitute the practice of law.”); *Greenspan v. Third Fed. Savings & Loan Ass’n*, 912 N.E.2d 567, 571 (Ohio 2009) (“[T]he Supreme Court of Ohio has exclusive jurisdiction over the practice of law in Ohio, including the unauthorized practice of law. Section

2(B)(1)(g), Article IV of the Ohio Constitution confers on this court exclusive power to regulate, control, and define the practice of law in Ohio. Our jurisdiction thus extends to regulating the unauthorized practice of law.”) (internal quotes omitted); *Arkansas Valley State Bank v. Phillips*, 171 P.3d 899, 905 (Okla. 2007) (“It is this Court’s nondelegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law, and in doing so, to preserve public confidence in the bar and the judicial process”); *Ballou v. State Ethics Comm’n*, 424 A.2d 983 (Pa. Commw. Ct. 1981) (“It has long been settled as a matter of fundamental law not necessary to be recorded in the State Constitution, that the Supreme Court has inherent and exclusive power to govern the admission, conduct and discipline of attorneys and that a statute which would encroach on that power must be regarded as a vain attempt by the Legislature to exercise a power which it does not possess. When the Judiciary Article of the Pennsylvania Constitution was revised in 1968, the Supreme Court’s inherent and exclusive power, until then implicit as a fundamental matter, was made explicit by Article V, Section 10(c).”) (internal quotes omitted); and *Cohn v. Board of Prof’l Responsibility*, 151 S.W.3d 473, 486 (Tenn. 2004) (“We have stated many times that this Court has inherent authority to regulate the practice of law pursuant to Article VI, section 1 of the Tennessee Constitution.”).

In California, Michigan, and Texas, like Missouri, the judiciary’s power to regulate the practice of law is rooted in statute. *Baron v. City of Los Angeles*, 469 P.2d 353, 356, 358 (Cal.banc 1970) (“Regulation of attorneys and control over the

practice of law have always been considered matters of statewide concern. . . . Furthermore, the scope of the State Bar Act as it is written today manifests legislative belief that there is a substantial state interest in the regulation of the legal profession. . . . To the extent that the ordinance purports to govern lawyers' activities which constitute the 'practice of law' within the State Bar Act, it invades a field of regulation preempted by state law..."); *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003) ("In Michigan, the practice of law is regulated by statute.") (citing MCL 450.681); *See Petitions of Ingham County Bar Ass'n*, 69 N.W.2d 713, 717 (Mich. 1955) ("Since it is left to the courts of this State as well as those of most other States, to define the 'practice of law' we must consider the adjudicated authorities."); Tex. Government Code § 81.101 ("(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."); *Unauth. Practice Comm. v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985) ("The courts may ultimately decide whether certain undisputed activities constitute the unauthorized practice of law"). Indiana's prohibition on the unauthorized practice of law is also set out by statute. *See* Ind. Code § 33-24-1-2(b)(2).

Many jurisdictions also have regulatory schemes whose sole function is to investigate and prosecute unauthorized practice of law claims. For example, in Ohio, the Ohio Supreme Court has created a comprehensive and exclusive procedure for unauthorized practice of law claims. Ohio Const. Art. IV § 5(B);

Gov.Bar.R. VII. The Ohio Supreme Court Rules for the Government of the Bar establish the Board of the Unauthorized Practice of Law of the Supreme Court and define the unauthorized practice of law. Gov.Bar.R. VII, § 1, § 2(A). The Supreme Court Rules provide that “All proceedings arising out of complaints of the unauthorized practice of law shall be brought, conducted, and disposed of in accordance with the provisions of this rule.” Gov.Bar.R. VII § 4 (A). Having a single body make these determinations “allows uniform resolution” of these matters. *Miami Valley Hosp. v. Combs*, 695 N.E.2d 308, 312-13 (Ohio App. 1997). And, while Ohio now recognizes a private cause of action for the unauthorized practice of law, “a claimant may commence a civil action for the unauthorized practice of law only ‘upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law.’” *Greenspan*, 912 N.E.2d at 572 (quoting R.C. 4705.07(C)(2)). Further, under the statute, “ [t]he court in which the action for damages is commenced is bound by the determination of the supreme court regarding the unauthorized practice of law and shall not make any additional determinations regarding the unauthorized practice of law.” *Id.* In Texas, the Supreme Court of Texas has appointed the Texas Unauthorized Practice of Law Committee in an effort to eliminate the unauthorized practice of law, and the Committee has the power to authorize the filing of lawsuits to enjoin the unauthorized practice of law. *See* Tex. Government Code Ann. §§ 81.103; 81.104. In Colorado, the Supreme Court of Colorado has appointed an Unauthorized

Practice of Law Committee with jurisdiction to consider complaints concerning the unauthorized practice of law. CRCP Rules 228-230. The Committee is vested with the authority to file civil injunction and contempt proceedings. CRCP Rules 234, 238.

In other jurisdictions where defendant TMBC does business, regulation of the practice of law is no less comprehensive than in Missouri. These other jurisdictions, like Missouri, have great interest in regulating the practice of law within their borders. These jurisdictions, however, have no interest in regulating the practice of law in Missouri, just as Missouri has no interest in paternalistically applying its practice of law policies in other jurisdictions.

3. Each Jurisdiction's Regulations Governing Dealerships Vary Greatly and Are Fundamental Policies of the Respective Jurisdictions.

In addition to regulating the practice of law in their jurisdictions, states also heavily regulate licensed dealerships and have adopted specific rules and regulations governing document fees and disclosures that apply to dealerships. In many cases, states where TMBC has stores permit dealerships to charge document preparation fees by statute or regulation so long as certain state mandated disclosures are made.

There is no dispute, for example, that TMBC does business in Texas (Rels' Br. A27-32). The representative contracts between TMBC and purchasers in the State of Texas have agreement dates of 5/31/07, 5/31/08, and 5/23/09 (Rels' Br.

A27-32). Because TMBC follows the laws of the states where its stores are licensed, each contract includes a “document fee” of \$50 and also contains the Missouri choice-of-law clause at issue.

Document preparation fees in Texas are regulated by the Office of Consumer Credit Commissioner. Tex. Fin. Code Ann. §341.101. Since September 1997, the State of Texas has explicitly permitted a document preparation fee of \$50 or less to cash buyers and credit buyers

for services rendered to, for, or on behalf of a retail buyer in preparing, handling, and processing documents relating to, and closing a retail installment transaction involving, a . . . all-terrain vehicle, boat, boat motor, boat trailer, or towable recreation vehicle.

Tex. Fin. Code Ann. § 345.251.

This section is part of a comprehensive statutory and regulatory scheme governing dealers and manufacturers licensed to do business in the State of Texas. *See* Tex. Fin. Code Ann. Chapters 345, 348, 349. The Texas statutes provide remedies for violation of Section 345.251, including refund of excess fees and reasonable attorney’s fees (§349.001(b)); triple damages beyond actual economic loss (§349.003); and the right to a class action proceeding (§349.403). In addition, a dealer charging a fee twice that permitted by statute is guilty of a misdemeanor. §349.501. Texas also requires a specific document fee notice to be “bold faced, capitalized, or underlined” or otherwise made conspicuous in sale documents. §345.251(c)(2).

Thus, in 2007, 2008, and 2009, when TMBC charged the \$50 document fees, these fees were heavily regulated—yet explicitly authorized and lawful—in the state where the transactions took place, Texas.

Similarly, TMBC is licensed and does business in the State of Ohio (Rels' Br. A33-40). Ohio, like Texas, has a comprehensive statutory and regulatory scheme protecting consumers from unauthorized document preparation fees. The Ohio Bureau of Motor Vehicles is responsible for enforcing the statutory scheme against dealers, and the statutes permit a civil fine of not more than \$1,000 or imprisonment for not more than one year or both for willful violations. Ohio Rev. Code Ann. §1317.99. Nevertheless, by statute, since June 30, 2006, Ohio has explicitly authorized and made lawful document preparation fees of \$250 or less. § 1317.07.

At least seven other states where TMBC is licensed and does business expressly permit document preparation fees by statute and/or regulation.

Since October 1, 2008, Florida (Rels' Br. A11-14) has authorized the charging and collection of document preparation fees so long as the fee is disclosed, is not reimbursed by the manufacturer, and the dealer includes disclosure language specified by statute. Fla. Stat. Ann. § 501.976(18). Violations of the statute may result in civil litigation (§501.976(18)); denial of license; revocation or suspension of license; permanent restrictions on license; reprimand; and an administrative fine not to exceed \$1,000 per violation (§520.995). The statutes expressly apply to trailer sales. §520.02(10). In

addition, a violation may give rise to civil litigation for recovery of damages, costs, and reasonable attorneys fees (§501.211); willful violations may result in a civil penalty of not more than \$10,000 per occurrence plus reasonable attorneys fees (§501.207); and a violator may be subject to administrative remedies such as appointment of a receiver, freezing of assets, restrictions on future activities, and other legal or equitable relief (§501.207).

Since May 5, 1991, Indiana (Rels' Br. A15-16) has expressly permitted collection of a document fee of unlimited amount by statute so long as the fee "reflects expenses actually incurred for the preparation of documents." Ind. Code Ann. § 9-23-3-6.5. Enforcement of the statute is regulated by the Bureau of Motor Vehicles and may result in a Class B misdemeanor (§9-23-6-1); a civil penalty of not less than \$50 or more than \$1,000 (§9-23-6-4); and/or revocation or suspension of license as well as legal action by the Secretary of State or State Attorney General (§§9-23-6-5; 9-23-6-6). The Indiana statutes apply to ATVs and trailers. §9-13-2-105.

New York (Rels' Br. A19-24) expressly permits a document fee of \$75 or less. N.Y. Comp. Codes R. & Regs. tit. 15, § 77.8. Specific written disclosure language is required by the rule. §77.8. The Department of Motor Vehicles is charged with enforcing the regulations, and violation of the regulations may result in suspension or revocation of license as well as a civil penalty not to exceed \$1,000. §78.32.

Since January 1, 1992, Illinois has permitted a documentary fee of \$40. 815 Ill. Comp. Stat. Ann. 375/11.1. Specific written disclosure language is required by the statute. §375/11.1. A knowing violation of the fee provision is a Class A misdemeanor, which is punishable by imprisonment of not more than 1 year; probation of not more than 2 years; and/or a fine of \$2500 per offense or the amount specified in the offense, whichever is greater. §375/24(b).

Since July 2, 1999, Louisiana has permitted a document fee of up to \$35. La. Rev. Stat. Ann. § 6:969.18(A)(1). The statute applies to sellers of all-terrain vehicles and boats. §6:969.6(23)(b). Specific disclosure language must be placed in the bill of sale, buyer's order, or sales contract. §6:969.18(G). For intentional or not in good faith violations of the statute, a consumer is entitled to a refund of charges and may recover three times the amount of the charge and reasonable attorney's fees and said fees are to be measured by time reasonably expended on the case, not by the amount of recovery. §6:969.33.

Since July 1, 2003, Maryland has permitted a reasonable document fee, which was not to exceed \$100 and may not exceed \$200 from 7/1/11 through 6/30/14 or \$300 after 6/30/14. Md. Code Ann., Transp. § 15-311.1. The statute requires specific fee disclosure language, in 12 point type or larger, in the sales contract. Violations may result in license suspension, revocation, or nonrenewal instead of or in addition to a fine not to exceed \$1000 per violation. §§15-109; 15-315.

Since March 13, 1990, Michigan has permitted a document fee not exceeding 5% of the cash price of a motor vehicle or \$160, whichever is less, to be recalculated every 2 years. Mich. Comp. Laws Ann. §492.113(2)(a). Intentional violations of the statute are misdemeanors punishable by a fine of not more than \$500 per offense and imprisonment not to exceed 1 year. §492.137(b).

4. Under Section 187 of the Restatement (Second) Conflict of Laws, Application of Missouri Law Would Violate the Fundamental Policies Regulating the Practice of Law and Dealerships In Jurisdictions Where TMBC Stores Are Located, and These Jurisdictions Have a Materially Greater Interest Than Missouri in Regulating the Practice of Law and Dealerships Within Their Borders.

These pervasive schemes regulating the practice of law and dealerships amount to “fundamental policies” under Section 187 of the Restatement (Second) Conflict of Laws, which Missouri courts have applied in determining whether to give effect to parties’ contractual choice-of-law provisions. *See Bauer v. Farmers Ins. Co.*, 270 S.W.3d 491, 497 (Mo.App. 2008); *Tri-County Retreading, Inc. v. Bandag*, 851 S.W.2d 780, 784 (Mo.App. 1993). Under Section 187(2)(b), a choice-of-law provision will not be enforced to the extent that

application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and

which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.⁹

“Fundamental policy” is further explained in Comment g to Section 187: “Fulfillment of the parties’ expectations is not the only value in contract law; regard must also be had for state interests and for state regulation.”

Whether a policy is fundamental is to be decided by the forum: “The forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule.” § 187 cmt. g. This Court has already decided in *Eisel* that application of the unauthorized practice of law to document fees is fundamental. *See also Jitterswing, Inc. v. Francorp, Inc.*, 311 S.W.3d 828, 831 (Mo.App. 2010); *Janson v. LegalZoom, Inc.*, 727 F.Supp.2d 782, 787 (W.D.Mo. 2010); *Huch v. Charter Communs., Inc.*, 290 S.W.3d 721, 726 (Mo.banc 2009) (Chapter 407, Merchandising Practices Act, “is fundamental policy” (citing §187 cmt. g) and “may not be ignored by waiver or by contract, adhesive or otherwise” because to do so “renders the statutes useless and meaningless”);¹⁰ *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493,

⁹ Relators do not dispute that jurisdictions where the dealers are licensed and located “would be the state of the applicable law” under Section 188 in the absence of the Missouri choice-of-law clause.

¹⁰ That Relators have brought a claim under Chapter 407 does not mean this Court must apply Missouri law based on *Huch* to claims of out-of-state purchasers. In

498-99 (Mo.banc 1992) (liquor distribution) (declining to enforce forum selection clause requiring suit to be brought in Kentucky because Missouri liquor control legislation is “a matter of important public policy to the state of Missouri. . . . Liquor distribution is an area that has always been heavily regulated by state government; moreover, the methods of distribution and extent of regulation vary enormously from state to state”); and *State ex rel. Geil v. Corcoran*, 623 S.W.2d 557, 559 (Mo.App. 1981) (securities protection) (declining to enforce New York choice-of-law clause because to do so would be “contrary to [Missouri’s] fundamental policy regarding statutory protection of investors in securities transactions.”) (emphasis added).

Relators argue that state regulation of the practice of law and document fees are not fundamental and can be contracted around at will.¹¹ The fallacy of Relators’ position is illustrated by the following situations:

- Missouri now allows boat dealers to charge an administrative fee of less than \$200 if certain disclosures are made.
 - Do Relators believe that TMBC may now charge an administrative fee in all states under the authority of Section

Huch, this Court did not consider or decide whether applying Missouri law would be contrary to fundamental policy of a jurisdiction with a materially greater interest in the issue.

¹¹ Relators ignore *Eisel* in their discussion of fundamental policies.

301.558(3), RSMo. 2010, even in a state which does not allow any document fee?

- Under Relators' theory may TMBC now charge a document fee in Texas greater than \$50.00? (Texas limits document fees to \$50.00)
- The required disclosures differ between Texas and Missouri, and a dealer may only charge the fee if the proper disclosure is made. Should TMBC use the Missouri or Texas disclosure under Relators' theory? Should one state's law apply to the content of the disclosure and another state's law apply to the amount of the fee?
- Each state regulating dealers provides for administrative (and perhaps criminal) penalties for dealers who violate certain statutes and regulations. Presumably Relators do not believe that a choice of law provision in a customer contract would take away the jurisdiction of the regulatory agency. Relators' theory would result in a massive conflict between administrative and civil liability:
 - If document fees were not allowed by Missouri law, but were in other states, TMBC would have civil but not administrative liability for charging document fees in those states.
 - If document fees were allowed by Missouri law (as is the case now under Section 301.558), TMBC would have administrative, but not civil, liability if it followed Missouri

law but did not strictly follow the laws allowing document fees in other states.

These examples demonstrate why the choice-of-law clause cannot be applied to causes of action based on detailed statutory and regulatory schemes. The rules should not depend on which state allows the higher or lower fee or mandates the least onerous written disclosure. Following Relators' theory would inspire a "race to the bottom" for the application of state law and would frustrate the ability of states to regulate both the practice of law and the dealers which they license. It would give this Court the ability to regulate the practice of law in 27 other states where TMBC does business. Conversely, under Relators' theory, if a dealer included an Illinois choice-of-law clause in a customer contract, the Supreme Court of Illinois would have the ability to regulate the practice of law in Missouri.

Not only are each jurisdiction's comprehensive schemes regulating the practice of law and dealerships fundamental policy, but each jurisdiction has a materially greater interest than Missouri in regulating the practice of law and dealerships within its border and thus in deciding the issue in this case of whether charging for document preparation fees constitutes the unauthorized practice of law within the jurisdiction. That Missouri has an interest in the activities of its corporate citizens does not give Missouri a materially greater interest. This is particularly true here where the activities involve out-of-state purchasers in transactions occurring wholly outside of Missouri in various dealership locations

throughout the country. The court considered this very issue in *Brack v. Omni Loan Co.*, 80 Cal. Rptr.3d 275 (Cal.App. 2008), and rejected the argument that Nevada had a materially greater interest in applying a Nevada choice-of-law clause because defendants were Nevada corporations:

[N]othing in Nevada law prevented Omni from fully complying with California law. Rather, Nevada's interest in applying its law is limited to its more general interest in enforcing the provisions of contracts made by one of its citizens. Given these circumstances, application of Nevada law would impair California's regulatory interests to a far greater extent than application of California law would impair Nevada's interests.

Id. at 287.

The analysis and result in *Brack* should apply with equal weight here. Nothing in Missouri law prohibited TMBC from subjecting itself to the regulatory authority of other jurisdictions, and, in fact, TMBC was required to license its dealers in other states. While Missouri has an interest in enforcing a contract made by one of its citizens, that interest is not materially greater than each state's interest in regulating the unauthorized practice of law and dealers within its borders. Likewise, Missouri has no particular interest in exporting its unauthorized practice of law rules and licensed dealer regulations to other states. The choice-of-law clause cannot trump each state's materially greater interests in

applying their fundamental policies contrary to Missouri's own fundamental policies.

The better-reasoned policy is the one adopted in *Eisel* and set forth in Section 187, which requires honoring "fundamental policies" of the state with the materially greater interest even where parties have agreed to choice of law by contract. Following that approach, even if the Court accepts Relators' interpretation of the choice-of-law clause's language or their position on judicial estoppel, Respondent did not abuse his discretion in refusing to certify a nationwide class.

**5. The General Principles of Choice of Law in the Restatement
Support Application of the Law of Each Store Location to the
Issue of Legality of Document Preparation Fees.**

Missouri courts rely on principles of Section 6(2) of the Restatement (Second) Conflict of Laws in resolving conflict of laws questions. *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699, 702 n.3 (Mo.banc 1974); *Adams v. One Park Place Investors, LLC*, 315 S.W.3d 742, 745 (Mo.App. 2010). Those principles are:

- (a) the needs of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (d) the protection of justified expectations;

- (e) the basic policies underlying the particular field of law;
- (f) certainty, predictability and uniformity of result; and
- (g) ease in the determination and application of the law to be applied.

Id.

Each of these factors favors application of the law of store location to the issue of whether document fees violate the rules governing the practice of law in that jurisdiction even if questions about the interpretation of the contract are governed by Missouri law. As discussed above, all states have a fundamental interest in regulating the practice of law (often enshrined in their constitution) and dealers doing business within their borders while Missouri has no interest in exporting its rules. (§§ (a)-(c)) The only evidence of the actual expectations of the parties is that TMBC has operated its stores in conformity with the laws of the state where each dealership is licensed. There was no showing or argument that any TMBC customer had any particular understanding or took any action based on an expectation of what law applies to the unauthorized practice of law and document fees. Therefore, the only evidence of the “justified expectations” of the parties is that the law of the state where each store is licensed would apply to whether document fees amount to the unauthorized practice of law (§ (d)). As discussed in the preceding section, a holding that Missouri law applies to the issue of legality of document preparation fees charged by TMBC stores in states outside of Missouri would not create certainty, predictability, and uniformity of result but

would only result in mass confusion and many unanswered questions for future litigation. (§§ (e)-(g)).

The rules regarding whether document preparation fees amount to the unauthorized practice of law should be easy to understand and follow and should yield the same result no matter which state court is deciding the case and no matter whether a dealer has a choice-of-law provision.

D. The Choice-of-Law Clause Is Not Ambiguous, and Defendants Do Not Argue Against Application of Missouri Law Only When It Benefits Them to Do So.

Relators also argue that, notwithstanding the language of the choice-of-law clause, and notwithstanding any “fundamental policy” analysis, Missouri law should nevertheless be applied on a nationwide basis because (1) any ambiguity in the choice-of-law clause should be construed against defendants, and (2) because defendants only seek to disavow their own clause when it benefits them to do so. Neither argument has merit.

Under *Service Vending*, *Jitterswing*, *Janson*, and *Farmers*, the choice-of-law clause does not apply to Relators’ non-contract claims as a matter of law. Thus, there is no ambiguity to construe against anyone.

Relators’ suggestion that defendants only disavow their own clause when it benefits them to do so ignores the facts of this case and the applicable law. Relators essentially suggest that if a defendant drafts a choice-of-law provision, then, despite the analysis of *Eisel* and Section 187, that defendant can *never* argue

against application of the choice-of-law provision to any issue. Although Relators cite cases where choice-of-law provisions were enforced against their drafters, Relators fail to cite a single legal authority that supports this over-reaching argument.

In addition, the factual basis of this case undermines Relators' argument. Relators argue that "the foundation of Bass Pro's opposition to (nationwide) class certification...was based on an objection to language it drafted." (Rels' Br. 41). Relators suggest that defendants only now oppose application of the choice-of-law clause on a nationwide basis because "it became advantageous to do so."

This is flatly wrong. TMBC has not changed its position on the law applicable to document fees at its stores, as Relators suggest. In fact, if TMBC believed the choice-of-law clause at issue applied to Relators' claims, TMBC always would have followed Missouri law with respect to the charging of document fees and document fee disclosures in transactions nationwide. TMBC would now be charging administrative fees of up to \$200.00 in all states where it does business, since that sum is much more than allowed in most states. *See* RSMo. § 301.558 (2009). TMBC would also be utilizing the Missouri mandated written disclosure in other states. Instead, TMBC's conduct in the litigation is the same as its business conduct—the law of the state where each store is located governs document fees.

E. The Cases on Which Relators Rely Ignore the True Issues and Otherwise Have Little Application to the Facts of This Case.

Relators pepper their brief with references to cases from around the country they claim support their request for a nationwide class based on extraterritorial application of a choice-of-law clause. The primary problem with Relators' cases is that they ignore *Eisel*, and the constitutional and statutory schemes of other states, which make clear that the laws governing the unauthorized practice of law cannot be waived. Moreover, Relators cases are easily distinguished.

Bauer v. Farmers Insurance Co., 270 S.W.3d 491 (Mo.App. 2008), is inapposite because it held that a Kansas anti-stacking statute was not a fundamental policy that overrode a very specific choice-of-law provision. *Eisel* has already decided that the application of the unauthorized practice of law statute to document fees is fundamental. Likewise, *A.G. Edwards & Sons, Inc. v. Smith*, 736 F. Supp. 1030, 1036 (D. Az. 1989), does not address the fundamental policy analysis. *A.G. Edwards* also notes that the plaintiff attempted to disregard its choice-of-law provision when it "believed it would be advantageous to do so." TMBC's position has been consistent.

Relators also focus on *Hall v. Sprint Spectrum L.P.*, 876 N.E.2d 1036 (Ill.App. 2007), claiming the court there rejected the argument that the Kansas Consumer Act could not be applied extraterritorially (Relators' Brief 31-33). In that case, the sole issue was validity of early termination fees charged by Sprint, and there is no indication that Kansas law differed in any respect, let alone in a

fundamental respect, from the law of any other jurisdiction. Indeed, the court appears to not have considered the “fundamental policy” issue on the ground that Illinois did not have a “materially greater interest” in the litigation than Kansas. *Id.* at 1041.¹²

None of the cases upon which Relators rely give guidance as to how this Court should proceed when application of Missouri law conflicts with fundamental policies of jurisdictions with a materially greater interest in the issue and transaction. Fortunately, *Eisel*, *Jitterswing*, *Janson*, *High Life*, the Restatement, and the other authorities cited by defendants, instruct that a Missouri choice-of-law clause may not be applied when application of Missouri law conflicts with a fundamental policy of a jurisdiction with a materially greater interest. The trial court correctly refused to certify a nationwide class in this case for that reason.

¹² Relators cite a number of other cases but none of them deals with a conflict between fundamental policies of jurisdictions.

CONCLUSION

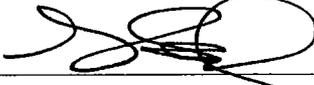
Relators fail to establish any element requiring the application of judicial estoppel in this case. The underlying legal and factual contexts of the positions taken differed greatly such that they are not irreconcilable, there is no evidence to suggest any court accepted the positions much less that any court was intentionally misled, and no party's position is improved or worsened in any way if defendants are not estopped. Further, judicial estoppel does not apply because the allegedly inconsistent positions were both taken within the same lawsuit. Relators' superficial analysis and inapplicable cases ignore each of these issues.

Relators otherwise fail to satisfy that they are entitled to a nationwide class. The claims on which Relators seek nationwide certification are all based on whether document fees amount to the unauthorized practice of law, issues which vary greatly by state and which are governed by fundamental policies such as the constitutions and statutes of other states where defendants do business. The narrow choice-of-law provision cannot trump those policies.

Relators have failed to establish that the Class Certification Order is in any way inappropriate, let alone that it "shocks one's sense of justice" or "indicates a lack of careful consideration." This Court should quash its Preliminary Writ of Prohibition.

Respectfully submitted,

HUSCH BLACKWELL LLP

By:  _____

Bryan Wade, #41939

Ginger K. Gooch, #50302

Jason C. Smith, #57657

bryan.wade@huschblackwell.com

ginger.gooch@huschblackwell.com

jason.smith@huschblackwell.com

901 St. Louis Street, Suite 1800

Springfield, MO 65806

Phone: (417) 268-4000

Fax: (417) 268-4040

HUSCH BLACKWELL LLP

James D. Griffin, #33370

james.griffin@huschblackwell.com

Husch Blackwell LLP

4801 Main Street, Suite 1000

Kansas City, MO 64112

Phone: (816) 983-8000

Fax: (816) 983-8080

Attorneys for Respondents

**CERTIFICATE OF COMPLIANCE WITH
RULE 84.06 AND CERTIFICATE OF SERVICE**

Pursuant to Rule 84.06(c), counsel for defendants certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). There are 18,117 words in this brief. Counsel for defendants relied on the word count of his word processing system in making this certification.

Pursuant to Rule 84.06(h), counsel for defendants certifies that the file filed herewith has been scanned for viruses and is virus-free.

Further, counsel for defendants states that Respondent's Brief in the within cause was by him caused to be served, either by the Court's e-filing system, hand delivery, or by ordinary mail, postage prepaid, addressed to the following named persons at the addresses shown, all on this 1st day of September, 2011:

Mr. Bill Thompson
Interim Clerk of the Supreme Court of Missouri
P.O. Box 150
Jefferson City, MO 65102

Honorable Michael J. Cordonnier
Judge of Greene County Circuit Court, Div. 1
Greene County Judicial Facility
1010 Boonville Ave.
Springfield, MO 65802

Steve Garner
Chandler Gregg
Strong-Garner-Bauer, P.C.
415 E. Chestnut Expressway
Springfield, MO 65802

David L. Baylard
Baylard, Billington, Dempsey & Jensen, P.C.
30 South McKinley
Union, MO 63084

HUSCH BLACKWELL LLP

By: 

Bryan Wade, #41939

Ginger K. Gooch, #50302

Jason C. Smith, #57657

bryan.wade@huschblackwell.com

ginger.gooch@huschblackwell.com

jason.smith@huschblackwell.com

901 St. Louis Street, Suite 1800

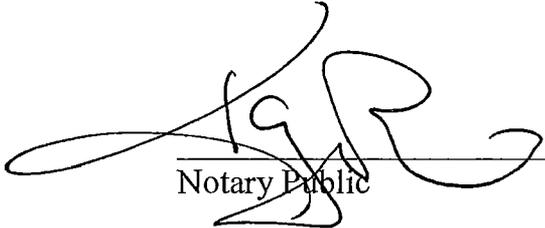
Springfield, MO 65806

Phone: (417) 268-4000

Fax: (417) 268-4040

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Subscribed and sworn to before me this 1st day of September, 2011.



Notary Public

My commission expires:

KERRY B. NOE
Notary Public – Notary Seal
STATE OF MISSOURI
Greene County– Comm#10503945
My Commission Expires Apr. 8, 2014