

IN THE MISSOURI SUPREME COURT

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**Appeal No. SC 88367**

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Cynthia Carpenter, *et al.*,

*Respondents,*

vs.

Countrywide Home Loans, Inc.,

*Appellant.*

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**Respondents' Brief**

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TABLE OF CONTENTS

**TABLE OF CONTENTS** ..... 2

**TABLE OF AUTHORITIES** ..... 8

**STANDARD OF REVIEW** ..... 16

**FACTUAL RESPONSE** ..... 20

A. Countrywide did not uniformly charge document preparation fees on mortgage loans made in Missouri, but decided whether to charge such fees based on competitive considerations, and stopped charging such fees because of a "glitch" in its computerized document system .....21

B. Fannie Mae and Freddie Mac do not require lenders to charge document preparation fees as a condition of selling loans in the secondary mortgage market. ....25

C. Non-lawyer Countrywide employees select the legal documents used in each loan transaction .... 27

D. Plaintiffs timely objected to the improper expert testimony of former Supreme Court Judge John Holstein .....28

E. Countrywide created a definition of "document preparation fee" specifically for use at trial and falsely represented in discovery and at trial that Countrywide had no prior written definition of "document preparation fee" .....29

**ARGUMENT** .....36

I. The trial court did not err in entering judgment against Countrywide for engaging in the law business in violation of Section 484.020 because a non-lawyer may not charge for assisting in the drawing of any paper affecting or relating to secular rights even in transactions in which the non-lawyer is a party (*Response to Point Relied On No. I*) 36

.....

documents violates Section 484.020 regardless of whether the non-lawyer is a party to the transaction..... 40

B. Applicability of Section 484.020 to Countrywide’s conduct is reinforced by the General Assembly’s recent enactment of Section 484.025 .....49

C. Countrywide’s contention that Missouri has adopted a multi-factor test in which whether a separate fee was charged is just one, non-determinative factor to be considered is contrary to the express holdings of *Hulse* and *First Escrow*.....52

D. A lender may not charge a borrower for preparing legal documents even if the lender is not representing the borrower in the transaction....56

E. Barring non-lawyers from charging for preparing legal documents even in transactions to which they are a party is good public policy.....60

F. The cited cases from other jurisdictions contradict Section 484.020 and do not provide a sound basis to

change Missouri law prohibiting non-lawyers from charging for preparing legal documents even in transactions in which they are parties.....66

II. The trial court did not err in overruling Countrywide's motion for a new trial on the basis that Section 484.020 is unconstitutional because Countrywide failed to raise its challenge to the statute at the first available opportunity (*Response to Point Relied On No. II*).....78

.....

unconstitutional because neither the Missouri nor the United States Constitutions require finding a culpable mental state as a condition precedent to imposing statutory treble damages (*Response to Point Relied On No. II*)..... 84

IV. The trial court did not err in holding that the voluntary payment doctrine did not provide Countrywide a defense because the doctrine does not apply to claims mandated by statute (*Response to Point Relied On No. III*).....94

V. The trial court did not err in declining to apply a two-year limitation period to plaintiffs' claims under Section 484.020 (*Response to Point Relied On No. IV*).....98

A. Countrywide has failed to properly raise, preserve, and assert any error by the trial court with respect to limitations, and its point relied on is not in compliance with Rule 84.04(d)(1)(A).....98

B. Section 484.020 does not provide a limitation period for actions brought under it.....99

C. Plaintiffs' claims under Section 484.020 are subject to the six-year limitation period provided by Section 516.420 for suits against moneyed corporations for a penalty or statutory violation .....104

D. Plaintiffs did not admit or agree that their Section 484.020 claims were subject to a two-year limitation period .....108

VI. The trial court did not err in awarding plaintiffs prejudgment interest (*Response to Point Relied On No. V*) .....112

**CONCLUSION** .....115

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Pages</b>
<i>Barth v. Canyon County</i> , 918 P.2d 576 (Idaho 1996) . . . .	93
<i>Bennett v. Owens-Corning Fiberglass Corp.</i> , 896 S.W.2d 464 (Mo. banc 1995)	92
<i>Blane v. American Inventors Corp.</i> , .....934 F. Supp. 903 (M.D. Tenn. 1996)	85
<i>Bray v. Brooks</i> , 41 S.W.3d 7 (Mo. App. 2001) . . . . .	96
<i>Brizendine v. Conrad</i> , 71 S.W.3d 587 (Mo. banc 2002)	86, 87
<i>Burnett v. Griffith</i> , 769 S.W.2d 780 (Mo. banc 1989) ..	92
<i>CADCO, Inc. v. Fleetwood Enterprises, Inc.</i> , .....207 Mo. App. Lexis 458 (March 20, 2007)	82
<i>Cain v. Merchant National Bank &amp; Trust Co.</i> , .....268 N.W. 719 (N.D. 1936)	75
<i>Call v. Heard</i> , 925 S.W.2d 840 (Mo. banc 1996) . . . . .	94
<i>Cardinal v. Merrill Lynch Realty/Burnet, Inc.</i> , .....433 N.W.2d 864 (Minn. 1988)	70-71

<i>Charter One Mortgage Co. v. Condra,</i>	
.....	2007 Ind. Lexis 288 (May 2, 2007) 72-73
<i>Clippard v. Pfefferkorn,</i>	168 S.W.3d 616 (Mo. App. 2005)97
<i>Coffee County Abstract &amp; Title Co. v. State,</i>	
.....	445 So. 2d 852 (Ala. 1983) 63, 76
<i>Commonwealth v. Jones &amp; Robins, Inc,</i>	
.....	41 S.E.2d 720 (Va. 1947) 75
<i>Cooperman v. West Coast Title,</i>	75 So. 2d 818 (Fla.
1954) .....	76
<i>Cushman v. Mutton Hollow Land Development, Inc.,</i>	
.....	782 S.W.2d 150 (Mo. App. 1990) 17-18
<i>Delmar Bank of University City v. Douglas,</i>	
.....	366 S.W.2d 80 (Mo. App. 1963) 96
<i>District Cablevision L.P. v. Bassin,</i>	
.....	828 A.2d 714 (D.C. 2003) 92
<i>Does &amp; Harper Stone Co., Inc. v. Hoover Brother Farms,</i>	
<i>Inc.,</i>	
.....	191 S.W.3d 59 (Mo. App. 2006) 61
<i>Dressel v. Ameribank,</i>	664 N.W.2d 151 (Mich. 2003) .68-69
<i>Edgar v. Fitzpatrick,</i>	377 S.W.2d 314 (Mo. 1964) .....108

<i>Eisel vs. Midwest Bank Centre</i> , Appeal No. SC 88167 (Mo.)	
.....	(decision pending) 79-80
<i>Eminence R-1 School Dist. v. Hodge</i> ,	
.....	635 S.W.2d 10 (Mo. 1982) 103
<i>Greeson v. Ace Pipe Cleaning, Inc.</i> ,	
.....	830 S.W.2d 444 (Mo. App. 1992) 85-86, 87
<i>Hanch v. K.F.C. National Management Corp.</i> ,	
.....	615 S.W.2d 28 (Mo. banc 1981) 82-83
<i>Hinnah v. Director of Revenue</i> ,	
.....	77 S.W.3d 616 (Mo. banc 2002) 18-19, 97
<i>Hodges v. City of St. Louis</i> , 2007 Mo. Lexis 27 (Feb. 27 2007)	..... 62, 66
<i>Hoffmeister v. Tod</i> , 349 S.W.2d 5 (Mo. banc 1961)	.. 38-39
<i>Honda Motor Co., Ltd. v Oberg</i> , 512 U.S. 415 (1994)	... 92
<i>Hulse v. Criger</i> , 247 S.W.2d 855 (Mo. banc 1952)	.. <i>passim</i>
<i>Illinois Brick Co. v. Illinois</i> , 431 U.S. 720 (1977)	.. 62
<i>Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc.</i> ,	
.....	602 S.W.2d 282 (Tex. Civ. App. 1980) 85, 89-90
<i>In re First Escrow</i> , 840 S.W.2d 839 (Mo. banc 1992)	<i>passim</i>

<i>In re Marriage of Kenney</i> , 137 S.W.3d 487 (Mo. App. 2004) .....	18
<i>Jones v. Jones</i> , 891 S.W.2d 551 (Mo. App. 1995)	17, 18, 19
<i>Keyes Co. v. Dade County Bar Ass'n</i> , .....	46 So. 2d 605 (Fla. 1950) 76
<i>King v. First Capital Financial Services Corp.</i> , .....	828 N.E.2d 1155 (Ill. 2005) 67-68, 72, 73
<i>Liberty Mutual Ins. Co. v. Jones</i> , .....	130 S.W.2d 945 (Mo. 1939) 46, 57, 58-59
<i>McClure v. Nowick</i> , 382 S.W.2d 731 (Mo. App. 1964)	95, 96
<i>McCollum v. O'Dell</i> , 525 S.E.2d 721 (Ga. App. 1999) ...	61
<i>Meadowbrook Country Club v. Davis</i> , .....	384 S.W.2d 611 (Mo. 1964) 78
<i>Mercer v. Long Mfg. N.C., Inc.</i> , 665 F.2d 61 (5th Cir. 1982) .....	85, 92
<i>Missouri Highway &amp; Transp. Com. v. Myers</i> , .....	785 S.W.2d 70 (Mo. 1990) 64
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	16, 17, 20
<i>National Enameling &amp; Stamping Co. v. City of St. Louis</i> , .....	40 S.W.2d 593 (Mo. 1931) 95, 96
<i>Oregon State Bar v. Security Escrows, Inc.</i> ,	

..... 377 P.2d 334 (Or. 1962) 71-72  
*Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980)85, 90-91  
*Perkins v. CTX Mortgage Co.*, 969 P.2d 93 (Wash. 1999)69-70  
*Pope County Bar Ass'n v. Suggs*,  
..... 624 S.W.2d 828 (Ark. 1981) 75  
*Pulse v. North American Land Title Co.*,  
..... 707 P.2d 1105 (Mont. 1985) 74  
*Randall v. Sorrell*, 126 S. Ct. 2479, 165 L. Ed. 2d 482  
(2006) ..... 62, 66  
*Reinert v. Director of Revenue*,  
..... 894 S.W.2d 162 (Mo. banc 1995) 19  
*Ridgway v. TTnT Development Corp.*,  
..... 126 S.W.3d 807 (Mo. App. 2004) 87-89  
*Rois v. H.C. Sharp Co.*, 203 S.W.3d 761 (Mo. App. 2006)115  
*Sadofski v. Williams*, 290 A.2d 143 (N.J. 1972) ..... 61  
*Schwartz v. Bann-Cor Mortgage*,  
..... 197 S.W.3d 168 (Mo. App. 2006) 105-06, 109

<i>State Bar Ass'n. v. Connecticut Bank &amp; Trust Co.,</i> .....	131 A. 2d 646 (Conn. 1957)	75
<i>State ex rel. Edu-Dyne Systems v. Trout,</i> .....	781 S.W.2d 84 (Mo. banc 1989)	50
<i>State ex rel. Laszewski v. R.L. Persons Constr., Inc.,</i> .....	136 S.W.3d 863 (Mo. App. 2004)	78, 85, 87
<i>State ex rel. Tompras v. Board of Election Commissioners,</i> .....	136 S.W.3d 65 (Mo. banc 2004)	79
<i>State Farm Mut. Auto Ins. v. Campbell,</i> 538 U.S. 408 (2003) .....		92
<i>State v. Entertainment Ventures I, Inc.,</i> .....	44 S.W.3d 383 (Mo. banc 2001)	16
<i>State v. Pughe,</i> 428 S.W.2d 549 (Mo. 1968) .....		108
<i>State v. Schleiermacher,</i> 924 S.W.2d 269 (Mo. banc 1996)		84,90
<i>The State Bar v. Guardian Abstract &amp; Title Co.,</i> .....	575 P.2d 943 (N.M. 1978)	75
<i>Thummel v. King,</i> 570 S.W.2d 679 (Mo. 1978) .....		98, 99
<i>Ticor Title Ins. Co. v. Mundelius,</i> .....	887 S.W.2d 726 (Mo. App. 1994)	95, 97
<i>Vogel v. A.G. Edwards &amp; Sons, Inc.,</i>		

.....	801 S.W.2d 746 (Mo. App. 1990)	112-13
<i>Western Cas. &amp; Sur. Co. v. Kohm,</i>		
.....	638 S.W.2d 798 (Mo. App. 1982)	95

**Constitutional Provisions, Rules, and Statutes**

Fourteenth Amendment, U.S. Constitution .....	80
Rule 73.01(c), Missouri Rules of Civil Procedure	16, 20, 97
Rule 84.04(d)(1)(A), Missouri Rules of Civil Procedure	98, 112
Rule 84.13(c), Missouri Rules of Civil Procedure	.82, 83
Section 15-19-52, GA. CODE ANN.....	77
Section 83.001, TEX. GOV'T CODE .....	77
Section 290.300, RSMo .....	87
Section 408.020 RSMo .....	112, 113, 114
Section 484.010, RSMo .....	<i>passim</i>
Section 484.020, RSMo .....	<i>passim</i>
Section 484.025, RSMo .....	49-50, 62
Section 516.010, RSMo .....	101
Section 516.095, RSMo .....	102
Section 516.097, RSMo .....	102
Section 516.100, RSMo .....	100

Section 516.420, RSMo. ....100, 104-05, 110

Section 527.420, RSMo. .... 86

Section 537.340, RSMo. .... 87-89

**Other Authorities:**

*Advisory Committee Opinions* (Missouri Bar), available at:

*<http://newsite.mobar.org/formal/ch09.htm>* 47

Missouri Supreme Court Advisory Committee  
 ..... Formal Opinion 646-47

Missouri Supreme Court Advisory Committee  
 .....Formal Opinion 3846-47

Missouri Supreme Court Advisory Committee  
 .....Opinion Un.Pr.-4647-48

### STANDARD OF REVIEW

Countrywide lost its case. On an appeal from a bench trial, the appellate court accepts the evidence and inferences favorable to the prevailing party and disregards all contrary evidence. *State v. Entertainment Ventures I, Inc.*, 44 S.W.3d 383, 385 (Mo. banc 2001); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Countrywide did not request findings of fact pursuant to Rule 73.01(c). "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.* Thus all of the fact issues in this case should be considered to have been found in favor of plaintiffs and against Countrywide.

Countrywide contends it can nonetheless present the evidence it unsuccessfully adduced at trial as part of the record on appeal because that evidence was purportedly "uncontroverted or admitted." *Countrywide Brief* at 43-44. Countrywide's contention fails. Key

portions of the evidence were controverted, including the opinions of Countrywide's expert witnesses and whether such opinions were admissible, and whether Countrywide had a definition of "document preparation fee" in materials available to its customers. Moreover, the cases cited by Countrywide do not support its contention that the appeal should be decided as though Countrywide's trial evidence was uncontroverted and true.

*Jones v. Jones*, 891 S.W.2d 551 (Mo. App. 1995), was a "friendly suit" to establish paternity of a child. The putative father had died and all of the witnesses, including the putative father's mother, testified that the decedent was the child's father. The trial court mysteriously denied the petition. The appellate court reversed, holding that there was no substantial evidence to support denial of the petition. *Id.* at 553. The holding in *Jones* is consistent with the rule established in *Murphy v. Carron*, that "the decree or judgment of the trial court will be sustained by the

appellate court *unless there is no substantial evidence to support it...*" *Murphy*, 536 S.W.2d at 32 (emphasis added).

*Cushman v. Mutton Hollow Land Development, Inc.*, 782 S.W.2d 150 (Mo. App. 1990), is another case that properly applies *Murphy v. Carron*. The appellate court found the trial court's judgment "is against the weight of the evidence and erroneously applies the law." 728 S.W.2d at 163. In *Cushman*, the trial court authored a series of numbered paragraphs captioned "findings of fact." The appellate court found these findings to be confused, contrary to the undisputed documents, and containing mixed findings of fact and conclusions of law where the conclusions of law were erroneous. *Id.* at 156-57. *Cushman* does not present a basis for treating Countrywide's rejected evidence as though it were established at trial.

*In re Marriage of Kenney*, 137 S.W.3d 487 (Mo. App. 2004), which quotes *Jones v. Jones*, was not decided on any ground relating to standard of review. The holdings

in *Kenney* were (1) payments made to a Uniform Trust for Minors pursuant to the parents' separation agreement are not child support but are the child's separate property, and (2) a motion to modify can only address changes in circumstances and cannot be used to correct errors in the original divorce decree. *Id.* at 491. Neither of these holdings have anything to do with whether a losing party's evidence can be treated as part of the record on appeal.

*Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002), was a review of a license revocation. The Court stated that the sole issue at trial was whether the police officer *had probable cause to believe* plaintiff was driving a motor vehicle intoxicated. Whether plaintiff was actually driving was irrelevant. There was no dispute plaintiff was arrested and refused to submit to the chemical test. This Court affirmed the trial court's reinstatement of the driver's license, holding that the police officer's uncontradicted testimony included statements from which

the trial court could find an *absence* of probable cause. 77 S.W.3d at 621. *Hinnah* does not support Countrywide's position.

In *Reinert v. Director of Revenue*, 894 S.W.2d 162, 164 (Mo. banc 1995), another license revocation case, a police officer was the only witness at trial. The officer unequivocally identified Reinert as the driver and "testified that Reinert drove erratically, smelled of alcohol, and failed three field sobriety tests..." 894 S.W.2d at 164. The trial court nevertheless reinstated Reinert's license. This Court reversed. Because the officer was the *only witness* at trial, and because his evidence was unequivocal and uncontradicted, this Court held there was no substantial evidence to support a finding that the officer did not have probable cause. *Id.*

*Reinert* is thus similar to *Jones*: the trial court's judgment was reversed due to the absence of substantial evidence supporting the judgment, not because the losing party's evidence was uncontradicted. Neither

case stands for the proposition that where, as here, a plaintiff offers substantial evidence supporting the judgment, the judgment should nevertheless be reversed because the defendant offered some immaterial evidence not directly rebutted at trial.

Countrywide's proposed rule on uncontradicted evidence, if adopted, would impose a great burden on litigants and the courts: Whenever a party offered immaterial evidence, the opposing party would have to offer its own immaterial evidence in rebuttal out of fear that otherwise the party offering the evidence might argue on appeal that its evidence was unrebutted and therefore must be accepted as both true and controlling.

Parties should not be penalized for trying their cases efficiently and without wasting time responding to irrelevancies. The rule established by *Murphy v. Carron* and Rule 73.01(c) should continue to be followed, and Countrywide's evidence at trial,

including but not limited to the testimony of its expert witnesses, should be disregarded in this appeal.

#### **FACTUAL RESPONSE**

Countrywide, both in its Statement of Facts and in the text of its argument, consistently cites to evidence it adduced at trial. This is improper. As discussed in the preceding section, Countrywide lost at trial and its evidence should be disregarded. There was also additional evidence supportive of the judgment that Countrywide failed to mention in its brief.

**A. Countrywide did not uniformly charge document preparation fees on mortgage loans made in Missouri, but decided whether to charge such fees based on competitive considerations, and stopped charging such fees because of a "glitch" in its computerized document system.**

Richard Monley was formerly regional vice president for the consumer market division of Countrywide. [Tr. 318]. The consumer market division makes loans directly to borrowers, while other divisions make loans to

brokers who lend to borrowers. [Tr. 318]. Monley testified that out of the 11 branches in his region that made Missouri loans, three charged document preparation fees: Lee's Summit, Columbia, and Overland Park, Kansas. [Tr. 323-24].

Monley testified that the decision whether to charge a document preparation fee was based on competition:

Q: Okay. Who decided when a document preparation fee would be charged on a particular loan?

A: The procedure that we had was that we allowed the Branch Manager in each area or each territory to do a survey of competitors to see what the competitors had as fees; what was common in the market; what would be acceptable in the market, and then

they would give those to me for my  
final approval.

[Tr. 324-25].

Similarly, the amount of any document preparation fee had nothing to do with Countrywide's cost of preparing documents and everything to do with competition and how much Countrywide could get away with:

Q: Now, when a document preparation fee was charged, how was the amount of the fee determined?

A: Again, it was determined by the Branch Manager doing a survey of competitors, coming up with a suggestion of what the competitors were charging, what was common in the area and acceptable, and – and I would sign off on it.

[Tr. 326].

Even those Countrywide branches that could competitively charge document preparation fees did not charge them to all borrowers:

Q: What would be some of the circumstances under which a document preparation fee wouldn't be charged in those Branches that otherwise might do it?

A: Well, the most common one was that there's certain loan programs that won't allow it: FHA and VA. And ... the Manager had the flexibility to waive those fees if they needed to to satisfy the client to get the loan closed. So, we leave it - left it up to them for the final decision.

[Tr. 326; see also Tr. 395 (document preparation fee not charged for FHA or VA government loans or on home equity lines of credit)].

Plaintiff Carpenter herself was charged a document preparation fee on one of two loans she had with Countrywide, but was not charged a document preparation fee on the second loan she obtained from Countrywide the same day. [Tr. 67-68].

Countrywide's consumer product division eventually stopped charging document preparation fees, but that decision had nothing to do with this lawsuit or with any of the reasons Countrywide asserts as negative consequences of the judgment below:

Q: Okay. And why did the Consumer Markets Division Branches stop charging document preparation fees?

A: There was some glitch in our computer system - our EDGE system that was producing new disclosures and costs, and everything. So, senior management, which was the management above me,

decided not to go ahead and charge it anymore.

[Tr. 325].

Since 2003, Countrywide's St. Louis branch has charged borrowers a \$575 "underwriting fee." [Tr. 253].

**B. Fannie Mae and Freddie Mac do not require lenders to charge document preparation fees as a condition of selling loans in the secondary mortgage market.**

Kimberly McMann is first vice president of operations for Countrywide's documents systems and compliance department in California. [Tr. 258]. McMann testified that Countrywide sells its loans to Fannie Mae and Freddie Mac, two "investors" in mortgages. [Tr. 262].

McMann reviewed several of Countrywide's form documents at trial. McMann identified some of the documents as forms prepared by Fannie Mae or Freddie Mac. [Tr 261-64]. McMann identified others as prepared in-house by Countrywide and yet others as prepared by

VMP, Countrywide's "outside document vendor." [Tr. 265]. "VMP is what I would consider to be our form designers, and they are setting up the form as we have asked them to set it up, insuring that it's compliant with the various state rules." [Tr. 268].

Christian Ingerslev is Countrywide's executive vice president of product management in California. [Tr. 217-18]. On cross-examination, Ingerslev admitted that neither Fannie Mae nor Freddie Mac requires lenders to charge borrowers a document preparation fee. "To charge for the fees, no, there is no such requirement." [Tr. 232].

John McNearney is a lawyer with Blackwell Sanders Peper Martin. He testified as an expert witness for Countrywide. [Tr. 334]. McNearney testified about the importance of having standardized forms for mortgage loans. [Tr. 344-47]. McNearney admitted on cross-examination, however, that neither Freddie Mac nor Fannie Mae requires lenders to charge borrowers document preparation fees as part of their uniform

standards and practices. [Tr. 352]. McNearney admitted lenders did not have a uniform practice of charging document preparation fees. [Tr. 353]. Finally, McNearney admitted mortgage loans would be as readily able to be sold on the secondary market regardless of whether lenders charged document preparation fees:

Q: And, similarly, the charging or not charging of document preparation fees does not affect whether or not a loan can be sold in the secondary market, correct?

A: I don't think it would, no.

[Tr. 354].

**C. Non-lawyer Countrywide employees select the legal documents used in each loan transaction.**

While Countrywide's brief suggests that Countrywide's EDGE computer system automatically selects the Countrywide documents used in each loan transaction, without any person exercising discretion,

in fact non-lawyer employees of Countrywide, known as "funders," select the documents used in each transaction from a menu of documents provided by EDGE. [Tr. 423-24]. "The system will provide us a list of documents it feels is applicable, and then we must select from that list... They provide a - a long list of anything that could be applicable to that one loan transaction, and then a funder actually has to pick the loan documents from that list." *Id.*

Moreover, the EDGE system was admittedly "not perfect." [Tr. 424]. For example, on balloon loan transactions, EDGE would produce two separate promissory notes - a balloon note and an adjustable rate mortgage note. *Id.* It was then up to the funder to know which note was correct and to choose the proper note. *Id.*

**D. Plaintiffs timely objected to the improper expert testimony of former Supreme Court Judge John Holstein.**

Countrywide presented as an expert witness former Missouri Supreme Court Judge John C. Holstein. [Tr. 427]. Plaintiffs timely objected to this testimony as improper expert witness testimony and as irrelevant. [Tr. 426-27, 434-35]. The trial court made plaintiffs' objections continuing. [Tr. 427, 435]. While Countrywide relies heavily on Judge Holstein's opinions and analysis of the statutory language, treating his testimony as though it had been accepted by the trial court, the trial court in fact stated it would allow Holstein to testify fully, "but I'll look at it at the time I'm making my decision whether it should have been admissible or not admissible." [Tr. 434, 435].

The testimony was not admissible and, in any case, was clearly not accepted or adopted by the trial court.

**E. Countrywide created a definition of "document preparation fee" specifically for use at trial and falsely represented in discovery and at trial that Countrywide had no prior written definition of "document preparation fee."**

Exhibit 3 is a booklet published by the United States Department of Housing and Urban Development ("HUD") titled, *Buying Your Own Home*. Federal law requires lenders to provide *Buying Your Own Home* to all persons borrowing money for a home purchase. [Tr. 150]. Countrywide routinely provides the booklet to its home-buying customers. [Tr. 415-16].

Exhibit 3 was offered as evidence of the generally-accepted meaning of "document preparation fee" as used on the HUD-1 closing form. [Tr. 150]. Exhibit 3 defines the fee as: "This is a separate fee that some lenders or title companies charge to cover their costs of preparation of final legal papers, such as a mortgage, deed of trust, note or deed." [Tr. 415].

Countrywide's attorney, Thomas Hefferon, objected to admission of Exhibit 3, stating in part:

Furthermore, this describes what, at best, HUD says is what "some" lenders do, and the testimony that's already in the record is that that's not what

Countrywide does. *Countrywide charges a document preparation fee for all of the documents.*

[Tr. 152 (emphasis added)].<sup>1</sup>

Immediately following Hefferon's objection, the trial court had the following exchange with him:

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<sup>1</sup>The significance is that Countrywide contended that document preparation fees should be allocated among all documents prepared by Countrywide, but that a plaintiff could only recover that part allocated to preparation of "final legal papers." This contention, if accepted by the trial court, could have materially decreased the total damages recoverable. [See LF 335, 350-51]. At trial, Countrywide's damages expert testified that only 11.35 percent of the Countrywide documents were "legal documents," and opined that damages should be reduced by almost 90 percent from the amount plaintiffs requested. [Tr. 513-16, 525].

Countrywide has not pursued this argument on appeal.

Court: You have - do you have written documentation that says ... what the document preparation fee is for?

Hefferon: I think the testimony is that there - that, at the time, there was no written documentation, Judge.

[Tr. 152].

Exhibit 3 was admitted into evidence over Countrywide's objection, as was Exhibit 4, the official portion of the Federal Register containing the text of *Buying Your Own Home*. [Tr. 154].

Jennifer Corcoran is vice president, regional operations manager for Countrywide's wholesale lending division in Missouri. [Tr. 357-58]. Corcoran admitted on cross-examination that the purported Countrywide definition of "document preparation fee" she testified to at trial - a fee charged for all documents Countrywide prepares except those documents for which

it cannot legally charge a fee under federal law – was a definition she created specially for trial. [Tr. 416-17]. Corcoran testified that Countrywide had no previously-existing documents defining “document preparation fee”:

Q: I’ll represent to you, Miss Corcoran, that we asked your lawyers to produce any documents that Countrywide had. Not necessarily the ones they gave to their borrowers, but any internal documents they had that defined what this document preparation fee was for, and there were no – there were no such documents. Is that consistent with your understanding?

A: It is.

Q: So, Countrywide, on the inside, regardless of what it says to borrowers; in your offices or in the

national office out in Calabasas, California, they have no working definition - at least, they didn't a few years ago - of what a document preparation fee, is that right?

A: That is correct.

[Tr. 413].

Plaintiffs called as rebuttal witness Scott Barrett. [Tr. 557]. Barrett is a Chicago lawyer who attended the trial as an observer because he is an attorney for plaintiffs in a similar case against Countrywide pending in California. [Tr. 559-60]. When Barrett heard Corcoran testify that Countrywide had no written definition of "document preparation fee," it concerned him because he had learned the contrary in his own case. [Tr. 561-65]. Barrett had a copy of a definition of "document preparation fee" Countrywide published on its website in 2004 faxed to St. Louis for use in this trial. [Tr. 561-62, 569]. The website

printout was admitted in evidence as Exhibit 26. [Tr. 565].

Exhibit 26 defined document preparation fee as: "This fee covers the expenses associated with the process of preparing the legal documents that you will be signing at the time of closing, such as the mortgage, note, and truth-in-lending statement." [Tr. 566].<sup>2</sup>

Astonishingly, on cross-examination, attorney Hefferon – who previously assured the trial court that Countrywide had no written definition of "document preparation fee" and who presented Corcoran's testimony to that effect – attacked Barrett for not telling the trial court that Countrywide purportedly had two different written definitions of "document preparation fee" on its website:

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<sup>2</sup>Corcoran, however, testified Countrywide was not permitted to charge for the preparation of truth-in-lending-act documents. [Tr. 370].

Q: Now, Mr. Barrett, why didn't you tell the Court that Countrywide has another definition of "Document Preparation" fee on its website as of the time this definition (indicating) was printed out?

[Tr. 569-70].

Q: Mr. Barrett, isn't it true that you've sat through Depositions in the Countrywide case in California in which that other definition was marked as an Exhibit and discussed?

[Tr. 570].

Q: Mr. Barrett, isn't it true that the other definition on Countrywide's website, in 2004 when Exhibit 25 [sic: 26] was printed, was that it - the document preparation fee was a fee that covers the lender's costs for all

the documents utilized in its loan transactions.

A: You know, I'm sorry. I don't recall those words. I thought the words were something like "All the documents that you will be signing at closing," or "All the legal documents that you'll be signing at closing." I don't recall the exact words, but I don't think that the quote you just gave me is correct.

[Tr. 571-72].

Countrywide moved to strike Barrett's testimony and Exhibit 26. [Tr. 577]. Plaintiffs responded, stating in part: "So, we - we've moved in a matter of minutes from Countrywide saying there's no definition to saying there are two, and I think that is important evidence, and I think it goes tremendously to the credibility of the Countrywide witnesses..." [Tr. 579].

## ARGUMENT

I. The trial court did not err in entering judgment against Countrywide for engaging in the law business in violation of Section 484.020 because a non-lawyer may not charge for assisting in the drawing of any paper affecting or relating to secular rights even in transactions in which the non-lawyer is a party. (*Response to Point Relied On No. I.*)

This lawsuit is an action for damages provided by statute. Sections 484.010 and 484.020, RSMo., together define and impose criminal and financial penalties on non-lawyers who engage in "the law business." Section 484.010 defines the law business:

The law business is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association or corporation as to any secular law or

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

Section 484.010.2 (emphasis added). Section 484.020 identifies who may engage in the law business:

No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in

full force and effect, nor shall any association, partnership, limited liability company or corporation, except [listing certain entity forms permitted for law firms] engage in the practice of the law or do law business as defined in section 484.010, or both.

Section 484.020.1.

Section 484.020 imposes criminal and civil penalties upon those who violate the statute:

Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be

sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof..

Section 484.020.2.

While only this Court can regulate the practice of law, which it does through its "inherent power to regulate and discipline the Bar, to define and declare what is the practice of law, and to prevent the practice of law by laymen or other unauthorized persons," that power is separate from the General Assembly's power to declare certain conduct unlawful and to impose penalties for such conduct. *Hoffmeister v. Tod*, 349 S.W.2d 5, 11 (Mo. banc 1961) ("the legislature may, in the exercise of the police power, aid the court by providing penalties for unauthorized practice").

This Court recognizes the distinction between its control over the practice of law and the General Assembly's control over the punishment of persons who

engage in "the law business" in violation of the statutes:

We have at times recognized and used the statutory definition...; we may undoubtedly do so reserving the right, however, at all times to fix our own boundaries and declare our own restrictions in all matters *other than a prosecution under the statute.*

*Hoffmeister*, 349 S.W.2d at 11 (emphasis added). Countrywide acknowledges that imposition of treble damages under the statute is a penalty. *Countrywide Brief* at 76-78. Consequently, the imposition of such treble damages is squarely within the realm of the General Assembly's police powers. See *In re First Escrow*, 840 S.W.2d 839, 843 n.7 (Mo. banc 1992) ("the legislature has criminalized the activities at issue here only when they are done for compensation").

Plaintiffs did not seek an injunction barring Countrywide from charging document preparation fees.

They did not ask that the lawyers employed by Countrywide or those who drafted the form documents be disciplined for assisting in the unauthorized practice of law. That type of relief is solely within the domain of the Court. All plaintiffs have sought is the financial penalty mandated by statute. Section 484.020 is clear. The statute is a proper exercise of the General Assembly's police powers. The statute should be followed.

**A. This Court has consistently held that a non-lawyer's charging of a separate fee for the preparation of legal documents violates Section 484.020 regardless of whether the non-lawyer is a party to the transaction.**

Although the statutory language is controlling, this Court's decisions on the practice of law and the law business lead to the same conclusion. This Court has twice examined the law business as it relates to the completion of standard-form documents for mortgage loans. *First Escrow and Hulse v. Criger*, 247 S.W.2d 855

(Mo. banc 1952). Each time, the Court held that non-lawyers who charge a separate fee for the completion of these standard-form documents are improperly engaged in the law business. *First Escrow*, 840 S.W.2d at 843; *Hulse*, 247 S.W.2d at 862.

*Hulse* concerned the preparation of closing documents by a real estate broker. The broker prepared documents similar to those prepared by Countrywide: deeds conveying real estate, deeds of trust and promissory notes secured by such deeds of trust, leases of real estate, options for purchase, contracts of sale and agreements. *Hulse*, 247 S.W.2d at 856.

This Court issued detailed and very specific holdings conveniently stated in numbered paragraphs:

First: A real estate broker, in transactions in which he is acting as a broker, may use a standardized contract in a form prepared or approved by counsel and may complete it by filling in the blank spaces to

show the parties and the transaction which he has procured.

Second: A real estate broker, in transactions in which he is acting as a broker, may use standardized forms of warranty deeds, quit claim deeds, trust deeds, notes, chattel mortgages and short term leases, prepared or approved by counsel and may complete them by filling in the blank spaces to show the parties, descriptions and terms necessary to close the transaction he has procured.

Third: *A real estate broker may not make a separate charge for completing any standardized forms,* and he may not prepare such forms for persons in transactions, in which he is not acting as a broker, unless he is

himself one of the parties to the  
contract or instrument....

*Id.* at 862 (emphasis added).

Thus, *Hulse* holds that while a non-lawyer who is a party to a transaction may prepare legal documents necessary to the transaction, the non-lawyer party *may not charge* a fee to another party for preparing the documents, even if document preparation is limited solely to completion of standardized forms prepared or approved by a lawyer:

[T]he preparation of [deeds and deeds of trust] is so closely related to the transaction and the business of the broker as to be practically a part of it and that he is not engaging in unlawful practice of law to prepare them under such circumstances. The same thing is true of ordinary short term leases, notes, chattel mortgages and trust deeds in transactions which

the broker procures. However, he cannot make separate charges, in addition to his commission, for preparing any instruments ....

*Id.* at 861 (emphasis added).

In *First Escrow*, this Court expanded on *Hulse*. *First Escrow* considered whether an escrow company, which unlike a broker has no direct financial interest in a real estate transaction, may nonetheless fill in the blanks of standard-form documents without thereby engaging in the unauthorized practice of law. The Court held that an escrow company could fill in the blanks of lawyer-prepared standardized documents, but only under the supervision of and as the agent for an entity with a direct financial interest in the transaction. *First Escrow*, 840 S.W.2d at 840.

In reaching its conclusion, the Court held that the completion of standard-form closing documents *is* the practice of law. *Id.* at 842 n.4. Thus the Court framed the issue as: May escrow companies complete these form

documents as the *authorized* practice of law? *Id.* at 843. While the Court answered that question in the affirmative, it held firm to its earlier holding in *Hulse* that non-lawyers *cannot charge* for completing these documents. "Both *Hulse* and our opinion today bar service providers from charging a fee for preparing legal documents..." *Id.* at 843 n.7. The Court defined "service providers" as including "brokers, title companies and *lenders.*" *Id.* at 844, n.10 (emphasis added).

As in *Hulse*, this Court in *First Escrow* issued its holdings in a series of numbered paragraphs. Of particular interest is the fifth paragraph:

Escrow companies may not charge a separate fee for document preparation, or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction.

*Id.* at 849.

Finally, the Court addressed the specific issue in this case – the charging of document preparation fees by mortgage lenders. In summarizing the law of other states, the Court concluded:

The bulk of the opinions in this area have considered the role of brokers, title companies, and *lenders*...

(3) *Banks* and trust companies may fill in the blanks of standardized real estate forms related to mortgage loans, *so long as they do not charge a fee for the service.*

*Id.* at 844-45 n.10 (internal citations omitted; emphasis added).

It should be noted that the rule established by *Hulse* and *First Escrow* as well as the penalties imposed by Section 484.020 do not affect the ability of parties to a contract to agree that one party shall pay the other party's legal fees. Such a provision is common, for example, in commercial loan transactions, where the

borrower agrees to reimburse the lender its legal fees. Such agreements are not affected by the holding advocated by plaintiffs because the fee the lender is charging the borrower is the actual fee being charged by the lender's attorney. In other words, a lawyer is preparing the documents and is being paid for it; no layperson is being paid for preparing legal documents under this scenario.

Countrywide's citation of the Supreme Court Advisory Committee Opinions does not strengthen its case. Such opinions are not authoritative, and are regularly withdrawn when this Court rules contrary to the Advisory Committee's expectations. For example, Formal Opinion 5 was withdrawn when *Hulse* was decided, and Formal Opinion 10 was withdrawn when this Court decided *Liberty Mutual Ins. Co. v. Jones*, 130 S.W.2d 945 (Mo. 1939).

Moreover, the Advisory Opinions cited by Countrywide do not support its position. Formal Opinion 6 is inapposite, as it does not hypothesize the

charging of a fee for the preparation of documents. In any case, that opinion found the drafting of papers under the facts hypothesized therein to be prohibited. Formal Opinion 38 is also inapposite, as once again the charging of a fee was not part of the facts presented. Formal Opinion 38 is in fact as consistent with the position of plaintiffs as it is with that of Countrywide.

One Advisory Opinion that Countrywide failed to mention, however, is significantly more on point than Formal Opinions 6 and 38: Unauthorized Practice Opinion Un.Pr.-46, rendered May 23, 1980.<sup>3</sup> This Advisory Opinion presents the following question and answer:

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<sup>3</sup>Plaintiffs are unable to determine definitively whether Un.Pr.-46 is a Formal or Informal Opinion, although it appears to be a Formal Opinion. It is reproduced in the Missouri Bar's *Advisory Committee Opinions* handbook (now out of print) and is also

Q QUESTION: Situation 2. Unrelated to Situation 1 except that A is the same attorney.

A is a stockholder, director, officer and general counsel of a corporation whose business is diversified into insurance sales, real estate sales, *mortgage banking*, and other activities which are permitted under certain licensing statutes of Missouri and for which the corporation is properly licensed. The corporation will as a matter of policy, pursuant to board resolution, disclose to its clients the entire interest of A in the corporation.

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available on the Missouri Bar's website at:

<http://newsite.mobar.org/formal/ch09.htm>.

1. May A draw documents for the corporation to facilitate its providing to its clients those services for which it is licensed?

ANSWER: Situation 2.

The answer to this question depends on the kind of documents which are being drawn. The corporation may not provide documents for clients in such a fashion that it is engaged in the unauthorized practice of law. *Neither may the corporation make an additional charge for the drawing of documents even if the drawing is proper in connection with the business transaction being carried on.*

Un.Pr.-46 (emphasis added).

Thus, the Advisory Opinions support plaintiffs' position.

**B. Applicability of Section 484.020 to  
Countrywide's conduct is reinforced by the  
General Assembly's recent enactment of Section  
484.025.**

If there was any doubt Section 484.020 prohibited mortgage lenders from charging their borrowers a fee for completing residential loan documentation, that doubt should be erased by Section 484.025, which states:

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

Section 484.025, RSMo.

This statute, effective August 28, 2005, was passed while this case was pending. Section 484.025 changed

the law by carving out a narrow exception to the general rule established by Section 484.020. When the legislature enacts a new statute on the same subject as an existing statute, it is ordinarily the intent of the legislature to change the existing law. *State ex rel. Edu-Dyne Systems v. Trout*, 781 S.W.2d 84, 86 (Mo. banc 1989). The new statute changed the law by creating an exception to the statutory ban on lenders charging for preparing legal document for those lenders who charge a fee under \$200 in residential loan transactions.

The conclusion is straightforward. Before August 28, 2005, it was unlawful by statute for any lender to charge a fee for completing loan documents. After that date, it was only unlawful for residential mortgage lenders to charge a borrower a document preparation fee of \$200 or more. This case involves document preparation fees Countrywide charged before the new law became effective. The trial court did not err in holding Countrywide's conduct to have violated the law as it existed when Countrywide charged the fees.

Countrywide attempts to flip the import of the General Assembly's enactment of Section 484.025, contending that the new statute establishes "that the practice [of charging document preparation fees] is common and customary." *Countrywide Brief* at 57. Countrywide's contention is wrong.

The evidence at trial was that the practice of charging document preparation fees was not the standard, even at Countrywide. *Only three out of the 11 Countrywide branches making loans in Missouri ever charged document preparation fees*, and those branches did not do so in all cases. [Tr. 323-24]. No document preparation fees were charged in FHA or VA loans – such fees are prohibited by federal law for these government-supported loans – and the fee was waived at the branch manager's discretion for those customers who complained strongly enough about it. [Tr. 236]. Neither Fannie Mae nor Freddie Mac requires lenders to charge document preparation fees to participate in the secondary loan market, and Countrywide admitted that

lenders did not uniformly charge such fees. [Tr. 232, 352-54].

So the inference that Countrywide seeks to make from enactment of Section 484.025 that the charging of a document preparation fee is both common and customary is contrary to the evidence adduced at trial from Countrywide's own witnesses.

Moreover, even supposing Countrywide's contention were true, it would provide no basis for reversing the judgment. It may be "common and customary" to drive 80 miles per hour on rural interstate highways in Missouri. That does not mean that those who are caught doing so should escape the legal penalty set by the General Assembly. The same is true here. Countrywide broke the law and must now pay the penalty - even if some of those who broke the law with it managed to get down the road without being pulled over.

C. Countrywide's contention that Missouri has adopted a multi-factor test in which whether a separate fee was charged is just one, non-determinative factor to be considered is contrary to the express holdings of *Hulse* and *First Escrow*.

Countrywide in its brief presents two primary arguments. The first is that Missouri has adopted a "multi-factor test" to determine whether a person's completion of a form document is the unauthorized practice of law. Countrywide contends that because the Court listed a number of factors to be considered in its opinions in *Hulse* and *First Escrow*, one of which is the charging of a separate fee, the charging of a separate fee for the preparation of documents cannot be a determinative factor. Instead, according to

Countrywide, the various factors must be weighed and balanced against each other on a case-by-case basis.<sup>4</sup>

There are problems with Countrywide's multi-factor argument. First, and perhaps most significantly, Countrywide simply misstates the holding in the two cases. As shown by the extensive quotations above, this Court has consistently held that *the charging of a fee, standing alone, is enough to convert innocent pro se activity by a party to a transaction into the unauthorized practice of law or unlawful law business. Hulse, 247 S.W.2d at 861. Hulse held: "A real estate broker may not make a separate charge for completing any standardized forms..." Id. at 862. First Escrow reaffirmed the central importance of whether a charge*

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<sup>4</sup>Countrywide's second primary argument is that no one engages in the law business unless acting in a representative capacity. This argument is addressed below in subsection D.

is imposed for the documents: "Both *Hulse* and our opinion today bar service providers *from charging a fee* for preparing legal documents..." 840 S.W.2d at 843 n.7 (emphasis added). *First Escrow* further explained: "Banks and trust companies may fill in the blanks of standardized real estate forms related to mortgage loans, so long as they do not charge a fee for the service." *Id.* at 844-45 n.10.

This Court's holdings could not be clearer. Countrywide may not like the rule, but it is our rule.

Countrywide apparently misunderstands the role played by the factors discussed in *Hulse* and *First Escrow*. The factors are not like the elements of a cause of action, where each and every one needs to be satisfied to state a cause of action. Rather, the factors show different roads by which a non-lawyer can go astray and engage in the unauthorized practice of law or the law business.

For example, a non-lawyer who prepares legal documents for another in a representative capacity is

engaging in the law business even if she does so for free. A *pro bono* lawyer is still a lawyer. Acting in a representational capacity is enough, standing alone, to cause the non-lawyer's conduct to be the unauthorized engaging in the law business. This is true even if the legal work done is simple and the non-lawyer accepts no compensation.

Similarly, a non-lawyer who prepares complex legal documents for his employer, or who prepares documents outside the ordinary nature and custom of his employer's main business, would be violating the prohibition against unauthorized engaging in the law business, even though the employee was not paid separately for this work, was not representing a third party, and even though his employer had a strong financial interest in ensuring that the document was prepared absolutely correctly. In other words, preparing complex legal documents for another is enough, standing alone, to violate the statute, even if

one does not receive separate compensation and is not acting in a representative capacity.

By a similar analysis, a non-lawyer who charges a separate fee to prepare legal documents violates the statute's prohibition even if the documents are simple and the work is done solely for her employee in a non-representative capacity. Charging a separate fee for legal work is enough, standing alone, to violate the statute.

D. A lender may not charge a borrower for preparing legal documents even if the lender is not representing the borrower in the transaction.

Countrywide contends that the key issue in applying the law business statute is whether the lender acted in a "representative capacity" on behalf of the borrower when preparing the documents in question. *Countrywide Brief* at 70-71. Countrywide goes so far as to state: "When a lender's conduct in no way involves representing another ... it does not constitute the practice of law or the law business at all." *Id.* at 72.

This contention is based upon a strained and improper reading of Section 484.010. To understand the error in Countrywide's argument, it is helpful to refer to the statute, parsed out to disclose its grammatical structure:

The law business is hereby defined to be and is [1] the advising or counseling for a valuable

consideration of any person, firm, association or corporation as to any secular law or [2] the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or [3] the doing of any act for a valuable consideration in a representative capacity obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Section 484.010 (bracketed numbers added)

The brackets are added to show that Section 484.010 defines three distinct activities as being within the law business: (1) advising; (2) drawing; and (3) representing. "Representative capacity" only appears as

an element of the third of the three stated activities, "the doing of any act," *et cetera*. See *Liberty Mutual*, 130 S.W.2d at 954 (dividing the predecessor statute to Section 484.010, Section 11692, R.S. 1929, into three paragraphs, pursuant to which the paragraph marked as [3] above stands separated from the paragraphs marked as [1] and [2] above).

Representative capacity is not an element of the second of the activities, the activity at issue here, "the drawing ... of any paper..." Countrywide interprets the statute so that the phrase "in a representative capacity" applies to all three actions prohibited by the statute. While this might be a possible, albeit strained, interpretation *if* the phrase "in a representative capacity" appeared at the very end of the third clause of the statute, it makes no sense to suggest that this phrase can be pulled out of the middle of the third clause of the statute and distributed over the two prior clauses. To suggest this

interpretation is simply to ignore the structure of the statute and the conventions of the English language.

This Court analyzed the statutory language similarly, albeit many years ago, in *Liberty Mutual*:

The first paragraph of the statute, defining the "practice of the law," covers appearances, in courts of record, etc., in a representative capacity, and technical preparation therefor, but says nothing about a consideration. The second paragraph defining "law business" includes advice and the drawing of papers relating to secular rights for a valuable consideration. The third paragraph is very broad and covers "the doing of any act for a valuable consideration in a representative capacity," for the purpose of securing

for another "any property or property rights whatsoever."

*Liberty Mutual*, 130 S.W.2d at 955. Thus, the phrase "representative capacity" does not apply to the provision of advice or the drawing of papers relating to secular rights for a valuable consideration.

The authorities cited do not support Countrywide's contention that all lawyer-like activities are permitted to lay persons unless undertaken in a representative capacity. Not a single Missouri authority cited by Countrywide approves the provision of *pro se* legal services by a non-lawyer charging a fee for that otherwise legal activity, whether or not the non-lawyer is acting in a representative capacity. Non-lawyers are forbidden from engaging in *pro se* legal activity in a representative capacity whether or not they are paid. They are also forbidden from engaging in *pro se* legal activity for pay whether or not they are acting in a representative capacity. Both are prohibited under Missouri law.

**E. Barring non-lawyers from charging for preparing legal documents even in transactions to which they are a party is good public policy.**

The rule prohibiting non-lawyers from charging fees for preparing legal documents makes good common sense and is good public policy. If the underlying business is the real economic driver for a transaction, and the preparation of documents merely incidental, then each party to the transaction is relying on the profit it hopes to make in the underlying business transaction.

Charging a fee for preparing legal documents, however, changes the character of the transaction. Charging the fee suggests that the preparation of the documents is itself an economic driver for the transaction and that the non-lawyer prepares the documents as a money-making activity. This is one of the wrongs the statute and this Court's decisions sought to prevent. "Such conduct would not be any part of his business ... but would be placing the emphasis upon conveyances as a practice of law ... and it would

also violate the provisions of [the statute]." *Hulse*, 247 S.W.2d at 861 (discussing why a broker cannot charge a fee for preparing any of the documents relating to the transactions he procures).

Countrywide contends that prohibiting non-lawyers from charging document preparation fees in transactions in which they are parties is bad law and does not support the underlying public policy of protecting the interests of consumers and other members of the public. This Court, in both *Hulse* and *First Escrow*, concluded otherwise. Both experience and common sense suggest this Court was correct. Missteps in choosing the right legal document can have damaging consequences. See, e.g., *Does & Harper Stone Co., Inc. v. Hoover Brother Farms, Inc.*, 191 S.W.3d 59, 61 (Mo. App. 2006) ("The mining lease at issue here ... typifies why the public needs greater protection from the unauthorized practice of law by lay persons, whether by non-lawyer title company employees, on-line non-lawyer purveyors of legal documents, or others"); *Sadofski v. Williams*, 290

A.2d 143, 147 (N.J. 1972) (detailing the misfortune ensuing when a bank officer, a lay person, "did not appreciate the legal significance of the language used or know how to prepare a proper format to carry out [the customer's] real intention"); *McCollum v. O'Dell*, 525 S.E.2d 721, 722 (Ga. App. 1999) ("This case presents a perfect example of what happens when lay persons exercise their right to draft a legal document").

Moreover, this Court is not writing fresh on a blank slate. *Stare decisis* strongly weighs against changing a rule that has been part of the legal framework of this State for more than half a century, at least since *Hulse* was decided in 1952. "[T]he rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires 'special justification.'" *Randall v. Sorrell*, 126 S. Ct. 2479, 2489, 165 L. Ed. 2d 482, 496 (2006); *Hodges v. City of St. Louis*, 2007 Mo. Lexis 27 at \*11 (Feb. 27 2007) ("In respect for the principle of *stare*

*decisis*, the Court declines to revisit the issue"). Adhering to prior case decisions is especially important when the Court is interpreting a statute because the legislature can always change a statute if it disagrees with the Court's interpretation. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).<sup>5</sup>

"The most complex [legal documents] are simple to the skilled, and the simplest often trouble the inexperienced." *Hulse*, 247 S.W.2d at 861 (citations omitted). The selection of which standard-form document to use requires sophistication and knowledge. Lawyers, who have both the education and the experience to make these selections, may forget how difficult the choice can be in any particular transaction. Lay persons, who often lack both the necessary education and experience,

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<sup>5</sup>Here the General Assembly, in enacting Section 424.025, showed it did not disagree with the Court's interpretation generally, but thought it appropriate to create a narrow exception to the general rule.

may not recognize the difficulty. See *Coffee County Abstract & Title Co. v. State*, 445 So. 2d 852, 856 (Ala. 1983) (legal discretion involved in choosing correct form document).

Here, a computer system called EDGE selects a set of documents which may potentially be used in a particular loan transaction. A non-lawyer employee of Countrywide known as a "funder" then selects the particular documents to be used from the set of documents offered by EDGE. The funder is not a lawyer, and while it is possible computer programs will someday be welcomed as members of the Bar, today is not that day. It is misleading for Countrywide to pass-off the combined work of a computer program and lay person as the work of a lawyer.

Charging a "document preparation fee" for legal work performed by a computer program misleads the public. The public is presumed to know the law. *Missouri Highway & Transp. Com. v. Myers*, 785 S.W.2d 70, 75 (Mo. 1990) (conclusive presumption). Consumers

are therefore presumed to know that Section 484.020 provides that *only* lawyers are permitted to engage in "the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights...", and are also presumed to know what this statute means, as interpreted by *Hulse* and *First Escrow*.

Add to this knowledge the definition of document preparation fee provided to every borrower by every lender per HUD requirements whenever a home is purchased on credit, and borrowers would naturally conclude that documents for which a document preparation fee is paid are prepared or reviewed by a lawyer. While the borrower knows the lawyer is not *her* lawyer, the fact that *some* lawyer has vetted the documents would likely give the borrower comfort that the documents are appropriate for her transaction. That simple fact could influence the borrower not to hire a lawyer to review the documents on her behalf.

Finally, a decision affirming the judgment below will not compel lenders to hire attorneys to handle closings, making real estate transactions more complex and expensive, as Countrywide contends. *Countrywide Brief* at 67. Lenders can continue to prepare their own documents for real estate closings. *Hulse, First Escrow*, and the decision below all permit it. Lenders just cannot charge a separate fee for doing so.

If the self-preparation of these legal documents is as convenient, cost-effective, and beneficial to lenders as claimed, then lenders will continue to self-prepare documents even if they cannot charge their borrowers for it and thereby profit from preparing legal documents.

If these lenders stop self-preparing documents because they cannot charge the borrowers, then that is evidence preparing documents is an activity lenders engage in not merely as part of the business of making loans but as a separate money-making endeavor.

Finally, it is important to note that the majority of Countrywide's branches making loans into Missouri – 8 out of 11 – did not see a need to charge document preparation fees before this suit was filed. The ability to charge such a fee is far from necessary to Countrywide's business.

**F. The cited cases from other jurisdictions contradict Section 484.020 and do not provide a sound basis to change Missouri law prohibiting non-lawyers from charging for preparing legal documents even in transactions in which they are parties.**

Countrywide cites some out-of-state cases to support its contentions. These cases are cited for the proposition that "a fee, standing alone, does not convert permissible behavior into the unauthorized practice of law." *Countrywide Brief* at 61. Countrywide asks the Court to follow these cases.

These cases do not provide compelling grounds for either ignoring the clear dictates of Section 484.020

or for overruling this Court's decisions in *Hulse* and *First Escrow*. The rationales for the decisions reached in these out-of-state cases certainly do not provide the "special justification" needed to overthrow 50-plus years of *stare decisis*. See *Randall*, 126 S. Ct. at 2489, 165 L. Ed. 2d at 496; *Hodges*, 2007 Mo. Lexis 27 at \*11. And, even if the Court were simply weighing the conflicting cases in a balance to go with the majority – and that is not an approach this Court has taken in the past – there are more decisions from other states *consistent with* the judgment and with *Hulse* and *First Escrow* than are contrary.

*King v. First Capital Financial Services Corp.*, 828 N.E.2d 1155 (Ill. 2005), is a recent out-of-state case cited by Countrywide. *Countrywide Brief* at 61. In *King*, the Illinois Supreme Court accepted all of the arguments made here by Countrywide. The Illinois court concluded as a matter of first impression under Illinois law that charging a fee for preparing legal documents was consistent with Illinois' court-created

*pro se* exception to the prohibition of the unauthorized practice of law. *King*, 828 N.E.2d at 1163. The Illinois Court discussed the decisions of various other states prohibiting parties involved in a transaction from charging for document preparation, but rejected those cases because purportedly none (except *Hulse*) gave a reason for its holding. *Id.* at 1166.

*King* chose not to follow *Hulse*. The only reason given by the Illinois court for that decision was: "The Missouri court also noted that making a separate charge for the document preparation would violate Missouri statutory law." *Id.* at 1165. The Illinois Attorney Act, in contrast with Missouri's Section 484.020, does not provide a private right of action for damages against those who engage in the unauthorized practice of law. *Id.* at 1170. Although this difference was not cited as a basis for the holding in *King*, it is a notable difference between the two states' statutes.

The Missouri unauthorized practice of law statute provides a private cause of action for its breach,

while the equivalent Illinois statute does not; and *Hulse* prohibits *pro se* parties from charging others for preparing legal documents, while *King* does not. This does not mean that Missouri should abandon *Hulse*, or the cause of action provided by Section 484.020, to adopt the Illinois alternative. Illinois chose to follow a different path than Missouri. Each state is entitled to follow its own path.

Countrywide also cites *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003). *Countrywide Brief* at 61. The decision in *Dressel* flowed from a Michigan definition of the practice of law substantially different than that historically followed in Missouri. The case thus provides little if any guidance as to what the decision should be here. Under Missouri law, the issue is not whether Countrywide engages in the practice of law when it completes standard-form documents, for it clearly

does. *First Escrow*, 840 S.W.2d at 842 n.4.<sup>6</sup> The issue in Missouri is whether *charging a fee* causes Countrywide to be engaged in the *unauthorized* practice of law. *Id.* at 843. In Michigan, the law is completely different. The Michigan Supreme Court explained: "our courts have consistently rejected the assertion that the Legislature thought that a person practiced law when

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<sup>6</sup>Although Countrywide titled a section of its brief, "Filling In Blanks On Forms Does Not Constitute The Law Business," *Countrywide Brief* at 72-74, that assertion is wrong. Countrywide reaches the conclusion by incompletely quoting the statute and citing Chief Justice Robertson's *concurring* opinion in *First Escrow* that filling in the blanks in legal forms is not the practice of law. *Countrywide Brief* at 73-74. The majority in *First Escrow*, however, knew Chief Justice Robertson's views and expressly rejected them. *First Escrow*, 840 S.W.2d at 842 n.5.

simply drafting a document that affected legal rights and responsibilities." *Dressel*, 664 N.W.2d at 156.

The other cases cited by Countrywide also provide no basis for reversing the judgment. In *Perkins v. CTX Mortgage Co.*, 969 P.2d 93 (Wash. 1999), lawyers employed by CTX performed all of the tasks requiring legal judgment in the preparation of the form documents. Lawyers employed by borrowers prepared the non-form documents requiring an exercise of legal judgment, such as the purchase and sale agreement, the HUD-1, the warranty deed, and others. *Id.* at 96-97. The only activity lay persons employed by CTX performed relating to legal documents was completing the form documents previously prepared *and selected by* CTX's lawyers. The Washington State Supreme Court decided that whether a fee was charged for the activities of these lay persons was irrelevant so long as the lay persons did not exercise any legal discretion. *Id.* at 98.

Thus in *Perkins*, unlike the present case, lawyers were involved throughout the process, including selecting the forms to be used. The facts in *Perkins* are completely different than those here.

*Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864 (Minn. 1988), presents an interesting situation. There, the Minnesota legislature passed a law specifically providing that real estate brokers and agents could engage in "drawing or assisting in drawing, with or without a charge, papers incident to the sale, trade, lease, or loan..." *Id.* at 866-67. The Minnesota Court "accorded, as a matter of comity, limited acceptance of the legislative declaration of public policy..." *Id.* at 867. This acceptance had not been traditionally extended to "the notion that the nonlawyer could charge for the performance." *Id.* at 868. Nevertheless, applying its "common sense," the Minnesota Court held that charging a fee for "the preparation of ordinary documentation for a real estate transaction" does not convert this activity into the

unauthorized practice of law. *Id.* at 869. Minnesota is all over the map on the issues, but the Court ultimately held brokers could lawfully charge for completing simple documents in transactions they procured and for which they are receiving a commission. *Id.* This was not a surprising decision, since the Minnesota statute expressly permitted brokers to do so. *Id.* at 867.

*Oregon State Bar v. Security Escrows, Inc.*, 377 P.2d 334 (Or. 1962), is inapposite. The Oregon Bar sought to enjoin two escrow companies from preparing legal documents for closings for customers who used their escrow service. The escrow companies charged their customers fees based on the value of the property in the transaction without regard to whether the escrow agent was preparing documents for closing. *Id.* at 335. The Oregon Court held that when an escrow agent exercises any discretion in selecting or preparing an instrument for another, he engages in the unauthorized practice of law regardless of whether he charges for

the service. *Id.* at 339. On the other hand, if an escrow agent merely fills in the blanks on form documents "selected by their customers, ... carried out under the direction of the customer...", the agent is not engaged in the practice of law. *Id.* at 340. The case does not deal with any of the issues here and it is puzzling why Countrywide chose to cite it.

In a case decided after Countrywide filed its opening brief, the Indiana Supreme Court reversed its prior decisions which had followed *Hulse* and chose instead to follow *King*. The opinion in *Charter One Mortgage Co. v. Condra*, 2007 Ind. Lexis 288 (May 2, 2007), is flawed in several respects.

First, the court's logic is flawed. The court states: "A pro bono lawyer is a lawyer, despite the lack of compensation for the lawyer's services. Similarly, payment of compensation does not convert an otherwise proper activity by a layperson into the practice of law." *Id.* at \*8-\*9. There is no logical connection between the two statements. The truth of one

is not dependent upon the truth or falsity of the other.

Second, the court's analysis of the decisions reached by other state's courts was remarkably shallow. It did not note any of the peculiarities of local law in Michigan, Washington, and Illinois, discussed above, and consequently did not discuss whether the rule adopted in those states could properly be transferred to Indiana.

Finally, *Charter One* uses a rather odd analogy to support its conclusion: "Many essentially routine tasks have some legal component. Even telling a driver to slow down entails knowledge that the law imposes speed limits and, in some sense, is giving legal advice." *Id.* at \*12. This is not the type of careful analysis that generates enthusiasm for a decision. After all, one could just be telling a driver to slow down because it seems safer. And few people, if any, charge a separate fee for such advice.

Thus, like *King*, *Charter One* is simply a case of a different state choosing a different path than Missouri – and, as was the case with Illinois, Indiana does not have a statute equivalent to Section 484.020.

In contrast with these cases, a greater number of states hold that a lender cannot charge a fee for preparing legal documents *pro se* without engaging in the unauthorized practice of law. Many of these courts cite *Hulse* approvingly in reaching their decisions.

Montana follows the same basic rule as Missouri. It has adopted a three-part test for whether a party's completion of real estate forms constitutes the unauthorized practice of law. "First, the real estate instruments must be prepared only incident to transactions in which the maker is interested; second, the instruments must be prepared without a separate charge; and third, the preparation must not go beyond the filling in of blank forms." *Pulse v. North American Land Title Co.*, 707 P.2d 1105, 1109 (Mont. 1985). This test is quite similar to the rule established by *Hulse*

and reiterated by *First Escrow*. Again, the charging of "a separate charge" is, by itself, sufficient under Montana law to cause otherwise innocent *pro se* activity to be the unauthorized practice of law.

New Mexico follows the same rule. The New Mexico Supreme Court, citing *Hulse*, explained that although it allows title companies to complete blank forms, "the making of separate additional charges to fill in the blanks would be considered the 'practice of law,' for the reason that it would place emphasis on conveyancing and legal drafting as a business rather than on the business of the title company." *The State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978).

Similarly, the Connecticut Supreme Court decreed that "one not a member of the bar may draw deeds, mortgages, notes and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made."

*State Bar Ass'n. v. Connecticut Bank & Trust Co.*, 131 A. 2d 646 (Conn. 1957).

North Dakota has the same rule: "A person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefor." *Cain v. Merchant National Bank & Trust Co.*, 268 N.W. 719, 723 (N.D. 1936).

The same is also true in Arkansas and Virginia. The preparation of real estate documents is the unauthorized practice of law in Arkansas, unless the preparer "shall make no charge for filling in the blanks." *Pope County Bar Ass'n v. Suggs*, 624 S.W.2d 828 (Ark. 1981); see also *Commonwealth v. Jones & Robins, Inc*, 41 S.E.2d 720 (Va. 1947) (holding that real estate brokers who prepared deeds and mortgage documents for a fee were engaged in the unauthorized practice of law).

Some state courts have not reached the issue for reasons favorable to the judgment below. In some states, the preparation of documents, including the completion of form documents, is restricted solely to lawyers regardless of whether the lay person charges a fee. In other states, a statute bars this type of conduct for a fee. In either case, the law of these states is contrary to the rule Countrywide proposes.

In Florida, non-lawyers may not complete closing documents because that is the unauthorized practice of law. "We are not shaken in this view because of the argument that oft times the instrument to be executed is a copy of one which has been prepared by an attorney." *Keyes Co. v. Dade County Bar Ass'n*, 46 So. 2d 605, 607 (Fla. 1950); *Cooperman v. West Coast Title*, 75 So. 2d 818 (Fla. 1954). The same is true in Alabama. *Coffee County Abstract & Title Co.*, 445 So. 2d at 854-55 (holding that completing form documents constitutes unauthorized practice of law).

Texas and Georgia have taken a different tack by enacting statutes prohibiting document preparation fees. Georgia's statute provides:

[N]or shall any person, firm, or corporation be prohibited from drawing any legal instrument for another person, firm, or corporation, *provided it is done without fee* and solely at the solicitation and the request and under the direction of the person, firm, or corporation desiring to execute the instrument. Furthermore, a title insurance company may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, *where no charge is made by it for the papers.*

GA. CODE ANN. § 15-19-52 (emphasis added).

In Texas, anyone who is not a lawyer or licensed real estate broker "may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien." TEX. GOV'T CODE § 83.001. Lenders are not included among those who can charge document preparation fees in Texas.

For all of the foregoing reasons, Countrywide's first point relied on should be denied and the judgment affirmed.

**II. The trial court did not err in overruling Countrywide's motion for a new trial on the basis that Section 484.020 is unconstitutional because Countrywide failed to raise its challenge to the statute at the first available opportunity.**

*(Response to Point Relied On No. II.)*

Constitutional questions must be raised at the first opportunity or be waived. A constitutional

challenge may not be raised for the first time as an afterthought in a post-trial motion. *State ex rel. Laszewski v. R.L. Persons Constr., Inc.*, 136 S.W.3d 863, 871 (Mo. App. 2004). "It is firmly established that a constitutional question must be presented at the earliest possible moment 'that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.'" *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo. 1964) (citation omitted); see also *State ex rel. Tompras v. Board of Election Commissioners*, 136 S.W.3d 65, 66 (Mo. banc 2004).

Countrywide did not comply with this requirement. As a result, Countrywide's constitutional challenge to Section 484.020 was waived and the Court should not reach Countrywide's second point relied on.

Countrywide was named as a defendant in the original petition filed by Carpenter and the initial group of plaintiffs March 2, 2002. [LF 64-67]. The original petition claimed treble damages against

Countrywide under Section 484.020. [LF 81]. The claim for treble damages was reasserted in a first amended petition filed April 18, 2002, a second amended petition filed January 6, 2003, and a third amended petition filed March 31, 2003. [See LF 99 (third amended)]. While Countrywide moved to dismiss each petition on multiple grounds, its motions did not raise a constitutional challenge to treble damages. [See LF 274-76].

During four years of vigorous litigation, Countrywide never asserted its constitutional challenge.

Then a related case, *Eisel vs. Midwest Bank Centre*, presently pending before this Court as Appeal No. SC 88167, was tried, resulting in a judgment for the plaintiffs and class. Midwest obtained new counsel to assist in its post-trial filings and appeal. This new counsel came up with some new ideas, chief of which was the notion that the treble damage provisions of Section 484.020 violated the due process protection provided by

the Fourteenth Amendment to the United States Constitution. Countrywide's counsel apparently thought the notion was worth pursuing and on March 3, 2006, filed a motion to amend Countrywide's answer to the third amended petition to raise as an affirmative defense the purported constitutional invalidity of Section 484.020.[LF 287-91].

Countrywide's affirmative defense stated *in its entirety*:

Application of the treble damage provision in the Law Business Statute, 484.010, *et seq.*, R.S.Mo., violates Countrywide's due process rights, is unconstitutional on its face and as applied to Countrywide, is inappropriate, and is otherwise impermissible.

[LF 290].

*Thus, when Countrywide first raised its challenge to the validity of Section 484.020 after four years of*

*vigorous litigation it did not even state which constitutional provision – or even which Constitution – purportedly prohibited application of the treble damage provision of Section 484.010.*

Respondents respectfully suggest Countrywide has not properly raised or preserved its purported constitutional issue.<sup>7</sup>

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<sup>7</sup>Countrywide presents a minimal argument in support of its purported constitutional claims, devoting two pages of text out of its 101-page brief to the issue. *Countrywide Brief* at 76-78. The affirmative defense as pleaded does not state which constitutional provisions are purportedly violated. The brief itself barely scratches the issues – issues of which Countrywide is fully aware from its participation as an *amicus curiae* in the *Eisel* appeal.

In short, it is apparent Countrywide does not take its purported constitutional challenge to Section 484.020 seriously and raised it only as a subterfuge to obtain review in this Supreme Court rather than in the appellate court where it belongs.

Nor should Countrywide's constitutional challenge be reviewed for plain error under Rule 84.13(c). There is no plain error here. The judgment awarding treble damages results in neither "manifest injustice" nor a "miscarriage of justice," as required by Rule 84.13(c). Countrywide asserts Section 484.020 violates due process as guaranteed by both the Missouri and United States Constitution because under the statute a trial court *must* impose treble damages when a defendant violates the statute regardless of whether the defendant had a culpable mental state. *Countrywide's Brief* at 76-78. Countrywide contends, "Penal statutes like the Law Business Statute require a culpable mental state as a prerequisite to enforcement." *Id.* at 77.

This contention, however, is not the law. See *Section III below*.

"Relief under the plain error standard is rarely granted in civil cases, and is reserved for the situations in which hatred, passion, or prejudice have

been engendered..." *CADCO, Inc. v. Fleetwood Enterprises, Inc.*, 207 Mo. App. Lexis 458, \*10 (March 20, 2007).

Although the Court in *Hanch v. K.F.C. National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981), considered and then rejected a constitutional challenge raised for the first time on appeal, the circumstances in *Hanch* are quite different from those here. There appellant claimed Missouri's service letter statute infringed the right of free speech, a core First Amendment right. *Id.* at 33. Moreover, a federal district court had recently declared Missouri's service letter statute unconstitutional on the very ground raised by appellant. *Id.* There was great public interest in the issue, highlighted by the intervention of the Missouri Attorney General. *Id.* Under those circumstances, none of which is present here, this Court decided to exercise its discretion to declare the statute constitutional.

Countrywide's situation is not in the same league as those where appellate courts exercised discretion to

consider untimely-raised constitutional issues. Countrywide's constitutional challenge only involves money. It does not involve any of the most highly-regarded constitutional rights, such as free speech, the right to vote, or freedom from involuntary servitude. Plain-error review is discretionary and can only be invoked when *substantial* rights are affected. *Rule 84.13(c)*.

The Court should decline to exercise its discretion to consider the constitutional challenge asserted in Countrywide's second point relied on.

**III. The trial court did not err in overruling Countrywide's motion for a new trial asserting Section 484.020 is unconstitutional because neither the Missouri nor the United States Constitutions require finding a culpable mental state as a condition precedent to imposing statutory treble damages. (*Response to Point Relied On No. II.*)**

Statutes are presumed constitutional, and will be held unconstitutional only if they clearly contravene a

specific constitutional provision. *State v. Schleiermacher*, 924 S.W.2d 269, 275 (Mo. banc 1996). Assuming the Court reviews the constitutionality of Section 484.020, it should reject Countrywide's challenge.

In its brief, Countrywide states that statutory treble damages are "a substitute for punitive damages," and thus require the same culpable mental state as is required for an award of punitive damages. *Countrywide's Brief* at 76-77. Countrywide is wrong. Missouri is permitted under our state and federal constitutions to authorize the imposition of treble damages against all who violate Section 484.020 without conditioning this penalty on a finding that the violator had a culpable mental state.

It is telling that Countrywide does not cite a case from any jurisdiction holding a state cannot constitutionally impose statutory treble damages without a showing of a culpable mental state. That is because the law is the opposite. A state can impose

double or treble damages on those who violate its statutes even if the violation is negligent – or even innocent. It is a decision for the legislature. See, e.g., *Greeson v. Ace Pipe Cleaning, Inc.*, 830 S.W.2d 444, 448 (Mo. App. 1992); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 73-74 (5th Cir. 1982); *Blane v. American Inventors Corp.*, 934 F. Supp. 903, 910 (M.D. Tenn. 1996); *Pennington v. Singleton*, 606 S.W.2d 682, 689-90 (Tex. 1980); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 295-96 (Tex. Civ. App. 1980); accord *State ex rel. Laszewski*, 136 S.W.3d at 868-71.

*Greeson* was an action for waste brought under Section 527.420, RSMo., which states:

If any tenant, for life or years, shall commit waste during his estate or term, of anything belonging to the tenement so held, without special license in writing so to do, he shall be subject to a civil action for such

waste, and shall lose the thing wasted and pay treble the amount at which the waste shall be assessed.

Section 527.420.

The defendant in *Greeson* committed waste through neglect. Her conduct was not wanton. The trial court refused to award treble damages absent a jury finding that the waste was wantonly committed. 830 S.W.2d at 445. The appellate court reversed, holding: "The statute does not expressly state that waste be committed wantonly before the damages are trebled." *Id.* at 448. Thus trebling was required under Section 527.420 even though there was no evidence defendant had any culpable mental state when committing the waste. Indeed, this Court subsequently defined waste as *negligent* conduct. "Waste is the failure of a lessee to exercise ordinary care in the use of the lease premises or property that causes material and permanent injury thereto over and above ordinary wear and tear." *Brizendine v. Conrad*, 71 S.W.3d 587, 592 n.4 (Mo. banc

2002) (affirming statutory treble damages for waste against tenant under lease-purchase agreement with no finding of intentional misconduct; tenant was simply unable to keep up with maintenance).

There is nothing in *Greeson* or *Brizendine* suggesting the conduct of either defendant would permit punitive damages, yet in both cases statutory treble damages were held to be proper. Accord *Laszewski*, which affirmed an award of double damages under Section 290.300, which provides double damages to any workman on a public construction project who is not paid prevailing wages. *Laszewski* affirmed double damages notwithstanding defendant's innocent but erroneous belief that the prevailing wage act did not apply to independent contractors. 136 S.W.3d at 868-71.

Other Missouri decisions emphasize the distinction between the evidence required for imposition of punitive damages and that required for imposition of statutory treble damages. *Ridgway v. TTnT Development Corp.*, 126 S.W.3d 807 (Mo. App. 2004), illustrates the

distinction. *Ridgway* involved claims for both treble damages for trespass under Section 537.340 and for punitive damages. Defendant exceeded the boundaries and reasonable use of a roadway easement, knocking down numerous trees on plaintiffs' land. *Id.* at 810. The trial court awarded plaintiffs treble damages but denied punitive damages. Defendant appealed the award of treble damages; plaintiffs did not appeal the denial of punitive damages. *Id.* at 818.

The appellate court noted that treble damages under the statute required a showing that either (a) the trees severed from the land had value in their severed state, or (b) the removal of the trees from the land diminished the value of the land. *Id.* at 817-18. Because neither requirement was met, the trial court erred in awarding statutory treble damages and the appellate court reversed. *Id.* at 818. Of interest to the present appeal is the appellate court's conclusion that although the evidence of defendant's culpable mental state was sufficient to impose punitive damages,

that evidence had no bearing on whether treble damages were proper:

The trial court's judgment states that the damages in this case were trebled pursuant to § 537.340 because Developers "were aware of the encroachments during the construction of the road and yet proceeded to its conclusion." While such intentional conduct might have furnished a proper basis upon which to award punitive damages in this case, that issue is not before us... The only issue we must consider is whether the trial court's decision to treble the Ridgways' damages pursuant to § 537.340 was correct. In the absence of substantial evidence to support a recovery under the Ridgways' statutory trespass theory, we conclude that the trial

court erroneously applied the law in trebling the Ridgways' \$50,000 award for actual damages.

*Id.*

These holdings are not unique to Missouri. Other courts presented with similar arguments routinely hold that a culpable mental state is *not* constitutionally required to impose statutory treble or double damages.

In *Indust-Ri-Chem*, the Texas Court of Civil Appeals reversed a trial court's refusal to award treble damages under the Texas Deceptive Trade Practices Act ("DTPA"), rejecting defendant's contention that the Constitution requires a defendant to knowingly or intentionally violate a statute before treble damages can be imposed. *Indust-Ri-Chem*, 602 S.W.2d at 295-96. While a knowing or intentional violation is required when the conduct prohibited by statute is not sufficiently defined to put a defendant on notice that he may be subject to a treble-damages penalty, if the statute provides sufficient notice of what conduct

gives rise to the penalty, the Constitution's due process requirements are satisfied. *Id.* at 296. Here, Section 484.020 gave Countrywide sufficient notice of the prohibited conduct, and Countrywide does not contend otherwise. The constitutional requirements for due process are therefore satisfied. See also *Schleiermacher*, 924 S.W.2d at 275.

Similarly, in *Pennington*, the Texas Supreme Court held the Texas DTPA required treble damages to be imposed on an individual seller for material false statements made in the sale of a motorboat even though the seller did not know the statements were false and was not reckless in making the false statements. *Pennington*, 606 S.W.2d at 685-86.

It is unquestionably true that deception is more reprehensible when done intentionally and that liability for treble damages is less harsh when intent is present. The necessity or reasonableness of specific enactments,

however, is a matter of legislative discretion. Thus, the balance between expedience and fairness in application of the DTPA is the prerogative of the legislature, so long as constitutional limitations are not transgressed. We cannot hold that § 17.46(b) is unconstitutionally vague because it extends to misrepresentations made without knowledge of their falsity or to acts done without intent to deceive. Section 17.46(b) by its own terms extends to certain specified acts, not just to those acts done knowingly or with intent to deceive. The terms used are not so vague or indefinite as to violate due process, and we will not read into them an intent requirement merely to restrict the scope of their coverage.

*Pennington*, 606 S.W.2d at 689-90.

The United States Court of Appeals for the Fifth Circuit independently reached the same conclusion in *Mercer*, 665 F.2d at 73-74. "While this Court is not bound by the Texas court's determinations as to the validity of a state statute under the United States Constitution, we agree and accept what has been said by the Texas Supreme Court." *Id.* The Fifth Circuit held that imposition of treble damages on innocent violators is rationally related to the statutory purpose of deterring violations and securing consumer protection and is not unconstitutional. *Id.*

The cases cited by Countrywide do not hold otherwise.

*Burnett v. Griffith*, 769 S.W.2d 780, 787-89 (Mo. banc 1989), is a punitive damages case. Contrary to the present case, *Burnett* did not involve a statute imposing mandatory double or treble damages. The case is thus inapposite and provides no guidance about what state of mind, if any, must be established before

statutory double or treble damages can be imposed. The same is true of *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464, 466 (Mo. banc 1995); *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 416-17 (2003); and *Honda Motor Co., Ltd. v Oberg*, 512 U.S. 415, 420 (1994); all of which are punitive damages cases.

*District Cablevision L.P. v. Bassin*, 828 A.2d 714 (D.C. 2003), was a class action brought under a statute providing treble damages and punitive damages as alternate remedies. The trial court viewed treble damages as a species of punitive damages, and subject to the same proof requirements, and therefore refused to automatically award treble damages to the plaintiff class. Instead, the trial court allowed the jurors to decide in their discretion whether to award treble damages or punitive damages in whatever amount they saw fit. *Id.* at 725. The jury awarded punitive damages but not treble damages. The trial court set aside the punitive damages. *Id.*

On appeal, the appellate court held that while it agreed with the setting aside of punitive damages, the trial court erred in not awarding treble damages. *The appellate court held that treble damages were mandatory under the statute notwithstanding the class's failure to make a case for punitive damages. Id.; see also id.* at 726 (discussing role of treble damages in encouraging Bar to pursue enforcement of law as private attorneys general); accord *Barth v. Canyon County*, 918 P.2d 576, 581 (Idaho 1996) (reversing denial of treble damages).

In *Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), defendant did not raise his constitutional challenge to a punitive damages award under Missouri's wrongful death statute until his motion for new trial. But "the issue of punitive damages did not enter the case until the day of trial" – and defendant was not then present because he was in prison. *Id.* at 847. Under those circumstances, the motion for new trial was appellant's first practical opportunity to assert his challenge.

The Court considered and rejected the constitutional challenge.

Countrywide's constitutional challenge to Section 484.090 is without merit, and Countrywide's second point relied on should be denied.

**IV. The trial court did not err in holding that the voluntary payment doctrine did not provide Countrywide a defense because the doctrine does not apply to claims mandated by statute. (*Response to Point Relied On No. III.*)**

Countrywide asserts the "voluntary payment doctrine" as a defense to plaintiffs' claims. This doctrine has been traditionally stated:

Except where it is otherwise provided by statute it is held that, where one under a mistake of law, or in ignorance of law, but with full knowledge of all facts, and in the absence of fraud or improper conduct upon the part of the payee,

voluntarily and without compulsion pays money on a demand not legally enforceable against him, he can not recover it back.

*National Enameling & Stamping Co. v. City of St. Louis*, 40 S.W.2d 593, 595 (Mo. 1931).

The voluntary payment doctrine is subject to many exceptions. Payments made in the performance of one's duty are not voluntary, and thus can be recovered. *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726, 728 (Mo. App. 1994). Payments made to someone who knows he has no right to the money can be recovered. *Western Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 801 (Mo. App. 1982) (consumer who carelessly overpays bill entitled to recover overpayment). Payments made on a loan in excess of the legal rate of interest imposed by statute can be recovered. *McClure v. Nowick*, 382 S.W.2d 731, 733 (Mo. App. 1964). Payments made by mistake, even where there is negligence on the part of the person making the payment, may also be recovered. *Delmar Bank*

*of University City v. Douglas*, 366 S.W.2d 80, 83 (Mo. App. 1963).

Several of the exceptions to the voluntary payment doctrine are applicable here. First is the exception where payment is contrary to statute. The voluntary payment doctrine does not bar statutory claims. See *National Enameling*, 40 S.W.2d at 595; see also *McClure*, *supra* (payments violating usury statute). Indeed, one of the few appellate decisions considering Sections 484.010 and 484.020 stated: "The activities prohibited by [the statutes] are not subject to waiver, consent or lack of objection by the victim." *Bray v. Brooks*, 41 S.W.3d 7,13 (Mo. App. 2001). The voluntary payment doctrine is a defense based on waiver or consent. The doctrine therefore provides Countrywide no defense to plaintiffs' and the class's claims for violation of the statutes.

A second reason why the voluntary payment doctrine does not apply is that the doctrine applies only when a plaintiff makes payment with full knowledge of all

facts. *National Enameling*, 40 S.W.2d at 595. Countrywide presented no evidence that class members knew their legal documents were completed by lay persons, not lawyers.

Even if Countrywide had presented some evidence on this issue, which it did not, this appeal must nevertheless be decided consistent with a finding that plaintiffs did not have full knowledge of the fact that non-lawyers prepared the final legal documents for their transactions. "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Hinnah*, 77 S.W.3d at 621, quoting Rule 73.01(c); *Clippard v. Pfefferkorn*, 168 S.W.3d 616, 618 (Mo. App. 2005). This Court should defer to the trial court's implicit factual findings on the issue of full knowledge, an issue relevant to an affirmative defense for which Countrywide had the burden of proof.

A third applicable exception to the voluntary payment doctrine is the exception for transactions

where the recipient of a payment knows he has no right to the money. *Ticor Title*, 887 S.W.2d at 728. Here, one can infer that Countrywide knew it had no right to charge these fees because of the clear legal guidance given by *Hulse* and *First Escrow*.

For these reasons, the voluntary payment doctrine is inapplicable and provides no ground for altering the judgment.

Countrywide's third point relied on should therefore be denied.

V. The trial court did not err in declining to apply a two-year limitation period to plaintiffs' claims under Section 484.020. (*Response to Point Relied On No. IV.*)

A. Countrywide has failed to properly raise, preserve, and assert any error by the trial court with respect to limitations, and its point relied on is not in compliance with Rule 84.04(d)(1)(A).

Countrywide's fourth point relied on, relating to damages and the statute of limitation, fails to preserve a question for review because it does not identify the trial court ruling or action challenged by Countrywide. Rule 84.04(d)(1)(A); *Thummel v. King*, 570 S.W.2d 679, 684 (Mo. 1978). An examination of the argument following the point relied on suggests that Countrywide failed to timely raise and preserve the issue at trial, thus explaining the gap in its point relied on. Countrywide calls the trial court's calculation of damages "plain error" and states, "Countrywide timely filed a *post trial motion*, in which it asked the Circuit Court to correct its fundamental legal error." *Countrywide Brief* at 84 & n.11 (emphasis added).

Appellate review is limited to legal issues timely raised in the trial court, preserved for appeal, and then asserted in a proper point relied on. *Thummel*, 570 S.W.2d at 685. It appears Countrywide did not follow the requirements of raise, preserve, and assert.

Moreover, an examination of the argument suggests that Countrywide's real complaint is that the trial court erred in certifying a class of plaintiffs including persons whose claims accrued within five years before the filing of the petition. Countrywide, however, does not cite the class certification order in its point relied on and does not present any argument that the trial court erred in certifying a five-year class.

For all of these reasons, the issues Countrywide purports to raise in its fourth point relied on should be summarily denied.

**B. Section 484.020 does not provide a limitation period for actions brought under it.**

Even if the Court were to indulge Countrywide and review its limitation and damages issue on the merits, the point should be denied and the judgment affirmed. Contrary to Countrywide's assertions, Section 484.020 does not contain a statute of limitation. Thus Countrywide's arguments about which statute is more

specific or which was enacted later or which is more applicable are all moot. Section 484.020 does not include a limitation period within which actions must be commenced for a claim brought under it, and thus one needs to look elsewhere to determine the proper limitation period. As demonstrated below, the proper limitation period is the six-year period set by Section 516.420, RSMo., which applies to actions brought against "moneyed corporations" for penalties or liabilities created by statute.

Section 484.020, the law business statute, provides in relevant part:

Any person ... who shall violate the foregoing prohibition of this section ... shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person ... paying the same within two years from the date the same shall

have been paid and if within said time such person ... shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

Section 484.020.2.

This statute is not a statute of limitation and does not purport to be one, as is made evident by a comparison of the language of Section 484.020 - "shall be subject to be sued" - with the language used in various Missouri statutes of limitation. The general statute of limitation, for example, states:

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections,

after the causes of action shall have  
accrued...

Section 516.100, RSMo. The statutes of limitation relating to real property use a similar structure and phrasing. See, e.g., Section 516.010, RSMo. ("No action ... shall be commenced, had or maintained by any person ... unless it appear that the plaintiff ... within ten years before the commencement of such action"); Section 516.095, RSMo. ("No action ... shall be commenced after two years ... from the date when the right of action accrues..."); Section 516.097.1, RSMo. ("Any action... shall be commenced within ten years...").

The "no action shall be commenced" language found in Missouri statutes of limitation is quite different from the "shall be subject to being sued" language found in Section 484.020. Furthermore, it makes no sense to interpret the two-year period stated in Section 484.020 as a limitation period, as that interpretation would render a large portion of the statute surplusage and without effect. *The statute does*

not state that the right to recover treble damages ends after two years; it merely provides that the State can exercise that right after two years. If the two-year period were a limitation period, then the statutory language that, "then the state of Missouri shall have the right to and shall sue for such treble amount," would be without effect because the cause of action would be time-barred just as the State got the right to assert it. Thus, Countrywide's interpretation of the two years as a limitation period runs afoul of the bedrock rule of statutory interpretation that, "the entire act must be construed together and all provisions must be harmonized, if reasonably possible, and every word, clause, sentence, and section given some meaning." *Eminence R-1 School Dist. v. Hodge*, 635 S.W.2d 10, 13 (Mo. 1982).

In short, Section 484.020 never states that a plaintiff cannot bring an action for treble damages after two years. It merely states that if the person harmed by a violation of that section does not bring

such an action within two years, then the State of Missouri shall have the right to do so.

The General Assembly has written many statutes of limitation. It knows how to do so. It did not do so here.

Contrary to Countrywide's assertions in its brief, the above analysis is not something new that plaintiffs first presented after trial. The proceeding two-plus-pages of argument – beginning with the phrase "This statute is not a statute of limitation..." and ending with the citation to *Eminence R-1 School Dist.* – is lifted almost verbatim from pages 13-14 of a brief filed by plaintiffs August 15, 2002 in opposition to defendants' motions to dismiss.<sup>8</sup> The trial court in an

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<sup>8</sup>The brief was captioned, "Brief Establishing Plaintiffs' Claims for Defendants' Unlawful Practice of Law and Engagement in the Law Business, and Disposing of Defendants' Statute of Limitations Defenses as to These Claims." [See LF 10].

order issued November 2002 agreed with plaintiffs' argument, ruling: "Contrary to the allegations of the Defendants in their Motions to Dismiss, this statute [Section 484.020] is not a statute of limitations." [LF 93-94].

**C. Plaintiffs' claims under Section 484.020 are subject to the six-year limitation period provided by Section 516.420 for suits against moneyed corporations for a penalty or statutory violation.**

What, then, is the statute of limitation applicable to plaintiffs' claims for treble damages for violation of Section 484.020? Plaintiffs suggest, and the trial court apparently agreed, that the applicable statute of limitation is found in Section 516.420, which states:

None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or

forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

Section 516.420.

There can be no doubt that Countrywide is a "moneyed corporation" subject to the six-year statute of limitation established by Section 516.420. Countrywide is a mortgage finance company. It is in the business of making loans secured by real estate. "[A] mortgage finance company ... is a 'moneyed corporation' within the meaning of section 516.420. It is a company that makes loans.... Accordingly, the Missouri statute governs claims against a mortgage company arising out

of a statutory violation." *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 177 (Mo. App. 2006).

*Schwartz* reached its conclusion after an exhaustive study of New York law, the law upon which Section 516.420 was based. *Schwartz*, 197 S.W.2d 171-75. That study establishes that New York traditionally recognized four categories of for-profit corporations – business, moneyed, railroad, and transportation – and that moneyed corporations were those in the business of making a profit from the use of capital rather than by manufacturing or selling products or performing services. *Id.* at 173, 174. Thus a mortgage lender like Countrywide falls squarely within the definition of "moneyed corporation."

Furthermore, there is no doubt that the treble damages provided by Section 484.020 is a penalty. Countrywide itself contends that treble damages are a penalty. *Countrywide Brief* at 76-78. Thus, the plaintiffs' claim under Section 484.020 against Countrywide is a claim for a penalty against a moneyed

corporation. Thus the applicable limitation period is six years.

Why, then, did the trial court treble damages only for those class members whose Section 484.020 claims accrued within the two-year period prior to the filing of suit, and award the remaining class members single damages only? The answer to that goes back to the November 2002 order denying Countrywide's motion to dismiss. While the trial court ruled that the two-year period contained in Section 484.020 "is not a statute of limitations," [LF 93-94], the trial court continued and held that the two-year period "speaks to the issue of the *standing* of a Plaintiff to claim rights to recover under the provisions," and that for those plaintiffs who did not file suit within the two-year period, their right to obtain treble damages "vests *exclusively* with the State." [LF 94 (emphasis added)].

Plaintiffs disagree with the trial court's 2002 ruling that the State's right to sue for treble damages after two years is an *exclusive* right. The statutory

language does not so provide. It merely authorizes the State to file suit for treble damages if the injured party neglects to do so – “if within said time such person ... shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to...” Section 484.020. The 2007 judgment for plaintiffs, entered by a different judge than the one who entered the 2002 order, clearly did not give the State the exclusive right to recover damages outside of the two-year period. Thus, plaintiffs were not aggrieved by the interlocutory “standing” ruling of the 2002 order and had no basis to cross-appeal from that order. The 2002 order, like all court orders, was necessarily interlocutory and subject to change anytime before judgment was entered. This Court can thus conclude that the trial court through its 2007 judgment modified the 2002 order to the extent it had previously ruled that the State’s standing after two years was exclusive.

In any case, interpretation of statutory language presents a legal question and this Court therefore "may affirm the judgment, if correct, although for reasons other than those relied upon by the trial court." *State v. Pughe*, 428 S.W.2d 549, 549 (Mo. 1968). "[A] correct decision will not be disturbed because the court gave a wrong or insufficient reason therefor." *Edgar v. Fitzpatrick*, 377 S.W.2d 314, 318 (Mo. 1964).

For all these reasons, the trial court did not err in failing to limit damages to those plaintiffs whose claims accrued within two years prior to the filing of the petition.

**D. Plaintiffs did not admit or agree that their Section 484.020 claims were subject to a two-year limitation period.**

Countrywide's final argument on limitations is that plaintiffs "admitted" during trial that their claims under Section 484.020 were subject to a two-year limitation period and that plaintiffs abandoned their six-year statute of limitation argument before the

trial began when they withdrew their motion to amend the class definition. See *Countrywide Brief* at 84-88. Neither assertion is factually correct.

Countrywide's contentions misstate the record.

Plaintiffs filed a motion to amend the class definition. That motion was argued immediately before trial. [Tr. 26-32]. Plaintiffs pointed to the recent decision of the Western District Court of Appeals - *Schwartz, supra* - establishing a six-year limitation and asked that the trial court leave the evidentiary record open to permit time to gather and submit evidence concerning the people who were charged a document preparation fee more than five but less than six years before suit was filed. [Tr. 27]. Countrywide objected, noting that once the trial court had certified the five-year plaintiffs' class, the statute of limitation was no longer tolled for those persons whose claims fell outside of the class period, and that even the six-year statute of limitation had since run for those in the group sought to be added. Countrywide

contended that adding those persons to the class would therefore be a futile action. [Tr. 28-30].

The trial court ruled it would permit the petition to be amended to add the additional year of class members, but that the case would then be taken off of the trial docket and be subject to additional motions. [Tr. 31-32]. Plaintiffs, seeing the merit of Countrywide's argument on the tolling issue and not wishing to further delay the trial, elected to not amend the petition and class, and proceeded to trial. [Tr. 32].

Plaintiffs did not, however, agree that their five-year class would be reduced to two years only, or that their Section 484.020 claims were subject to any limitation period other than the six-year period provided by Section 516.420.

Countrywide states that, "Plaintiffs conceded at trial that a two year standing limitation applies to the Law Business claim." *Countrywide Brief* at 84. Read in context, plaintiffs' counsel is explaining that an

award of treble damages is mandatory within the two-year period. [Tr. 621-22]. At that point, the trial court had ruled that plaintiffs were only entitled to single damages outside of the two-year "standing" period, and plaintiffs were responding consistent with that ruling to show that treble damages were not discretionary within the two-year period. *Id.*

The fact that plaintiffs presented their case consistent with the trial court's prior rulings – including rulings with which they did not entirely agree – does not mean that plaintiffs "admitted" their claims were subject to a shortened limitation period. Plaintiffs had consistently pursued damages on the basis of trebled damages within two years, single damages within five years, ever since the trial court had so ruled. This consistent presentation is reflected by, among other papers, plaintiffs' trial brief [LF 315-16], plaintiffs' summary damages exhibits at trial [Exhibits 13, 15, 16, and 19], and plaintiffs' brief in

opposition to defendant's motion to amend the judgment [LF 392-95].

Plaintiffs requested the damages they were awarded at trial for their claims under Section 484.020, even though they were entitled to more under the statute properly interpreted. Countrywide's contention that "plaintiffs never requested the award that the court granted," *Countrywide Brief* at 87, is not merely wrong: it is bizarre. While Countrywide prevailed on some of the damages issues – the trial court found in Countrywide's favor on the "disputed" class member claims as well as the claims under the Missouri Merchandising Practices Act [LF 367] – all of the damages plaintiffs were awarded were damages plaintiffs requested at trial. See Exhibits 13, 15, 16, and 19, and plaintiffs' damages expert's testimony concerning those exhibits. [Tr. 108-18].

In summary, the Court should not reach Countrywide's fourth point relied on because the alleged error was not properly raised or preserved at

trial and was not properly asserted on appeal due to Countrywide's failure to comply with Rule 84.04(d)(1)(A). If, however, the Court should decide to review Countrywide's contentions, it should deny Countrywide's request to reduce the amount of damages, or redefine the class, or impose a limitation defense on certain class members - or whatever relief Countrywide's defective point relied on is attempting to request.

**VI. The trial court did not err in awarding plaintiffs prejudgment interest. (*Response to Point Relied On No. V.*)**

The trial court properly awarded plaintiffs prejudgment interest because each individual plaintiff's claim was for a liquidated sum and Countrywide's conduct in wrongfully charging and retaining these fixed sums of money conferred a monetary benefit on Countrywide. *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990); Section 408.020, RSMo.

Claims are liquidated where the measure of damages is readily ascertainable. *Vogel*, 801 S.W.2d at 758.

As a general rule, prejudgment interest is not recoverable on a tort claim. But, like all general rules in law, this rule has exceptions. Where the defendant's tortious conduct confers a benefit upon the defendant, prejudgment interest may be recovered. The claimed breach of fiduciary duty here is tortious conduct which would confer a benefit upon [defendant], the broker; namely, his commissions. Therefore, plaintiffs' claim fits within the exception of the general rule.

*Id.* at 757 (citations omitted). Since the date and amount of each payment was known, it was a simple matter to calculate damages and to calculate

prejudgment interest at the statutory interest rate. *Id.* at 758; Section 408.020.

Here, the measure of damages is the document preparation fee paid to Countrywide by each plaintiff and individual class member. The amount of each payment can be determined without any difficulty by looking at the one-page HUD-1 settlement statement for each class member's individual loan transaction. Indeed, the amount of each class member's document preparation fee paid was stipulated. In addition, the date of each payment can also be determined by looking at the same one-page document. Because each plaintiff's and each class member's individual claim is for a fixed-dollar amount, the damages owed to each class member are by definition liquidated.

Here, prejudgment interest was measured from the date suit was filed – except for those class members who paid the fee after suit was filed, for whom prejudgment interest began from the date of payment.

Under Section 408.020, prejudgment interest on liquidated claims is allowed only after demand for payment is made. The demand need not be in any certain form, but it must be definite as to amount and time. In the absence of a demand for payment prior to filing a lawsuit, the filing of the suit itself is sufficient to constitute a demand.

*Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 767 (Mo. App. 2006) (citations omitted). The filing of the petition here was sufficient notice to trigger prejudgment interest on the liquidated sums at issue.

Countrywide's fifth point relied on, seeking to set aside the award of prejudgment interest, should be rejected.

#### **CONCLUSION**

The judgment for the named plaintiffs and the plaintiffs' class should be affirmed in all respects without modification.

Respectfully submitted,

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