IN THE SUPREME COURT OF MISSOURI

No. SC86408

RODNEY GLASS and DIANE GLASS,
Plaintiffs/Respondents,
vs.
FIRST NATIONAL BANK of ST. LOUIS, N.A.,
Defendant/Appellant.

Brief of Amicus Curiae Missouri Bankers Association

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STATEMENT OF FACTS

The Missouri Bankers Association adopts the statement of facts in the brief of Appellant First National Bank of St. Louis, N.A.

POINT RELIED ON

THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE IT IS INCONSISTENT WITH SECTION 443.130, RSMO, AND THE STATE AND FEDERAL CONSTITUTIONS.

§ 443.130, RSMo.

Brown v. First Horizon Home Loan Corp., 150 S.W.3d 287 (Mo. banc 2004).

Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. banc 2004).

ARGUMENT

THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE IT IS INCONSISTENT WITH SECTION 443.130, RSMO, AND THE STATE AND FEDERAL CONSTITUTIONS.

The Court should reverse the judgment of the trial court because the plaintiffs' claims are contrary to Missouri law and the Missouri Constitution as shown by the briefs of Appellant First National Bank of St. Louis, N.A. The Missouri Bankers Association ("MBA") wishes to set forth additional reasons for the Court to reject the plaintiffs' arguments.

The MBA is an organization of 368 state and national chartered banks, trust companies, savings and loans, and savings banks in the State of Missouri. Founded in 1891, the MBA represents over 30,000 employees in almost 1,900 banking locations. The MBA is committed to bringing together and serving the best interests of its members by providing education to its members and the consuming public, fostering economic development in Missouri, and advocating on behalf of its constituents on issues of public importance.

This case involves claims as to the validity and operation of section 443.130, RSMo, which under specified circumstances provides a penalty in connection with certain mortgage transactions. The members of the MBA are directly affected by this statute. The MBA proposes to address the harm to the state and the members

of the MBA that would result by allowing plaintiffs to recover under section 443.130 under the circumstances of this case. The parties have not addressed these issues from the perspective of the MBA.

A. The financial world that gave rise to section 443.130 no longer exists.

The Missouri Bankers Association urges the Court, in ruling in this case, to consider the realities of modern mortgage lending. Today's lending environment bears very little resemblance to the one that spawned section 443.130.

The statute was enacted in the Nineteenth Century. *See Wiener v. Peacock,* 31 Mo. App. 238 (1888) ("Our statute provides that if any mortgagee, trustee, or cestui que trust, his executor, administrator, or assignee, receive full satisfaction of any mortgage or deed of trust, and do not within thirty days after request and tender of cost acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. on the amount of mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction.").

The cases dealing with the statutory penalty show the radically changed nature of the financial world. The *Weiner* case, for instance, involved a mortgage loan between private individuals for $1,000, a very substantial sum in the reported cases from that time. In *Dunkin v. Mutual Benefit Life Ins. Co.*, 63 Mo. App. 257

(1895), the plaintiffs borrowed $1,200. *Wood v. Ethridge,* 62 Mo. App. 127 (1895), involved chattel mortgages of $500. *Hill v. Wainwright,* 83 Mo. App. 460 (1900), arose from five notes in the amount of $15 each. In *Dodson v. Clark,* 49 Mo. App. 148 (1892), the mortgagee "resided in the country and about ten miles from the county seat." The issue in the case was whether the costs to be paid by the plaintiff mortgagor included "the necessary trouble and expense the mortgagee may be subjected to in getting to and from the county seat." These cases from decades and even centuries gone by demonstrate the circumstances in which the statute was designed to operate.

As Judge Grimm noted in 1995, however, much has changed in the lending business. *Trovillion v. Countrywide Funding Corp.*, 910 S.W.2d 822, 823 (Mo. App. 1995). Early in the Twentieth Century, and for many years thereafter, banks and other lenders retained the borrower's note in their own portfolio. *Id.* at 823-24. The borrower would deal directly with a local lender and could talk face to face with the lender or its employees. *Id.* at 824. Due to many factors including the expansion of the public's borrowing power, advances in technology, and the growth of financial markets, that practice has changed:

> Now, lenders loan money and take deeds of trust never intending to retain those notes in their own portfolio. Rather, they generate fees from making the loan and then

> promptly sell the loan to another. Often, the ultimate holder of a note and deed of trust is located a great distance from where the loan originated. Rather than talking in person with a lender's employee, borrowers communicate through the mails with unseen employees.

Id.

Home loans are now available from several types of lenders, including thrift institutions, commercial banks, mortgage companies, and credit unions. Advances in computer technology have improved information processing and changed the role of banks as credit intermediaries. Because of technology, rather than holding loans in portfolio until they mature, banks increasingly sell the loans they originate to the secondary markets.

By packaging loans or assets into bundles, banks securitize these assets. Securitization benefits banks by providing them with greater liquidity and freeing up costly capital. It also generates fee income from the originating, selling, and servicing of loans that have been securitized. Servicing means different functions to financial intermediaries; for many banks servicing allows the bank to forward the loan payment it receives to the conduit where the loan payment (perhaps minus some small percentage) is ultimately forwarded to the security holder. The loan then is no longer owned by the bank and consequently the bank may not release the

loan security, the deed of trust. Consumers benefit from securitization as it reduces the cost of credit.

One of the first markets to be securitized was the mortgage market. This arose from the fact that mortgages and their underwriting processes were relatively easily standardized, and the value of these securities was enhanced by guarantees from federal or quasi governmental agencies. In 1974, the volume of agency-backed and government sponsored enterprise (GSE)-backed mortgage pools was $18 billion. This represented a little over four percent of all home mortgage debt outstanding. In contrast, banks and savings institutions held almost $321.8 billion in mortgages.

By 2004, agency- and GSE-backed mortgage pools totaled $3.419 trillion, while mortgage debt held (but not securitized) by banks and savings institutions equaled $2.558 trillion. In other words, these mortgage backed pools have grown by almost 20 percent per year over the last thirty years. Furthermore, there is an additional $1.258 trillion in home mortgage debt held directly by the housing GSEs or through asset-backed security conduits. Thus, over the last thirty years, technology has revolutionized the credit intermediation function. Today, more mortgage debt is held in asset backed securities than on the balance sheets of banks and savings institutions.

B. The Court should strictly apply section 443.130.

Due to the penal nature of the statute, the Court has long held that section 443.130 must be strictly construed. *Snow v. Bass,* 73 S.W. 630, 174 Mo. 149 (1903) ("Statutes imposing penalties such as that provided in section [443.130] must be strictly construed; and, when one proceeded against falls not within the letter of its terms, the penalty is not enforceable."). Now more than ever, in light of the changed and still evolving nature of the lending environment in this state and across the country, the Court should take care to limit imposition of the statutory penalty to those plainly within its scope. This is an issue of great importance beyond First National Bank's concerns in this case.

In this case, the plaintiffs awarded $52,500 on their claim, ten percent of the face amount of the deed of trust in the amount of $525,000. Thus, as shown above, the amount of the penalty in this case far exceeds the amounts of the loans in the early cases applying the statute and is many times greater than the penalties envisioned by the General Assembly in enacting the statute.

A strict construction is especially compelled by the fact that the plaintiffs in this case did not suffer any damage. The plaintiffs did not have a cloud on their title, as shown by the fact that they refinanced their debt three times after their dealings with First National Bank (and sent demand letters to each financial institution requesting a deed of release in the hope of obtaining a recovery under

section 443.130). The plaintiffs did not suffer any problems, complications, or financial loss as a consequence of First National Bank's actions in connection with the deed of release. The plaintiffs' credit remains impeccable. They have no evidence that they were harmed in any way

Thus, a payment to the plaintiffs under section 443.130 would not serve any of the interests meant to be protected by the statute. The purpose of section 443.130 is to clear the mortgagor's title so that the record is not encumbered. *Garr v. Countrywide Home Loans, Inc.*, 137 S.W.3d 457, 460 (Mo. banc 2004). The record shows that the plaintiffs' credit was unimpaired and that their title was clear enough and unencumbered enough that they were able to obtain multiple home loans. Courts should apply close scrutiny to any claim that a penalty is payable under these circumstances.

Imposing a penalty would do nothing more than punish First National Bank for exercising all good faith in dealing with the plaintiffs. First National Bank's loan was satisfied on June 13, 2001. The deed of release was executed on June 19, 2001, and forwarded to the St. Louis County Recorder of Deeds no later than July 24, 2001. Mr. Glass sent his letter about a deed of release to First National Bank in July or August of 2001. Thus, the letter came at a time when First National Bank had executed a deed of release and forwarded it for filing. The deed of release,

however, was not recorded by the St. Louis County Recorder until October 9, 2001.

This sequence of events does not show any bad faith on the part of the defendant. Indeed, it shows that First National Bank acted promptly to process the deed of release and took all reasonable steps to achieve it. A statute that could penalize this conduct must be enforced sparingly indeed.

Like all participants in this industry, First National Bank is at the mercy of government offices that face their own constraints and concerns.[1] In the modern

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[1] *See* William C. Lhotka, *County Must Pay Title Company In Embezzling Case*, St. Louis Post-Dispatch, Jan. 28 2005 ("It took about six years for Margaret King to steal $865,444, and three years more before the courts handed a St. Louis County jury the question of exactly whose money she took. In an hour of deliberations, the jurors decided Thursday that the county itself bears the loss, and ordered $499,391 be paid to Investors Title Co. in an unusual case of embezzlement. . . . Legally, the verdict makes no difference to King, the former head cashier for the county Recorder of Deeds office. Now 50, she is serving a 12-year prison term for stealing the money to feed a gambling habit. . . . From 1995-2001, King has admitted, she helped herself to the office cash drawer, taking from $600 to $1,200 a day and balancing the office books by inflating the charges to Investors by an identical amount.").

financial world in which advanced technology and the emergence of national mortgage markets permit borrowers like the plaintiffs to obtain attractive loan terms, it is not possible for mortgagees to have ready access to personal service from every county recorder in the state. It would be irrational to construe section 443.130 to punish mortgagees like First National Bank for this circumstance.

C. The plaintiffs are not entitled to relief under section 443.130.

As the Court recently explained, the purpose of section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor's title so that the record is no longer encumbered. *Garr v. Countrywide Home Loans, Inc.*, 137 S.W.3d 457, 460 (Mo. banc 2004). This statute is an enforcement mechanism for section 443.060.01, RSMo, which requires a mortgagee to deliver a "sufficient deed of release of the security instrument" upon satisfaction of the instrument. *Id.* Because section 443.130 is penal in nature, it must be strictly construed. *Id.* Any demand letter purporting to invoke section 443.130 must place the mortgagee on notice that the statutory demand is being made. *Id.* As shown by the reply brief of the First National Bank, the plaintiff's letter did not invoke any right to relief under section 443.130.

The briefs of the parties explain their positions on the *Garr* case. After the briefing in the Missouri Court of Appeals was concluded, however, and before this matter was transferred, this Court handed down its opinion in *Brown v. First*

Horizon Home Loan Corp., 150 S.W.3d 287 (Mo. banc 2004), in which the Court reaffirmed the principles of *Garr*. As in this case, the plaintiffs in the *Brown* case borrowed money secured by a deed of trust. *Id.* at 288. As in this case, the plaintiffs in the *Brown* case sent a demand letter to the lender requesting a release. *Id.* Consistently with the *Garr* case, the Court held that the demand letter did not sufficiently track the statutory requirements of section 443.130 because it did not place the mortgagee on notice that the ***statutory*** demand was being made:

> While no particular language is specifically required to be included in the letter, the letter must somehow put the lender on notice that a demand is made under section 443.130. The Browns' letter has neither a reference to section 443.130 nor the 15 business days Home Loan has to respond. The person making satisfaction is not identified. No demand is made that the release be given to the person making satisfaction rather than filing the release with the recorder of deeds. As in *Garr*, in this case the Browns' letter as a whole does not place Home Loan on notice that demand is made under section 443.130.

Id.

As the First National Bank demonstrates in its discussion of *Garr* and similar cases, the letter the plaintiffs sent in this case did not meet the requirements of section 443.130. The Court would set a very dangerous precedent if it entered an opinion in this case permitting the plaintiffs to obtain a windfall of $52,500 on the basis of a letter that did not invoke the statute.

CONCLUSION

For the foregoing reasons, and for those set forth in the briefs of Appellant First National Bank of St. Louis, N.A., the judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 2638, excluding the cover page, signature block, and certificates of service and compliance. The undersigned certifies that the discs containing this brief filed with the Court and served on the parties were prepared using the Microsoft Word program and were scanned for viruses and found virus-free through the Norton Anti-Virus program.
