IN THE SUPREME COURT OF MISSOURI

Appeal No. SC85578

L. JOSEPH GARR, III and MARIANNE C. GARR,

Respondents/Cross-Appellants,

vs.

COUNTRYWIDE HOME LOANS, INC.,

Appellant/Cross-Respondent.

Appeal from the Associate Circuit Court of the County of St. Louis
State of Missouri

Honorable Mary Bruntrager Schroeder, Presiding

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JURISDICTIONAL STATEMENT

This is an appeal from a Final Judgment entered by the Associate Circuit Court of the County of St. Louis in favor of Respondents/Cross-Appellants, L. Joseph Garr, III and Marianne C. Garr, and against Appellant/Cross-Respondent, Countrywide Home Loans, Inc.

The appeal involves an issue concerning whether Mo. Rev. Stat. § 443.130 (2000), as applied to the facts of this case, is unconstitutionally vague and contravenes the due process clause of Amendment XIV of the United States Constitution and Article I, Section 10 of the Constitution of Missouri where a borrower/mortgagor seeks to recover the statutory penalty after sending a letter to the lender/mortgagee that does not mention the statute and, in several respects, demands action by the lender/mortgagee that is not required by the statute.

Because this appeal involves the validity of a statute of the State of Missouri, this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Constitution of Missouri.

STATEMENT OF FACTS

Respondents/Cross-Appellants L. Joseph Garr, III and Marianne C. Garr (hereinafter "the Garrs") filed this case against Appellant/Cross-Respondent Countrywide Home Loans, Inc. (hereinafter, "Countrywide") seeking a recovery under Mo. Rev. Stat. § 443.130 (2000). The statutes relevant to this case provide in pertinent part:

> **443.060. Acknowledgment of satisfaction and release, how made.** -- 1. If any mortgagee . . . receive[s] full satisfaction of any security instrument, he shall, at the request and cost of the person making the same, deliver to such person a sufficient deed of release of the security instrument . . .
>
> **443.130. Forfeiture for failing to satisfy -- demand by certified mail required.** -- 1. If any such person [mortgagee], thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages

such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.

2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee . . . by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

3. In any action against such person who fails to release the lien as provided in subsection 1 of this section, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.

(A4; A11-A12).[1]

At all relevant times, the Garrs have been husband and wife, residing at 1417 Marlann Drive, Des Peres, Missouri 63131. (LF20 at ¶ 2). On March 18, 2002, the Garrs signed a promissory note in favor of Mortgage Resources, Inc. in the principal amount of $165,000.00. (Id. at ¶ 3). The repayment of this promissory note was secured by a deed of trust on the Garrs' residence. (Id. at ¶ 4).

Sometime prior to August 2002, Mortgage Resources, Inc. assigned its interest in the promissory note and the deed of trust to Countrywide. (LF20 at ¶ 5; LF34 at ¶ 11). Countrywide is a mortgage lender that transacts business in Missouri. Countrywide's business office is located in Calabasas, California. (LF10 at ¶ 2).

On Friday, August 2, 2002, the Garrs refinanced their home with another mortgage lender, Matrix Financial. (LF21 at ¶ 6). In connection with this transaction, Mr. Garr contacted Countrywide and was given the payoff amount for the Garrs' promissory note held by Countrywide. (Id.). Countrywide received full payment under the note on Thursday, August 8, 2002. (LF40 at ¶ 1). On that same

[1] Citations herein to "A" followed by a number are to pages in the Appendix to this Brief. Citations herein to "LF" followed by a number are to pages in the Legal File, which was filed with this Court on October 1, 2003.

date, Mr. Garr sent a letter via certified mail, return receipt requested, to the attention of Countrywide's Payoff Processing Department in Plano, Texas, the text of which stated:

> On August 2, 2002, we closed on our Marlann Drive home. On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countrywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me. We still have not received a Deed of Release to release the lien against our personal residence at 1417 Marlann Drive, Des Peres, Missouri 63131.
>
> We are demanding *immediate release* of the Deed of Trust against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of *filing and recording* the Deed of Release regarding the transaction. *Please deliver in hand to me evidence of the release of the Deed of Trust*. In the event the Deed of Release has already been sent, please return my check to [the] above listed address.

(Emphasis added). (A21) (LF54). Mr. Garr's August 8, 2002 letter did not mention § 443.130 (2000). (Id.)

On Monday, August 12, 2002, Countrywide's Payoff Processing Department in Plano, Texas received Mr. Garr's letter and his personal check in the amount of $30.00. (A22) (LF41 at ¶¶ 2, 4; LF47). That same day, the Deed of Release requested by Mr. Garr was prepared by CTC Real Estate Services (an affiliate of Countrywide's located in California) and executed by an officer of Countrywide in California. (A25) (LF27 at ¶ 1(b); LF120). As requested by Mr. Garr in his August 8, 2002 letter, the Deed of Release included a directive in the lower left hand corner stating that the recorded deed should be mailed to the Garrs at their home address. (A25) (LF120).

Countrywide then sent the Deed of Release to the St. Louis County Recorder of Deeds for recording in the public real estate records. It was recorded on Monday, August 26, 2002 at 8:40 A.M. (A24) (LF42 at ¶ 8; LF119). This recording occurred on the tenth business day following Countrywide's receipt of Mr. Garr's August 8, 2002 letter. (Id.). According to the document certification sheet prepared by the St. Louis County Recorder of Deeds, a recording fee of $20.00 was paid at the time the Deed of Release was recorded. (A24) (LF119).

On August 14, 2002, Countrywide returned Mr. Garr's $30.00 check along with a letter stating: "Your loan is Paid in Full. Funds are not needed." (LF48).

The letter also directed the Garrs to contact a representative in Countrywide's Payment Processing Department at a specified extension number if they had any questions. (Id.).

On September 3, 2002, Mr. Garr sent another letter to Countrywide's Payment Processing Department in Plano, Texas, this time by regular mail.[2] (A26-A27) (LF59-60). In this letter, Mr. Garr identified himself as an attorney and stated, among other things, that he and his wife were "seeking damages against Countrywide Home Loans as a result of its flagrant violation of Mo. Rev. Stat. § 443.130." (A26) (LF59). Mr. Garr demanded that Countrywide pay the Garrs $16,500.00 and deliver a "sufficient deed of release" within ten days of the date of his letter or he would file suit against Countrywide. (A27) (LF60).

Countrywide received Mr. Garr's September 3, 2002 letter, although the exact date of its receipt is not known for certain. (LF22 at ¶ 15; LF42 at ¶ 9). Countrywide responded to Mr. Garr's letter on September 12, 2002 by causing its affiliate CTC Real Estate Services to mail the Garrs a copy of the Deed of Release

[2] Because September 2, 2002 was Labor Day, September 3, 2002 was the fifteenth (15th) business day following Countrywide's receipt of Mr. Garr's August 8, 2002 letter. See § 443.130.1 (defining a business day as "any day except Saturday, Sunday and legal holidays"). (A11).

that had been recorded in real estate records of St. Louis County on August 26, 2002. (A23-A25) (LF43 at ¶ 12; LF51-53). This mailing by Countrywide was made nine days after Mr. Garr's September 3, 2002 letter and 22 business days after Countrywide's receipt of Mr. Garr's August 8, 2002 letter. (Id.).

On November 13, 2002, the Garrs filed suit against Countrywide in the Associate Circuit Court of St. Louis County seeking to recover the statutory penalty under §443.130, *i.e.*, ten percent of the amount of their promissory note held by Countrywide or $16,500.00. (LF6-9). In addition, the Garrs requested that they be awarded prejudgment interest and reasonable attorney's fees. (LF9).

On March 17, 2003, the Garrs filed a motion for summary judgment with the trial court. (LF2; LF13-87). In their motion, the Garrs did not claim that they suffered any damages as result of Countrywide's alleged violation of §443.130. Instead, they sought a recovery of the statutory penalty. (Id.). On April 16, 2003, Countrywide filed a cross-motion for summary judgment and an opposition to the Garrs' summary judgment motion. (LF2-3; LF101-123). On May 30, 2003, the trial court conducted a hearing on the cross-motions for summary judgment. (LF131). At that time, the parties agreed to waive trial and submit the case for disposition on the motions and briefs filed. (Id.).

On June 5, 2003, the trial court entered its Final Judgment. (A1-A2) (LF132-133). Specifically, the trial court entered judgment in favor of the Garrs

and against Countrywide, and denied the Garrs' requests for prejudgment interest and attorney's fees. (A2) (LF133). The amount of the original judgment was $13,600.00. (Id.).

On June 19, 2003, the Garrs timely filed a Motion to Amend Judgment. (LF3; LF134-135). In this motion, the Garrs requested that (a) the amount of the judgment be changed from $13,600.00 to $16,500.00, and (b) the judgment include an award of prejudgment interest. (LF134-135) On July 3, 2003, the trial court entered an Amended Judgment in the amount of $16,500.00, but denied the Garrs' request for prejudgment interest on said amount. (A3) (LF144).

On July 7, 2003, Countrywide timely filed a motion requesting that the trial court reconsider and vacate its judgment. (LF145-157). In this motion, Countrywide contended that Mr. Garr's August 8, 2003 letter did not invoke § 443.130 because it did not refer to the statute and asked Countrywide to take actions different from those required by the statute. (LF145-150). Countrywide also renewed its contention, not addressed by the trial court in its Final Judgment, that § 443.130 is unconstitutionally vague if read to impose liability against Countrywide in this case in view of what Mr. Garr requested in his letter dated August 8, 2003. (LF112-114; LF150-151; LF166-167). On August 28, 2003, the trial court entered an Order denying Countrywide's motion to reconsider and vacate without comment. (LF169).

On September 8, 2003, Countrywide timely filed a Notice of Appeal to this Court. (LF170-178). The Garrs filed a Notice of Cross-Appeal on September 18, 2003 "only on the issue of the trial court's failure to award [them] prejudgment interest pursuant to Mo. Rev. Stat. § 408.020." (LF179).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE MR. GARR'S AUGUST 8, 2002 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY COUNTRYWIDE NOT REQUIRED BY THE STATUTE.

Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. Ct. App. 2002)

Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. 1996)

Snow v. Bass, 73 S.W. 630 (Mo. 1903)

Trovillion v. Chemical Bank, 916 S.W.2d 863 (Mo. Ct. App. 1996)

Mo. Rev. Stat. Section 443.060 (2000)

Mo. Rev. Stat. Section 443.130 (2000)

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE, EVEN IF MR. GARR'S AUGUST 8, 2002 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE GARRS FAILED TO PROVE THAT COUNTRYWIDE DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE GARRS REFLECTING THAT COUNTRYWIDE DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE TO MATRIX FINANCIAL.

Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. Ct. App. 1995)

Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. 1996)

Wing v. Union Central Life Ins. Co., 137 S.W. 11 (Mo. Ct. App. 1911)

Mo. Rev. Stat. Section 443.130 (2000)

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

Board of Education of the City of St. Louis v. State of Missouri,

47 S.W.3d 366 (Mo. 2001) (en banc)

State v. Young, 695 S.W.2d 882 (Mo. 1985) (en banc)

State ex rel. McNary v. Hais, 670 S.W.2d 494 (Mo. 1984) (en banc)

United States Constitution, Amendment XIV

Constitution of Missouri, Article I, Section 10

Mo. Rev. Stat. Section 443.130 (2000)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE MR. GARR'S AUGUST 8, 2002 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY COUNTRYWIDE NOT REQUIRED BY THE STATUTE.

A. Standard of Review.

After filing cross-motions for summary judgment in the court below, the parties agreed to "waive trial and submit the matter for disposition by the [trial] court on the motions and briefs filed." (LF131). Accordingly, there was no live testimony presented to the trial court, and all the evidence submitted was in written form, including an affidavit, discovery responses, letters and other documents. (LF20-63; LF117-123). The trial court was, therefore, not required to resolve any conflicting testimony or determine the credibility of any witnesses in rendering its Final Judgment in this case.

"On appeal from a judgment on an agreed statement of facts, or where the facts are not in dispute, the only question is whether the judgment is the proper

legal conclusion." State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission, 382 S.W.2d 645, 651 (Mo. 1964) (en banc). Where, as here, a question of law is involved, "it is a matter for the independent judgment of the reviewing court." House of Lloyd, Inc. v. Director of Revenue, 824 S.W.2d 914, 916 (Mo. 1992) (en banc). Specifically, this Court must address the legal consequences of the facts contained in the record and if, under those facts, the Garrs are not entitled to recover the penalty under § 443.130, the Final Judgment of the trial court must be reversed. See Schroeder v. Horack, 592 S.W.2d 742, 744 (Mo. 1979) (en banc). In making this determination, this Court should accord no deference to the trial court's conclusion. See id. See also Howard v. Missouri State Board of Education, 913 S.W.2d 887, 888-89 (Mo. Ct. App. 1995).

B. The Garrs Did Not Invoke Section 443.130.

The threshold issue posed in this case is whether Mr. Garr's letter dated August 8, 2002 invoked the remedy provided by § 443.130. This Court has not previously addressed such an issue. A determination of this issue requires an examination of both the letter and the statutory language. As discussed below, such an examination reveals that Mr. Garr's letter plainly did not trigger the forfeiture remedy contained in § 443.130.

Section 443.130 is an enforcement mechanism for § 443.060. Ong Building Corp. v. GMAC Mortgage Corp. of Pa., 851 S.W.2d 54, 55 (Mo. Ct. App. 1993).

Specifically, the purpose of § 443.130 is to enforce the duty of the lender/mortgagee to clear the title of the mortgagor, so that it is apparent upon examination that the incumbrance of record no longer exists. Id.; Roberts v. Rider, 924 S.W.2d 555, 558 (Mo. Ct. App. 1996); Henry v. Orear, 78 S.W. 283, 284 (Mo. Ct. App. 1904).

Significantly, it has long been recognized that § 443.130 is "highly penal" because it requires a lender/mortgagee to forfeit ten percent of the face amount of a promissory note. Trovillion v. Chemical Bank, 916 S.W.2d 863, 865 (Mo. Ct. App. 1996); Perrin v. Johnson, 124 S.W.2d 551, 555 (Mo. Ct. App. 1939). Consequently, this Court and the courts of appeal have repeatedly held that the statute must be "strictly construed." Id.; Snow v. Bass, 174 Mo. 149, 73 S.W. 630, 637 (Mo. 1903); Murray v. Fleet Mortgage Corp., 936 S.W.2d 212, 215 (Mo. Ct. App. 1996); Martin v. STM Mortgage Co., 903 S.W.2d 548, 550 (Mo. Ct. App. 1995). The present case must be considered in view of these key principles.

Mr. Garr's August 8, 2002 letter did not invoke the rights and obligations under § 443.130 for two reasons. First, the letter failed to put Countrywide on notice that a statutory demand under § 443.130 was being made. The letter does not mention the statute. (A21) (LF54). Nor does it even generally track the

statutory language.[3] Where a letter from a borrower/mortgagor fails to make clear that a *statutory* demand is being made, there is no entitlement to relief under § 443.130. See Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 679-80 (Mo. Ct. App. 2002) (affirming summary judgment in favor of bank where nothing in borrower's demand letter referenced § 443.130 and letter did not request a deed of release within 15 business days, as the statute states). This is especially true where, as here, the borrower/mortgagor also demands that the lender/mortgagee take several actions that are not required by the statute.

Second, and more importantly, Mr. Garr's letter of August 8, 2002 demanded actions by Countrywide not required by § 443.130. The second paragraph of Mr. Garr's letter begins with a demand for an "immediate release" of the Deed of Trust on the Garrs' property. (A21) (LF54). Under § 443.130, however, the lender/mortgagee is not required to immediately take action. Rather,

[3] In contrast, Mr. Garr's September 3, 2002 letter expressly referenced § 443.130 and requested "a sufficient deed of release." (A26-A27) (LF59-60). Because this second letter was not sent by certified mail, return receipt requested, it too did not constitute a proper demand under § 443.130. In any event, Countrywide complied with Mr. Garr's second letter by mailing him a copy of the recorded Deed of Release on September 12, 2002. (A23-A25) (LF51-53).

after receipt of a proper request, the statute allows the lender/mortgagee "fifteen business days" to deliver a sufficient deed of release to the person who paid the promissory note held by the lender/mortgagee. Thus, Mr. Garr's letter plainly demanded action by Countrywide sooner than the time set forth in the statute.

The second paragraph of Mr. Garr's August 8, 2002 letter then goes on to demand that Countrywide immediately release the Deed of Trust on the Garrs' property by *recording* a Deed of Release. (A21) (LF54). When § 443.130 is strictly construed, as it must be, it does not purport to require the lender/mortgagee to record anything. Instead, the statute merely requires that the lender/mortgagee "deliver" a "sufficient deed of release" to the person who paid the promissory note secured by the deed of trust.[4]

Prior to its amendment in 1994, § 443.130 allowed a lender/mortgagee to comply with the statute by either "acknowledg[ing] satisfaction on the margin of the record, or deliver[ing] to the person making satisfaction a sufficient deed of

[4] The term "a sufficient deed of release" is not defined in § 443.130 or any other statute contained in Chapter 443. Presumably, it is a deed of release that is in a form that can be recorded by the person to whom it is delivered by the lender/mortgagee.

release."[5] The 1994 amendment deleted the recording method as a means of complying with the statute. This amendment harmonized § 443.130 with § 443.060, which had been similarly amended in 1991 to delete the provision allowing a lender/mortgagee to release a deed of trust by "acknowledg[ing] satisfaction of the security instrument on the margin of the record thereof."[6]

In the court below, the Garrs conceded that "[i]n 1994 . . . the legislature amended § 443.130 and deleted the language allowing a bank to file the deed of release with the recorder of deeds as a mean of compliance." (LF14 at ¶ 5). As such, if a borrower now demands the recordation of a deed of release, as Mr. Garr did in the instant case, the provisions of § 443.130 are not triggered because the borrower has demanded action not required by the statute.

Mr. Garr's August 8, 2002 letter further demands that Countrywide "deliver in hand *to me* evidence of the release of the Deed of Trust." (Emphasis added) (A21) (LF54). Again, this demand called for action not required by § 443.130. Under § 443.130, Countrywide was only obligated to timely deliver a sufficient

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[5] A copy of § 443.130 prior to its 1994 amendment can be found on page 64 of the Legal File and on page 13 of the Appendix to this Brief. (A13).

[6] A copy of § 443.060 prior to its 1991 amendment can be found on pages 5 and 6 of the Appendix to this Brief. (A5-A6).

deed of release to "the person making satisfaction" of the security instrument. The undisputed record reflects that Mr. Garr is not such a person. In fact, Mr. Garr submitted an affidavit to the trial court in which he states the Garrs' indebtedness to Countrywide was paid when the Garrs refinanced their home with another lender, Matrix Financial. (LF21 at ¶ 6). Accordingly, "the person making satisfaction" was Matrix Financial, not the Garrs. As discussed below, "the person making satisfaction" (as referenced in § 443.130.1) is *not* synonymous with the "mortgagor" (as referenced in § 443.130.2).

The present case is substantially similar to Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. 1996). In that case, plaintiffs had a mortgage with Roosevelt Bank (the "bank"). After plaintiffs refinanced their mortgage with another lender, they sent a letter to the bank requesting a deed of release. Id. at 10. The bank did not comply with plaintiffs' request. Instead, the bank sent a deed of release to Commonwealth Title Company, as requested in a separate letter that the bank received from plaintiffs' refinancing lender. Id. Plaintiffs then sued the bank seeking statutory damages under § 443.130. Plaintiffs argued that §§ 443.060 and 443.130 required the bank "to provide them personally with a deed of release within thirty days and that delivery to the title company, at the new lender's direction, was insufficient under the statutes." Id. The trial court granted summary judgment in favor of the bank and plaintiffs appealed. Id.

On appeal, plaintiffs argued that §§ 443.060 and 443.130 direct a mortgagee to deliver a deed of release to the person making a request, not the person making the satisfaction. Id. at 11. The court of appeals rejected plaintiffs' construction of the statutes, finding it "absurd." Id. The court then stated:

> Under [plaintiffs'] theory, a mortgagee would be required to deliver a deed of release to anyone who tendered the costs and made a demand. We hardly think that was the intent of the legislature in enacting this statute. The statutory language in §§ 443.060 . . . and 443.130 . . . is clear. It requires a deed of release be delivered to the party making the satisfaction.
>
> [Plaintiffs] argue that if the legislature intended a new mortgagee receive the deed of release it would have used the term mortgagee in the statute but there are situations where a new mortgagee may not be the party making the satisfaction. The legislature intended to include all persons who make a satisfaction in the statute. On the other hand, if the legislature intended that only the mortgagor receive the deed of release, regardless of who

> made the satisfaction, it would have simply used the word mortgagor.

Id. (footnote omitted).

As in Masterson, judgment should have been entered against the Garrs because they were not "the person making satisfaction" and, consequently, they have no cause of action for any failure by Countrywide to deliver a sufficient deed of release to them. Like the plaintiffs in Masterson, the Garrs repeatedly asserted the following argument in the trial court: "Section 443.130 provides that any bank receiving satisfaction of a mortgage **shall deliver to the borrower** a sufficient deed of release . . .." (LF13; LF88; LF126) (Original emphasis). This is simply wrong. By its plain terms, § 443.130 applies only to those situations where a lender/mortgagee fails to timely deliver a sufficient deed of release to "the person making satisfaction." In many instances, including transactions where a debt is refinanced, "the person making satisfaction" is another lender -- not the mortgagor. Where the language of a statute is clear, as it is here, a court "should regard the laws as meaning what they say; the [legislature] is presumed to have intended exactly what it states directly and unambiguously." State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker, 955 S.W.2d 931, 933 (Mo. 1997) (en banc) (quoting In re Estate of Thomas, 743 S.W.2d 74, 76 (Mo. 1988) (en banc)).

The record in this case reflects that Countrywide discharged its duty under § 443.060 by promptly recording a release of its deed of trust on the Garrs' property. In fact, the record is undisputed that Countrywide filed a Deed of Release within ten business days after receiving Mr. Garr's August 8, 2002 letter. (A24-A25) (LF119-120). The purpose of § 443.130 was therefore served, even though Mr. Garr failed to invoke the statute with his August 8, 2002 letter.

Significantly, Countrywide did exactly as Mr. Garr requested in his letter dated August 8, 2002. Upon receipt of Mr. Garr's letter, Countrywide immediately prepared and executed a Deed of Release. It then sent the Deed of Release from its offices in California to the St. Louis County Recorder of Deeds for recording, which was accomplished in just ten business days following Countrywide's receipt of Mr. Garr's letter. Countrywide also directed the St. Louis County Recorder of Deeds to mail the recorded Deed of Release to the Garrs at their home address.

Nevertheless, the Garrs sued Countrywide for allegedly failing to comply with § 443.130. The Garrs, however, never asked Countrywide to take the actions required by the statute. Instead, they asked for something quite different, and Countrywide complied with their request. In short, the statutory penalty should not be imposed on a lender/mortgagee where, as here, it has dutifully complied with a borrower's request to take actions to clear title which are materially different than those required by § 443.130. To hold otherwise would violate the principle that

§ 443.130 must be strictly construed and result in an unwarranted expansion of a highly penal statute.

In the trial court, the Garrs relied heavily on Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. Ct. App. 1995). (LF15; LF90; LF128; LF160). This reliance is misplaced as Martin actually supports Countrywide's position. In Martin, the lender/mortgagee (STM) argued that plaintiffs (the Martins) were not entitled to the statutory penalty because their demand letter did not constitute a "request" as contemplated by §§ 443.060 and 443.130. Specifically, STM claimed that the Martins' letter "contained nothing more than a recitation of §443.130." Id. at 550. The court of appeals rejected this argument, citing the following general proposition:

> A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty. No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested.

Id. (quoting 59 C.J.S. Mortgages § 474c (1949)).[7]

Unlike the plaintiffs in Martin, Mr. Garr did not recite § 443.130 in his August 8, 2002 letter. In fact, Mr. Garr's letter does not even mention § 443.130. More importantly, in several respects previously noted, Mr. Garr's letter expressly demands that Countrywide take actions different from those required by § 443.130. While a proper "request" under § 443.130 may require "[n]o particular form of words," the borrower must say enough in the request to fairly put the lender/mortgagee on notice that a demand is being made pursuant to § 443.130. Id. Like the plaintiffs in Martin, Mr. Garr could have done so by simply reciting the statute in his August 8, 2002 letter. More simply, Mr. Garr could have referred to § 443.130 in his letter if he desired to invoke the statute.

In any event, the term "request" would have to be read expansively in order for the Garrs to recover the statutory penalty in this case. Of course, this is not permissible since § 443.130 is highly penal in nature. See Snow, 73 S.W. at 637.

[7] The Martin case was decided before the 1994 amendment to § 443.130. Thus, STM had the option of complying with the statute by "acknowledg[ing] satisfaction of the security instrument on the margin of the record thereof, or deliver[ing] to [the person making satisfaction] a sufficient deed of release of the security instrument . . .." (A13).

When correctly (strictly) construed, the substance of a proper "request" under § 443.130 entails a demand by the borrower/mortgagor that the lender/mortgagee deliver a sufficient deed of release to the person making satisfaction within 15 business days of receiving the demand letter. The Garrs made no such "request" in this case. Rather, they demanded that Countrywide immediately record a deed of release, which Countrywide did. In addition, the Garrs demanded that evidence of the release be delivered to them -- even though Matrix Financial was the person making satisfaction of the Garrs' debt to Countrywide. None of these actions are required by § 443.130.

It is not unfair to require borrowers a make an appropriate "request" under the statute since they stand to gain a substantial windfall should lenders fail to properly and timely respond. Further, an appropriate "request" is essential in view of the manner in which in lending industry has changed. As stated by the court in Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. Ct. App. 1995):

> In the early 1900's, and for many years thereafter, banks and other lenders retained the borrower's note in their own portfolio. Thus, during the term of the note, the borrower would deal directly with a local lender and could talk face to face with the lender or its employees.

> In recent years, 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. at 823-24 (footnote omitted) (emphasis added).

As this case demonstrates, an appropriate "request" by a borrower/mortgagor is also necessary to avoid turning § 443.130 into a game of "gotcha." Countrywide did everything that was requested of it by Mr. Garr in his August 8, 2002 letter and, in the process, released its deed of trust on the Garrs' property within ten business days of receiving Mr. Garr's letter. Nevertheless, the Garrs sued Countrywide claiming technical non-compliance with § 443.130. By assessing the statutory penalty against Countrywide, the lower court in effect found that Countrywide should have first understood Mr. Garr's letter to be a demand under § 443.130 (which is *not* what it purported to be) and then complied with the statute rather than doing as Mr. Garr requested. If allowed to stand, the result in

this case will encourage borrowers to make demands that are neither clear nor forthright, in hopes of lulling lenders into not complying with the statute. This Court should not countenance such gamesmanship.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE, EVEN IF MR. GARR'S AUGUST 8, 2002 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE GARRS FAILED TO PROVE THAT COUNTRYWIDE DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE GARRS REFLECTING THAT COUNTRYWIDE DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE TO MATRIX FINANCIAL.

The standard of review for this claim of error is the same as for Point I, supra.

By its terms, § 443.130 does not require a lender/mortgagee to deliver a sufficient deed of release to anyone other than "the person making satisfaction" of the mortgagor's debt. See Masterson, 919 S.W.2d at 11 ("the statute plainly states the deed of release must be delivered to the party making the satisfaction . . ."). In the case at bar, it is undisputed that Matrix Financial is the person who made satisfaction of the Garrs' debt to Countrywide. This satisfaction occurred in early

August 2002 when the Garrs refinanced their home with Matrix Financial. Thus, under § 443.130, Countrywide could only be subject to the statutory penalty if it failed to timely deliver a sufficient deed of release to Matrix Financial.

Nevertheless, the Garrs are attempting to recover the statutory penalty on grounds Countrywide allegedly failed to timely deliver a sufficient deed of release to *them*.[8] (LF8 at ¶¶ 13-14). The statutory penalty can only be imposed, however, if Countrywide failed to timely deliver a sufficient deed of release to Matrix Financial. Significantly, the Garrs presented no evidence in the trial court suggesting that such a failure occurred. This failure of proof by the Garrs requires a reversal of the lower court's Final Judgment.

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[8] Countrywide uses the word "allegedly" because it expressly directed the St. Louis County Recorder of Deeds to mail the recorded Deed of Release to the Garrs. (A25) (LF120). In the court below, the Garrs never denied that they received such a mailing from the St. Louis County Recorder of Deeds within the time prescribed by § 443.130. Rather, they only asserted that *Countrywide* did not mail the deed of release to them until September 12, 2002. (LF22 at ¶¶ 16-18, 20). Of course, this assertion does not mean that the St. Louis County Recorder of Deeds, acting at Countrywide's written behest, did not timely mail the deed of release to the Garrs.

The instant case is similar to Martin, which was "tried to the [trial] court on stipulated facts." 903 S.W.2d at 550. The trial court awarded plaintiffs the statutory penalty under § 443.130 and the lender appealed. The court of appeals reversed on grounds the plaintiffs failed to plead or prove the date on which they satisfied their debt to the lender. Id. at 551. Without proof of the payment date, the court concluded that it was impossible to determine whether the lender exceeded the time permitted for delivering a sufficient deed of release to the plaintiffs. Id. The court reached this conclusion even though "[i]n all likelihood, given the strict deadlines for the banking industry contained in the Uniform Commercial Code, the check was paid within days of its deposit and STM Mortgage violated the statute." Id. See also Wing v. Union Central Life Insurance Company, 137 S.W. 11 (Mo. Ct. App. 1911) ("The statute is highly penal, must be strictly construed and the plaintiff invoking it must plead and prove all of the elemental facts . . . Nothing must be left to inference.").

Like Martin, this case was tried below on stipulated facts. See Order dated May 30, 2003, stating in relevant part, "[t]he parties hereby waive trial and submit the matter for disposition by the court on the motions and briefs filed." (LF131). In addition, as in Martin, the Garrs failed to present evidence on a key point they were required to prove in order to recover the statutory penalty, *to-wit*, that Countrywide did not timely deliver a sufficient deed of release to "the person

making satisfaction." In view of this failure of proof, the judgment in this case should be reversed, as it was in Martin.

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE GARRS AND AGAINST COUNTRYWIDE BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

The standard of review for this claim of error is the same as for Point I, supra.

Countrywide's final appeal point concerns the constitutionality of § 443.130. Specifically, Countrywide contends that the statute, as applied to the facts of this case, is unconstitutionally vague. Of course, the Court need not address this point if it determines there is reversible error as to other issues raised by Countrywide. See Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53 (Mo. 1999) (en banc).

The "void-for vagueness" doctrine stems from the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section

10 of the Missouri Constitution. "These clauses require that statutes whose enforcement may result in a deprivation of liberty or property be worded with precision sufficient to enable reasonable people to know what conduct is proscribed so they may conduct themselves accordingly." Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52, 55 (Mo. Ct. App. 1990) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-228 (1972) and State ex rel. Cook v. Saynes, 713 S.W.2d 258, 260 (Mo. 1986) (en banc)).

In State v. Young, 695 S.W.2d 882 (Mo. 1985) (en banc), this Court stated:

> Vagueness, as a due process violation, takes two forms. One is the lack of notice given a potential offender because the statute is so unclear that men of common intelligence must necessarily guess at its meaning. The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application.

Id. at 884 (internal quotations and citations omitted).

More recently, in Board of Education of the City of St. Louis v. State of Missouri, 47 S.W.3d 366 (Mo. 2001) (en banc), this Court held:

> The standard for determining whether a statute is void for vagueness is whether the terms or words used are of common usage and are understandable by persons of ordinary intelligence. Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.

Id. at 369 (internal quotations and footnoted citations omitted).

The "void-for-vagueness" doctrine is applicable to civil as well as criminal cases. State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219, 223 (Mo. 1986) (en banc) (citing Boutilier v. Immigration & Naturalization Service, 387 U.S. 118, 123, 87 S.Ct. 1563, 1566, 18 L.Ed.2d 661 (1967)); Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921, 927 (Mo. Ct. App. 1984). Finally, in reviewing vagueness challenges, "it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." Young, 695 S.W.2d at 883-84.

The language of § 443.130 is unclear and confusing when applied to the facts of the instant case. The problem with the statute stems in large part from its recent amendments. As the Garrs correctly acknowledged in the trial court:

> Prior to 1994, § 443.130 allowed a bank two means of satisfying the statute at the election of the bank. Specifically, it could either (a) file the deed of release on the margin of record with the recorder of deeds, or (b) deliver the deed of release to the borrower. In 1994, however, the legislature amended § 443.130 and deleted the language allowing a bank to file the deed of release with the recorder of deeds as a means of compliance.

(LF14 at ¶ 5) (footnote and citations omitted).

As a consequence of the 1994 amendment, the most a borrower/mortgagor can demand of a lender/mortgagee is to timely "deliver to the person making satisfaction a sufficient deed of release." In other words, after 1994, a borrower/mortgagor no longer has a basis under the terms of the statute to demand that a lender/mortgagee *record* a release of a deed of trust. See State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564, 567 (Mo. 2000) (en banc) ("When the legislature has altered an existing statute such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act."). Indeed, because § 443.130 no longer involves the actual recording of a release, the time for lenders/mortgagees to comply with the statute

was *shortened* from 30 days to 15 business days when it was again amended in 1996.[9]

Confusingly, however, the 1996 amendment added a provision requiring that a proper statutory demand by a mortgagor "shall include . . . the expense of filing and recording the release . . .." See § 443.130.2. (A11; A20). This provision is contradictory to the 1994 amendment which, as previously noted, *eliminated* any recording requirement. Consequently, persons of common intelligence can only guess at what § 443.130 now means.[10] This Court has invalidated other statutes on vagueness grounds when faced with such internal contradictions. See, e.g., Board of Education of the City of St. Louis, 47 S.W.3d at 370-71.

In the present case, the trial court imposed the statutory penalty against Countrywide even though Mr. Garr demanded an "immediate release" of the Deed

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[9] The 1996 amendments to § 443.130 are set forth on page 20 of the Appendix to this Brief. (A20).

[10] Perhaps the undefined term "a sufficient deed of release" means a copy of a recorded deed of release, which would explanation the statutory language regarding the "expense of filing and recording." Of course, the problem with such an interpretation is manifest -- there is nothing in § 443.130 which indicates that recording is required.

of Trust on the Garr's property, which could only be accomplished by recording a deed of release. (A21) (LF54). Further, Mr. Garr also stated that he was enclosing funds "to cover the costs of the *filing and recording* of the release of the Deed of Trust." (Id.) (emphasis added). While Countrywide promptly complied with Mr. Garr's demand, it was not a demand that invoked § 443.130. Since its amendment in 1994, the statute has had nothing to do with recording -- the very act demanded here by Mr. Garr.

In addition, the trial court imposed liability on Countrywide even though Mr. Garr demanded that Countrywide "deliver in hand *to me* evidence of the release of the Deed of Trust." Id. (emphasis added). Liability under the statute, however, appears to be strictly predicated on a failure to timely deliver a sufficient deed of release to "the person making satisfaction" of the mortgage debt. Because the Garrs refinanced their property, they were not "the person making satisfaction." Rather, it was their refinancing lender, Matrix Financial. This is not a subtle distinction. Section 443.130 contemplates that "the person making satisfaction" and the "mortgagor" may not be the same. In a refinancing transaction like the case at bar, the new lender plainly has an interest in "having the existing deed of trust released." Murray, 936 S.W.2d at 216. By requiring that a sufficient deed of release be delivered to the person making satisfaction, § 443.130 places the

refinancing lender in a position to file the deed -- which it has a substantial incentive to do in order to remove the prior lien on its collateral.

By its terms, § 443.130 purports to impose a penalty on a lender/mortgagee if, after receiving full payment and a proper request from the mortgagor, a lender/mortgagee does not timely "deliver to the person making satisfaction a sufficient deed of release." Countrywide does not understand § 443.130 to extend liability to those instances where, as here, the mortgagor's request clearly demands action by the lender/mortgagee that is *different* from that required by the statute. Certainly, not every demand made by a mortgagor will invoke § 443.130. The statute, after all, requires that only certain, specified actions need be taken by the lender/mortgagee (*i.e.*, timely deliver to the person making satisfaction a sufficient deed of release). To somehow construe the statute to impose liability when a mortgagor has requested something different unfairly deprives potential offenders of their property without sufficient notice. Nevertheless, this is what the trial court did in this case.

As previously noted, the purpose of § 443.130 is to enforce the duty of a lender/mortgagee to clear the title of the borrower/mortgagor, so that it is apparent upon examination that the incumbrance of record no longer exists. Roberts, 924 S.W.2d at 558; Ong Building Corp., 851 S.W.2d at 55; Henry, 78 S.W. at 284. In the present case, it is undisputed that, within ten days of receiving Mr. Garr's

August 8, 2002 letter, Countrywide fulfilled its duty to clear the title on the Garrs' property by *recording* a deed of release. (A24-A25) (LF119-120). At that point, the purpose of the statute was clearly satisfied. Indeed, an examination of the public records on August 26, 2002 would have reflected that Countrywide's deed of trust on the Garrs' property had already been released. Requiring compliance with the statute at that point would be *senseless* because there was nothing for Countrywide to release. Its lien no longer existed. The inherent predicate for liability under § 443.130 is that a prior lien *continues to exist* after the obligation it secures has been paid in full. The statute would appear to be rendered inapplicable where, as here, a mortgagee immediately records a deed of release and thereby accomplishes what § 443.130 is designed to achieve (the clearing of title). See Budding v. SSM Healthcare System, 19 S.W.3d 678, 681 (Mo. 2001) (en banc) ("in construing the statute, the Court is not to assume the legislature intended an absurd result."); State ex rel. McNary v. Hais, 670 S.W.2d 494, 495 (Mo. 1984) (en banc) ("we presume that the legislature did not intend to enact an absurd law ... and we favor a construction that avoids unjust or unreasonable results."); State ex rel. Safety Ambulance Service, Inc. v. Kinder, 557 S.W.2d 242, 247 (Mo. 1977) (en banc) ("in construing the Act . . . we seek to promote the purposes and objects of the statute and to avoid any strained and absurd meaning.").

As the facts of this case demonstrate, the terms of § 443.130 are of such uncertain meaning that persons of common intelligence must necessarily guess at its meaning. The Court should therefore find it void.

CONCLUSION

For the reasons discussed herein, the Final Judgment of the trial court in favor of the Garrs and against Countrywide should be reversed.

Respectfully submitted this ____ day of December, 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed, first class, postage prepaid, to the person listed below this ____ day of December, 2003.

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 8,765. The undersigned relied on the word count feature of his firm's word-processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.