STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
WHITBECK, P.J., and SMOLENKSI and COOPER, J.J.

PAUL DRESSEL and THERESA DRESSEL

Plaintiffs-Appellees,

v

AMERIBANK

Defendant-Appellant.
_____/

Supreme Court Docket No. 119959

Court of Appeals Docket No. 2222447

Kent County Circuit Court No. 98-013017-CP

HOMESTEAD USA, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT AMERIBANK'S APPEAL

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I. STATEMENT OF INTEREST

Homestead USA, Inc. ("Homestead") is a residential mortgage lender that makes loans to consumers in several states including Michigan. Homestead charges its borrowers a document fee of $250 for the preparation of mortgage loan documents required by law to execute its loan transactions. Following the decision by the Court of Appeals in Dressel v Ameribank, a Complaint was filed against Homestead in Wayne County Circuit Court (Case No. 01-139176 CP), requesting class action certification and alleging that Homestead's document preparation fee violated Michigan's unauthorized practice of law statute as well as the Michigan Consumer Protection Act, MCL 445.901 et seq. The Nolan v Homestead lawsuit was one of many cookie-cutter lawsuits brought against Michigan mortgage lenders in the wake of the Dressel v Ameribank decision. The case against Homestead was ultimately dismissed voluntarily without prejudice after Homestead filed a motion to compel arbitration. However, there remains a substantial risk that Homestead will face similar lawsuits if the Dressel v Ameribank decision is not reversed.

Because Homestead has charged a document preparation fee for the majority of loan transactions that it has executed in recent years, its potential liability is significant. Homestead is extremely concerned about its ability to effectively compete in the mortgage loan industry if it is no longer permitted to charge a document preparation fee or is forced to retain attorneys to fill out its standard-form mortgage loan documents. If Homestead is not permitted to recover the costs of preparing mortgage loan documents, its profit margin will be significantly reduced. The Court of Appeals decision imposes unnecessary costs and burdens upon Homestead and other mortgage lenders. The decision will make it considerably more difficult for Michigan consumers

to obtain home loans. Homestead believes that its Amicus Brief will assist the Court in resolving the issues raised in Ameribank's Appeal.

II. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Homestead adopts the Statement of Facts and Material Proceedings set forth in Appellant's Brief.

III. STANDARD OF REVIEW

Homestead adopts the Standard of Review set forth in Appellant's Brief.

IV. ARGUMENT

A. Ameribank Employees Did Not Engage in the Practice of Law by Filling Out Standardized Mortgage Documents

Ameribank did not violate Michigan's unauthorized practice of law statute by filling in the blanks on standard form mortgage documents and charging its customers a document preparation fee. In fact, Ameribank did not engage in the "practice of law" period. MCL 450.681 provides:

> It shall be unlawful for any corporation . . . to practice . . . as an attorney-at-law for any person other than itself . . . or to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner . . .

Neither the 1969 ABA Model Code of Professional Responsibility nor the 1983 ABA Model Rules of Professional Conduct defines what constitutes the "practice of law." However, the Model Code's Ethical Consideration ("EC") 3-5 provides that "the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of a lawyer is his educated ability to relate the general body and

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philosophy of law to a specific legal problem of a client." (emphasis added). Pursuant to this definition, Ameribank clearly did not engage in the "practice of law."

Virtually all residential mortgage loans are written on standardized forms developed by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). These standardized forms have been drafted and revised over the years under the watchful eye of attorneys for these organizations. Lenders are constrained to adhere to these uniform forms in order to be able to sell the mortgages in the secondary market.

> [T]he residential real estate transaction has become standardized in large part. This is because, today, interstate lending and assignment of mortgage loans into a national secondary mortgage market have become the norm. . . . Consequently, forms approved by . . . Fannie Mae and . . . Freddie Mac for notes, mortgages and deeds of trust are used in almost every residential real estate closing. Even a buyer or seller's attorney is not likely to negotiate a change in the terms of such forms.

Joyce Palomar, "The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says 'Cease Fire'," Conn L Rev (Winter, 1999). See also, Michael Braunstein, "Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing," 62 Mo L Rev 241, 269-70 (1997) ("Because the lender wants to preserve the option to sell the mortgage on the secondary mortgage market, standardization is very important and alteration of the documents, except to fill in blanks concerning interest rate, term, etc., is not permitted. The lender presents documents on a 'take it or leave it' basis.").

The legal implications of the forms provided by every mortgage company are virtually identical. When Ameribank employees fill in the applicable data for a specific loan on these standardized forms, there is no room for legal discretion. In fact, Ameribank's lay employees exercise no discretion whatsoever with regard to the terms of the mortgage loan documents. No

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advice is dispensed by Ameribank employees regarding the legal impact of the forms. Ameribank employees do nothing more than fill in the blanks on the forms based on information provided by the customer. The information filled in by bank employees includes the names and addresses of the borrower and lender, the interest rate, the principal and interest payment and the length of the loan. The bank's employees essentially act as scriveners in this process.

In Colorado Bar Association v Miles, 192 Colo 294; 57 P2d 1202 (1976), the trial court issued a permanent injunction against several "divorce agencies" offering services to assist individuals with the divorce process on the grounds that the agencies were engaged in the unauthorized practice of law. The Colorado Supreme Court modified the terms of the injunction so that the agencies would not be barred from preparing pleadings or other written instruments relating to the dissolution of marriage in the manner performed by a scrivener or public stenographer. See also, Miller v Vance, 463 NE2d 250, 251 (Ind 1984) *quoting* State v Indiana Real Estate Assn, Inc, 244 Ind 214, 220; 191 NE2d 711, 715 (1963) ("Generally, it can be said that the filling in of blanks in legal instruments, prepared by attorneys, which require only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved, does not constitute the practice of law.").

The threshold question for this Court is whether Ameribank employees engaged in the "practice of law" by filling in the blanks on standardized loan documents. Homestead respectfully submits that Ameribank did not engage in the "practice of law." Consequently, this Court need not reach the question of whether Ameribank engaged in the "unauthorized" practice of law or whether charging a fee for document preparation makes Ameribank's actions unauthorized.

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B. Ameribank Did Not Engage in the Unauthorized Practice of Law Because It Was a Party to the Loan Transaction

Even if this Court finds that Ameribank engaged in the "practice of law," its actions were permitted under the statute because Ameribank was a party to the loan transaction and prepared the documents to protect its own interests as a lender. The mere fact that Ameribank charged a document preparation fee is completely irrelevant.

MCL 450.681 only forbids the practice of law "for any person other than itself." In Detroit Bar Ass'n v Union Guardian Trust Co, 282 Mich 216; 276 NW2d 365 (1936), the plaintiff sought to enjoin the defendant from drafting certain types of trust agreements for prospective trustors. The defendant argued that it was not engaged in the unauthorized practice of law because it was authorized by statute to act as a fiduciary and drafting the trust agreements was incidental to its business. This Court agreed that as a contracting party, the defendant was entitled to draft the trust agreements:

> [D]efendant points out that trust agreements which are revocable by the trustor and which do not contain provisions of donative or testamentary intent are mere agreements between the contracting parties fixing their respective rights and duties, that drafting such agreements in no way constitutes the practice of law, and does not involve conduct on the part of the respective parties over which courts have judicial control. We think defendant's contention is sound. Within the limitations indicated, drafting trust agreements is no more the practice of law, nor does it any more contemplate action in or by the courts, than does the ordinary run of agreements in the every day activities of the commercial and industrial world. A construction agreement may be considered as a fair example. If the contract project is of any magnitude it involves the making, the adoption, the interpretation and the execution of the plans and specifications. It is a matter of common knowledge that often, and perhaps usually, these details are of such a complex and technical character as not to be understood readily by the property owner who is a party to the construction contract. Nonetheless his right to enter into such a contract cannot be questioned nor is it requisite that it be drafted by one skilled in that field. The same may be said of trust agreements of the limited character which the defendant is

> now contending that it has the right to solicit, draft and consummate with prospective trustors. Union Guardian, 292 Mich at 228-29.

The Michigan Supreme Court thereby modified the injunctive relief granted by the trial court. Significantly, Union Guardian made no mention of any requirement that the trust company not charge the other contracting party a fee for preparing the trust documents to which it was a party. Prior to the Court of Appeals decision in the instant case, no Michigan decision has held otherwise.

The Opinion of the Court of Appeals referred to several Michigan cases in an attempt to support its conclusion that charging a separate fee for the drafting of mortgage documents constituted the unauthorized practice of law. The Court of Appeals properly cited Grand Rapids Bar Ass'n v Denkema, 290 Mich 56; 287 NW 377 (1939) for the proposition that "charging a fee for the preparation of legal instruments for others constitutes the practice of law." However, the Court of Appeals failed to discern that Denkema actually supports Ameribank's position. The defendant in Denkema charged his clients a fee for such activities as "drawing leases, land contracts, deeds and mortgages," some but not all of which were in connection with the defendant's business of making loans. The Michigan Supreme Court determined that the defendant was only enjoined from preparing such legal instruments for others, but was permitted to do so when acting as one of the parties in interest.

The other cases cited by the Court of Appeals are completely inapposite. See, e.g., Ingham County Bar Ass'n v Walter Neller Co, 342 Mich 214; 69 NW2d 713 (1955); State Bar of Michigan v Kupris, 366 Mich 688; 116 NW2d 341 (1962). Despite acknowledging that these cases dealt with real estate brokers rather than mortgage lenders, the Court of Appeals failed to recognize the very material distinction between the two situations. Significantly, a real estate

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broker is not a party to the real estate transaction, but simply acts as a go-between. The real parties in interest are the buyer and the seller of the property. Conversely, in a mortgage loan transaction, the two interested parties to the transaction are the borrower and the lender.

Ameribank acted as the lender in every transaction for which it charged a document preparation fee. In drafting the mortgage loan documents, Ameribank clearly acted on its own behalf. Although borrowers also benefit from the mortgage loan documents, in the sense that without the documents the borrower would be unable to procure the loan, the primary purpose of the documents is to protect the interests of the lender. The mortgage loan documents are essential to protect Ameribank's interests in enforcing the borrower's obligation to repay the loan. The best evidence of the fact that Ameribank was acting to protect its own interests is the fact that it only prepared loan documents for transactions in which it was a party. Ameribank never endeavored to prepare mortgage loan documents for other parties.

In Krause v Huntington Bank, Case No. 98-00750-CP, slip op at 2 (Kent County Cir Ct July 23, 1998) (Exhibit A), a case virtually identical to the case at bar, Judge Sullivan aptly pointed out:

> Does any reasonable person . . . really believe that the instruments prepared by the bank were solely or primarily for the protection of the borrower? The court thinks not. Mortgage lenders obviously rely on such instruments to protect their security.
>
> * * * * * * * * * *
>
> Defendant did not act as plaintiff's attorney, nor did it charge plaintiffs for legal services rendered on plaintiffs' behalves. Rather, it acted as its own attorney, and for its own benefit. Plaintiffs do not allege that defendant provided legal advice to plaintiffs, nor is there any current indication that it did. . . . And defendant's charging a fee to plaintiffs for document preparation no more creates an attorney-client relationship than a losing party who pays attorney fees after trial, one who pays attorney fees for his or her spouse in a pending divorce, or sellers of a business who

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> contract with buyers to pay sellers' attorney fees as part of the overall transaction.

Simply because Ameribank charged its customers a document preparation fee does not alter the fact that it was acting for its own benefit. Interestingly, mortgage lenders have been charging document preparation fees for decades, yet the State Bar of Michigan, the organization primarily responsible for prosecuting the unauthorized practice of law, has never challenged this widespread industry practice. Michigan's unauthorized practice of law statute is unambiguous on its face and makes no distinction where a separate fee is charged. In fact, the statute makes no mention whatsoever of a separate fee.

Ameribank's preparation of mortgage documents is no different than a retailer preparing a sales contract for the sale of goods to a customer. In preparing the sales contract, the retailer acts to protect its own interests. Although retailers generally do not charge a separate fee for preparation of the sales agreement, there is little doubt that the costs involved in the preparation are passed onto the customer. The price of the goods sold ultimately reflects all of the retailer's costs in providing the goods to the customer. Similarly, the bank or mortgage company that charges a document preparation fee simply passes along all of the costs associated with making the loan to the borrower. Every profitable business acts in precisely the same manner. There is nothing inherently unlawful about a provider of goods or services passing along its costs to the customer.

> Documents creating legal rights abound in the business community. The preparation of some of these documents is the principal occupation of some lawyers. The preparation of business documents also occupies part of the time of accountants, automobile salesmen, insurance agents, and many others. The practice of law manifestly includes the drafting of many documents which create legal rights. <u>It does not follow, however, that the drafting of all such documents is always the practice of law</u>.

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> Oregon State Bar v Security Escrows Inc, 233 Or 80; 377 P2d 334 (Or 1962) (emphasis added).

At page 8 of the circuit court's July 2, 1999 opinion in this case, Judge Kolenda articulately explained the insignificance of the fact that a fee was charged to prepare the documents in question.

> The charging of a fee is nothing more than passing along costs and attempting to earn a profit. The market system is based on the propriety of that being done by providers of products and services. Doing that hardly reveals assuming responsibility to act for somebody else.

This precise issue was addressed recently in a well-reasoned en banc decision of the Supreme Court of Washington. In Perkins v CTX Mortg Co, 137 Wash2d 93; 969 P2d 93 (Wash 1999), the Washington Supreme Court held that "charging a fee for the production of such documents is not the unauthorized practice of law where lay employees participating in such document preparation do not exercise any legal discretion." (emphasis added). In Perkins, the plaintiffs filed a class action lawsuit against the mortgage company on behalf of all borrowers who were or would be charged a document preparation fee. The $250 document preparation fee was not connected to any specific document, but rather was "charged to offset the overhead associated with the preparation of the extensive documentation necessary to process and complete loan transactions." Perkins, 969 P2d at 96. The court noted that the defendant's attorneys performed all the tasks requiring legal judgment, while non-lawyers were responsible for the ministerial data entry tasks.

The plaintiffs in Perkins conceded that mortgage companies are authorized to prepare the legal instruments necessary to complete a loan transaction as long as no fee is charged, but argued that the fee transformed the defendant's otherwise lawful activities into the "unauthorized practice of law." The court soundly rejected this argument, characterizing its essential inquiry as whether

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"a mortgage lender is authorized to prepare the legal documents that are ordinarily incident to its financing activities when lay employees participating in such document preparation do not exercise any legal discretion." Id at 102. Much like Ameribank, the lay employees of CTX Mortgage Company did not exercise any legal discretion.

The Perkins court astutely noted that the purpose of the prohibition against the unauthorized practice of law is "the promotion of the public interest." Because the court found "no risk of public harm from incompetent lawyering," it determined that the public interest would not be served by prohibiting lay employees of a mortgage company from performing the ministerial tasks of filling in the blanks on the legal documents in question. The court emphasized that the potential for public harm was small because the plaintiffs never alleged that the documents were deficiently drawn or that their legal rights were prejudiced in any way. The court noted that had the mortgage company employees endeavored to explain the legal significance of the documents and otherwise dispense legal advice, its decision might have been different. Instead, the court balanced the potential for public harm against the inconvenience and cost of requiring lawyers to be involved at every stage of a real estate transaction and determined that the defendant had not engaged in the unauthorized practice of law. See also, Colorado Bar Association v Miles, supra (the injunction could not regulate the fees charged by the agencies as public stenographers).

It is the nature of the services rendered rather than whether or not a fee was charged which should be most instrumental in determining whether a corporation engaged in the unauthorized practice of law. Homestead respectfully submits that Ameribank was acting for its own benefit and, therefore, did not engage in the unauthorized practice of law.

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C. The Court of Appeals' Decision Works to the Detriment of Consumers

The Dressels claim that the document preparation fee charged by Ameribank violated Michigan's unauthorized practice of law statutes as well as the Michigan Consumer Protection Act. It is ironic that a decision which will ultimately inure to the detriment of consumers was brought under the auspices of two statutes whose primary mission is to protect consumers and promote the public welfare. This Court must ask itself whether the public is truly the beneficiary of the Court of Appeals decision.

The sole purpose of unauthorized practice of law statutes is to protect the public from the potential harm that might result from a non-lawyer rendering legal advice. See, e.g., Perkins, supra ("Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm."); Cardinal v Merrill Lynch Realty/Burnet, Inc, 433 NW2d 864, 868 (Minn 1988) (stressing the "court's abiding concern for the public interest in determining whether certain conduct constitutes the unauthorized practice of law and also the difficulty in defining with any precision that conduct that is unauthorized. The overriding consideration in the case before us, in keeping with our tradition in these matters, is the public welfare rather than the advantage that might accrue to lawyer or nonlawyer."). However, rather than focusing on the type of activity conducted by Ameribank employees and whether the public was harmed in any way, the decision of the Court of Appeals hinged on the fact that Ameribank charged a separate fee for this activity.

In Cardinal, supra, the Minnesota Supreme Court held that a real estate broker did not engage in the unauthorized practice of law by charging its customers a drafting fee for closing

services in connection with the sale of real estate. The closing agent utilized preprinted forms in connection with the closing.

> The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field. . . . [W]e do not think it would be in the interest of the public welfare to restrain brokers from drafting the ordinary instruments necessary to effectuate the closing of the ordinary real estate transaction in which they are acting. We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.

Cardinal, 433 NW2d 864, 867-68 *quoting* Cowern v Nelson, 207 Minn 642, 646-47; 290 NW2d 795 (1940) (emphasis added). The Cardinal court emphasized that the plaintiffs did not claim that the documents were prepared inadequately or that an attorney's expertise would have protected the plaintiffs rights any better.

> [I]t is dispositive of our determination that the plaintiffs here do not contend that the document prepared by [the defendant's] closers involved anything out of the ordinary or that it presented difficult or doubtful questions which reasonably required the application of a trained legal mind. Nor do they complain of a lack of care or competence in the preparation of the documentation or in the closing of the transactions. They instead allege only that by charging and collecting a "drafting fee" [the defendant] engaged in the unauthorized practice of law.

Cardinal, 433 NW2d at 868-69. The court refused to elevate form over substance and properly considered how its decision would impact the public interest.

In 1996, the State Bar of Virginia was instrumental in introducing legislation that would have made real estate closings handled exclusively by real estate agents to be a violation of the state's unauthorized practice of law statutes. The efforts of the State Bar were sternly criticized

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by the Federal Trade Commission and the Department of Justice. In a joint letter to the executive director of the Virginia State Bar, Anne Bingaman, head of the Antitrust Division, and William J. Baer, director of the Federal Trade Commission, argued that:

> By ending competition from lay settlement services, the [state bar's] Opinion would likely increase the cost of real estate closings for consumers. . . . The restriction would adversely affect all consumers who might prefer the combination of price, quality, and services that a lay settlement service offers.

The letter emphasized the fact that consumers benefitted from the increased competition, and there was simply no evidence that consumers suffered any tangible harm by proceeding without the services of an attorney.

> The basis for . . . all regulation of the unauthorized practice of law - - is the risk that a lay person will make a mistake that a lawyer would not and thereby harm a consumer. . . . Hypotheses alone are an insufficient basis for restricting competition in a way that is likely to harm consumers . . .

The Virginia legislature ultimately passed a bill declaring that real estate closing work did not constitute the unauthorized practice of law.

The New Jersey Supreme Court recently held that conducting residential real estate closings and settlements without the presence of attorneys is not the unauthorized practice of law, as long as the parties are informed of the general risk involved in not being represented. The court emphasized that the public seemed to benefit from being permitted to make the choice of whether to utilize an attorney, free from judicial interference.

> There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it - - there is a point where that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public.

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In Re Opinion No. 26 of the Comm on the Unauthorized Practice of Law, 654 A2d 1344, 1360-61 (NJ 1995). See also, Michael Braunstein, "Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing," 62 Mo L Rev 241, 247, 269-70 (1997) ("[T]he residential real estate transfer is a routine, standardized transaction, in which lawyer involvement is hardly ever required. Moreover, even when lawyers are involved, outcomes for the parties are not significantly enhanced.").

A 1989 study conducted among home buyers in Ohio indicated that increased involvement of lawyers in the residential real estate purchasing process does not result in a more satisfied consumer base. The study reached the following conclusions: "Purchasers who use lawyers are no better informed than those who do not; Purchasers who use lawyers are no more satisfied with the purchase transaction. . . . Purchasers who use lawyers were no less likely to avoid disputes that those who do not." See, Michael Braunstein, "Structural Change and Inter-Professional Competitive Advantage: Am Example Drawn from Residential Real Estate Conveyancing," 62 Mo L Rev 241, 275 (1997).

Critics have long argued that unauthorized practice of law statutes serve only to hinder competition and negatively impact the choices available to consumers, thereby driving up the prices consumers must pay for legal services. Some have gone so far as to argue that the free market should represent the only restriction on providing professional services.

> Although "the public interest" is a prominent rhetorical feature of occupational licensing laws and pronouncements, historically the impetus for such licensing comes almost invariably from practitioners rather than the public, and it almost invariably reduces the quantity of new practitioners through various restrictive devices, and the result is higher prices.

Thomas Sowell, Knowledge and Decisions (New York: Basic Books, 1980), p. 200. An individual is generally the best evaluator of his own needs and circumstances. Because the public

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wishes to receive the best quality service at the lowest possible price, by allowing the market to function freely, those who are not qualified to perform a particular task efficiently will be driven out of the market.

> The market's standard is one of performance. The consumer is usually not concerned with the means by which practitioners acquire their skills. He cares only that he receives good value for his money, In any occupation, licensed or not, practitioners have to prepare adequately or they will quickly find themselves unable to handle the demands made on them. Failure to satisfy enough customers will threaten the ability to remain in business.

George Leaf, "The Case for a Free Market in Legal Services," Policy Analysis, No. 322, p. 22 (1998). Mr. Leaf argues that the prohibition against the unauthorized practice of law provides no benefit to consumers as remedies for fraud, breach of contract, and negligence provide consumers with at least as much protection against incompetent and unethical practitioners. Id at 24. Moreover, individuals and companies tend to solicit work that is within their capacity to perform.

> In the states where [unauthorized practice of law] prohibitions have been repealed or relaxed, unlicensed legal practitioners, mostly paralegals and legal secretaries, handle work that is within their capabilities and commonly refer more difficult or unfamiliar legal work to lawyers. They do so for the same reason that lawyers refer cases outside their area of expertise to other lawyers, even though they are not legally bound to do so: it is not in their interest to try and possibly fail at work that is beyond their capabilities.

Id. The Committee on Public Protection of the California Bar unanimously concluded that "unlicensed legal practitioners pose no danger to consumers and fill an important role in assisting people who would otherwise find it difficult to afford legal assistance." Id at 26.

The argument for the abolition of unauthorized practice of law statutes has a great deal of intellectual appeal, but is far beyond the scope of this amicus brief. Homestead does not

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intend to argue that there should be no prohibition against the unauthorized practice of law. However, such provisions should only be enforced in situations where the consumer, rather than merely the legal profession, shall benefit.

> Some types of routine client service, such as sales of residences, simple wills, and uncontested divorces, may not require lawyers who are thoroughly educated and as costly as lawyers are today. If these and other areas are opened to competition from other service providers, a market test of price and quality would be provided.

Roger C. Cramton, "Delivery of Legal Services to Ordinary Americans," 44 Case Western Reserve L Rev 551 (1994).

For instance, in the area of tax preparation services, the American Bar Association has long championed the free market. Individuals need not consult an attorney for assistance in preparing their tax returns each year. Depending on the complexity of the tax issues, taxpayers have a wide range of options at their disposal.

> This array of choices responds to a broad range of public demand for legal assistance. It may be a useful model of how the legal profession, together with non-lawyers, can offer the public the kinds of affordable, appropriate and reasonably safe help for law-related matters that the public seeks in many areas.

"Nonlawyer Activity in Law-Related Situations," American Bar Association, 1995, p. 134.

It is a longstanding practice of mortgage lenders to prepare standardized legal documents in loan transactions where the financial institution acts as lender and to charge a document preparation fee for the cost of completing and executing the appropriate legal forms. It makes no sense to burden the public with the impractical restraints and higher costs of requiring the involvement of lawyers in the completion of standardized legal documents in loan transactions.

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Despite the document preparation fee typically charged by mortgage lenders, the consumer is in a much more advantageous position than if the involvement of lawyers is required to complete the loan transaction. Competition within the mortgage lending industry and the operation of the free market makes it impossible for banks or mortgage companies to charge an exorbitant fee for document preparation. However, businesses are entitled to pass the costs of doing business on to their customers. Mortgage lenders expend a substantial amount of time and money in preparing the documents that are required by law for a mortgage loan to close.

This case has little to do with protecting consumers and the Court of Appeals' decision will have precisely the opposite effect. Rather, this case is about lawyers protecting their monopoly and elevating their financial well-being. If the decision of the Court of Appeals is permitted to stand, lenders will have to arrange for lawyers to review their mortgage lending documents, and that cost will ultimately be passed on to the borrowers. The median hourly rate for real estate attorneys in Michigan is $150 per hour. "2000 Desktop Reference on the Economics of Law Practice in Michigan," Michigan Bar Journal, Vol. 79, No. 11 (November 2000) at 1559-60. Consequently, 50% of real estate attorneys charge in excess of $150 per hour. In certain areas of the state, the median hourly rate is significantly higher. For instance, the median billing rate for an attorney practicing in Downtown Detroit is $177 per hour. Id. Amicus curiae, Homestead, charges its customers a $250 document preparation fee. Therefore, Homestead's fee is equivalent to less than an hour and a half of work by an attorney in Detroit charging the median rate.

If the lenders are forced to involve attorneys in the process, the borrower is more likely to retain an attorney of his own. In that case, the customer ends up footing the bill for two attorneys. However, there is no genuine role for attorneys to play in this process. The attorneys

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would simply be provided the information gathered by the loan originator and insert the information into the forms. The legal effect of the forms would remain unchanged while the cost to the borrower would dramatically increase. Considering the undisputed fact that there is no legal judgment or discretion involved in filling out these forms, a bigger waste of the consumer's resources can hardly be imagined.

> [P]ermitting mortgage lenders to prepare loan documents in the way the [mortgage company] does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents. Ironically, were the [plaintiffs] to prevail, future borrowers would bear the additional cost of having attorneys prepare their loan documents, which would likely exceed that portion of the [plaintiffs'] document preparation fee attributable to legal documents.

Perkins, 137 Wash2d at 106.

The Court of Appeals decision provides no tangible benefit to the consumer. For instance, rather than charging a separate document preparation fee, a mortgage lender is permitted to recover its document preparation costs via a loan processing fee or higher interest rate. Under this scenario, the mortgage loan documents would still be filled out by lay employees of Ameribank. There would be no separate document preparation fee, but ultimately there would be absolutely no financial savings to the consumer. Instead, the charges would be concealed and the consumer would be less informed.

> Common sense suggests . . . that charging a fee for services which include the preparation of ordinary documentation for a real estate transaction does not convert a practice not otherwise unlawful into the unauthorized practice of law. [The mortgage lender] could well have chosen to increase its rate of commission to reflect what would amount to the additional drafting fee and thereby hide the cost. That it instead opted for disclosure and enumerated the routine services encompassed by the fee is not determinative. . . .

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> To assert that whether conduct amounts to the unauthorized practice of law turns on what the actor calls the fee – on the mere designation of the charge as a 'drafting fee' – is to exalt from over substance and ignore the public welfare concerns.

Cardinal, supra, 433 NW2d at 869. The Court of Appeals' decision serves to impede lawful business transactions without providing any tangible benefit to the public. Homestead respectfully suggests that the only group that benefits from the decision is the legal profession.

VI. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Homestead submits that this Court should reverse the decision of the Court of Appeals.

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Dated: June 17, 2002

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EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

TONYA L. KRAUSE, an Individual and LAWRENCE PHELAN, an Individual on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE HUNTINGTON NATIONAL BANK, a National Banking Association, f/k/a FMB-FIRST MICHIGAN BANK GRAND RAPIDS, a Michigan corporation,

Defendant.

File No. 98-00750-CP

Hon. Paul J. Sullivan

OPINION

REC'D & FILED

JUL 2 3 1998

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17TH JUDICIAL CIRCUIT

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Plaintiffs' first amended complaint seeking class action relief consists of four counts alleging (1) violation of Michigan's Consumer Protection Act, (2) Unjust Enrichment, (3) Negligent Misrepresentation and (4) Innocent Misrepresentation. The common theme underlying plaintiff's complaint is the allegation that defendant banks engaged in the unauthorized practice of law by charging mortgage borrowers a fee (typically $225) for "document preparation". This fee is itemized on line 1105 of the HUD-1 Settlement Statement and shows proposed disbursement of $225 to FMB First Michigan Bank for "Document preparation" and treats same as a charge against plaintiff borrowers.

On June 12, 1998, the parties presented oral argument to the court on Defendant's Motion to Dismiss [MCR 2.116(C)(8)] or for Summary Disposition [MCR 2.116(C)(10)] and to Dismiss Class and Equitable Claims for Lack of Standing [MCR 2.116(C)(5)].

Plaintiffs complain that defendant bank engaged in the unauthorized practice of law by charging plaintiffs and others similarly situated for document preparation involving "final legal papers". Documents specifically mentioned were adjustable rate promissory notes and mortgages. The court is left to speculate on what other types of documents plaintiff may have had in mind. A fair reading of the complaint, however, suggests that the primary allegations relate to these two specific documents. Interestingly, both the Adjustable Rate Note and the Mortgage signed by plaintiffs were pre-printed forms with pertinent information relating to the Krause/Phelan transaction typed in the blank spaces provided. A review of the Note indicates on its face and at the bottom of each page that it is a standard FNMA/FHLMC Uniform Form 3502. Similarly, the mortgage used in the complained of transaction involving plaintiffs was a standard FNMA/FHLMC Uniform Form 3023.

In *Ingham County Bar Association v. Walter Neller Co.*, 342 Mich 214 (1955), the court held that real estate brokers could engage in conveyancing through the filling out of standard printed forms, where incidental to the business being transacted, no extra fees were being charged, and no advice or counsel were being given as to the legal effect or validity of same. The mere filling out of standard pre-printed forms by realtors under similar circumstances was impliedly reaffirmed in *State Bar of Michigan v. Kupris*, 366 Mich 688 (1962).

Plaintiffs do not allege the giving of advice by defendant bank, but they distinguish *Neller* and *Kupris* by the $255 fee charged. There is an additional and more important distinction, however, that favors defendant bank. *Neller* and *Kupris* involved non-parties to the transactions. The realtors themselves were acting merely on behalf of others, not themselves. In the instant case, however, the mortgages and promissory notes "prepared" by defendant bank were clearly needed to protect its own interest. Does any reasonable person, including the attorney plaintiffs in this case, really believe that the instruments prepared by the bank were solely or primarily for the protection of the borrower? The court thinks not. Mortgage lenders obviously rely on such instruments to protect their security. And had plaintiffs themselves or through their legal representatives prepared the documents in question, can there be any doubt that defendant bank, in order to protect itself, would have examined the instruments itself or through its own attorneys? Again, the court thinks not. What we have here, therefore, is defendant bank representing itself. And the preparation of legal documents, whether or not mere filling in of

blanks, is not prohibited by a party in interest to the transaction, such as the bank here. In other words, a non-lawyer party is not prohibited from representing him/her/itself. See, e.g., *Grand Rapids Bar Assn. v Denkema*, 290 Mich 56 (1939). And the prohibition against corporations practicing law applies only to the practice of law for persons **"other than itself"**. MCL 450.681 [emphasis added].

There is no reasonable basis for plaintiffs' assertion that defendant bank was acting as their attorney, or performing legal services on their behalves. The $255 fee set forth on line 1105 of the settlement statement refers to "document preparation", not "document preparation for benefit of borrower/buyer". Line 1105 is in the "Title Charges" section of the settlement statement. The statement also refers to plaintiff buyers/borrowers being charged $207.40 for lender's title insurance coverage, while sellers are being charged for owner's coverage. The direct beneficiary of lender's coverage is the bank, but without it plaintiffs probably would not be loaned the money. Indirectly, therefore, plaintiffs also benefit. Even if they didn't, however, is there anything legally offensive about charging the borrower for this coverage? The court thinks not, and we perceive little difference in theory between the charge for document preparation, and the charge for lender title insurance.

Furthermore, how can plaintiffs - themselves lawyers - seriously argue that defendant was acting as their lawyer or performing legal services for them when they signed the "Disclosure, Waiver and Release" stating *inter alia* as follows:

> "By signing this statement, I/we acknowledge and agree to the following:
>
> 1. FMB-First Michigan Bank (the 'Bank') is participating in the closing of this real estate transaction only for the purpose of satisfying its own requirements for acquiring the mortgage.
>
> 2. I/we and my/our agents remain solely responsible for determining if the Sellers have met their obligations and satisfied my/our requirements for the purchase of the property, including the satisfaction or waiver of any contingencies and the satisfaction or waiver of any tests or inspections.
>
> 3. The Bank is not acting as my/our agent, attorney, representative or fiduciary at this closing.
>
> 4. The Bank's employee attending the closing represents only the Bank and has no responsibility to me/us.
>
> 5. In consideration of making the loan described in my/our mortgage and note, I/we release the Bank, as well as its directors, officers, employees and agents, from all claims which I/we have or may have, known or unknown, resulting

from its involvement and participation in the closing of the property described above.

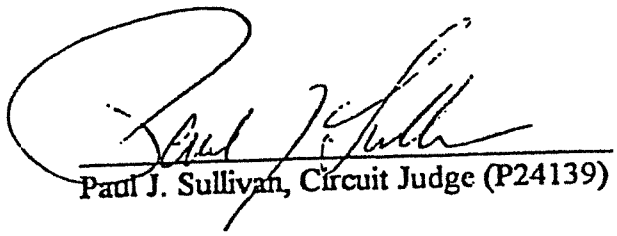
***."

It is this court's considered opinion that plaintiffs have failed to demonstrate the existence of any genuine issue of material fact relating to their unauthorized practice of law claims. The court makes this determination, as it is required to do, by looking at the facts in a light most favorable to plaintiffs. Defendant did not act as plaintiffs' attorney, nor did it charge plaintiffs for legal services rendered on plaintiffs' behalves. Rather, it acted as its own attorney, and for its own benefit. Plaintiffs do not allege that defendant provided legal advice to plaintiffs, nor is there any current indication that it did. In fact, defendant specifically disclaimed any such responsibility, and plaintiffs acknowledged same in writing. And defendant's charging a fee to plaintiffs for document preparation no more creates an attorney-client relationship than a losing party who pays attorney fees after a trial, one who pays attorney fees for his or her spouse in a pending divorce, or sellers of a business who contract with buyers to pay sellers' attorney fees as part of the overall transaction.

For all of the above reasons, defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) ought be and is hereby GRANTED as to all claims premised upon alleged unauthorized practice of law. And in reviewing plaintiffs' First Amended Complaint, it appears to this court that all four of plaintiffs counts are premised solely upon claims of unauthorized practice of law.

Mr. Fell is requested to prepare and submit in the usual manner a proposed Order consistent with the above Opinion.

DATED: July 23, 1998.



Paul J. Sullivan, Circuit Judge (P24139)

PJS/s

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