Nos. 97263 & 97761

SUPREME COURT OF ILLINOIS

WILLARD J. KING et al.,

Petitioner-Appellant,

v.

FIRST CAPITAL FINANCIAL SERVICES CORP. et al.,

Respondent-Appellees.

Appeal from the Appellate Court of Illinois, Third District
in No. 3-02-0488, Judge McDade

BRIEF OF *AMICUS CURIAE* **HALT, Inc.**

Thomas M. Gordon
(District of Columbia Bar #454949)
Counsel for *Amicus Curiae*
HALT, Inc.
1612 K Street NW, Suite 510
Washington, DC 20006-2802
(202) 887-8255

Table of Contents

TABLE OF AUTHORITIES: II

ARGUMENT 1

I. THE APPEALS COURT PROPERLY HELD THAT THE *PRO SE* EXEMPTION TO UNAUTHORIZED PRACTICE OF LAW RESTRICTIONS APPLIED TO THIS CASE. 1

II. EVEN IF THE PRO SE EXEMPTION TO THE UNAUTHORIZED PRACTICE OF LAW RESTRICTIONS DOES NOT APPLY, PUBLIC POLICY CONSIDERATIONS DEMAND THAT NON-LAWYERS BE ALLOWED TO COMPLETE MORTGAGE FORMS. 4

A. THE PUBLIC BENEFITS FROM THE ABILITY TO HIRE NON-LAWYER MORTGAGE PREPARERS WITH REGARD TO PRICE. 5

B. THERE MUST BE A SHOWING OF HARM TO JUSTIFY DENYING ACCESS TO ALL NON-LAWYER MORTGAGE PREPARERS. 7

III. RESTRICTIONS ON UNAUTHORIZED PRACTICE PROTECT LAWYERS, NOT CONSUMERS. 9

A. CONSUMERS HAVE ADEQUATE RECOURSE AGAINST FRAUDULENT OR INCOMPETENT NON-LAWYER SERVICE PROVIDERS. 10

B. CONVERSELY, CONSUMERS ARE NOT SUFFICIENTLY PROTECTED AGAINST FRAUDULENT OR INCOMPETENT ATTORNEYS. 11

IV. QUALIFIED NON-LAWYERS CAN PREPARE MORTGAGE DOCUMENTS COMPETENTLY AND DO SO IN MANY STATES WITHOUT ADVERSE CONSEQUENCES. 13

CONCLUSION 17

CERTIFICATE OF SERVICE 19

Table of Authorities:

CASES

Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E. 2d 771 (1966). 2, 3
Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al., 113 S.W.3d 105 (Ky. 2003). ---------- 10, 15, 16
Dressel v. Ameribank, 664 N.W.2d 151 (2003). ---------- 15
Eastman v. Messner, 188 Ill. 2d 404, 721 N.E. 2d 1154, (1999). ---------- 12
First Federal Savings and Loan Ass'n of Bureau County v. Sadnick, 162 Ill. App. 3d 581, 515 N.E. 2d 1354 (1987). ---------- 2, 3, 4
In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995). ---------- 6, 8, 16, 17
Johnson v. Pistakee Highlands Community Association, 72 Ill. App. 3d 402, 390 N.E. 2d 648 (1979). ---------- 4
King v. First Capital Financial Services Corp., 343 Ill. App. 3d 404, 798 N.E. 2d 118 (2004). ---------- 2, 4
Nika v. Danz, 199 Ill. App. 3d 296, 556 N.E. 2d 873 (1990). ---------- 12
Perkins v. CTX Mortgage Co., 137 Wn.2d 93 (1999). ---------- 14, 15
Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E. 2d 771 (1966). --- 4
Weatherman v. Gary-Wheaton Bank of Fox Valley, 186 Ill. 2d. 472, 713 N.E. 2d 543 (1999). ---------- 13

STATUTES

Consumer Credit Protection Act, 15 USCS § 1601-1667 (2004). ---------- 11
Home Mortgage Disclosure Act, 12 USCS § 2801-11 (2004). ---------- 11
Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1-12 (2004). ---------- 11
Real Estate Settlement Procedures Act, 12 USCS § 2601-17 (2004). ---------- 11

OTHER

American Bar Association Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans (1994). ---------- 6
American Bar Association, Survey on Lawyer Discipline (2002), *www.abanet.org/cpr/discipline/sold/sold-home.html.* ---------- 10, 12
Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423 (1999). ---------- 7
Letter from Jessica N. Butler-Arkow, Attorney, United States Department of Justice Antitrust Division and Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission to North Carolina State Bar Ethics Committee (Dec 14, 2001). ---------- 7

ARGUMENT

The case currently before the Illinois Supreme Court is a valuable opportunity for the Court to reaffirm its commitment to acting in the public interest. The Court can act in this interest by merely affirming the holding of the Appeals Court, or by following the trend of state supreme courts to uphold consumers' rights to have non-lawyers prepare basic documents in the home-buying process. The public interest demands that the Court decide to allow non-lawyers to continue preparing mortgage documents. The public benefits from the availability of non-lawyer mortgage preparers because using qualified non-lawyers reduces the cost of purchasing a home without detriment to the consumer. In addition, restrictions on the unauthorized practice of law protect attorneys, not consumers. Although consumers have adequate protection from fraudulent or incompetent non-lawyer service providers, there is not enough consumer protection from fraudulent or incompetent attorney service providers. Lastly, the national trend to allow non-lawyer mortgage preparers has supplied mounting evidence that non-lawyers can perform real estate services competently and without adverse consequences. For these reasons, the Illinois Supreme Court should either affirm the Appeals Court's decision or issue clarifying guidance that real estate services are not the practice of law.

I. THE APPEALS COURT PROPERLY HELD THAT THE *PRO SE* EXEMPTION TO UNAUTHORIZED PRACTICE OF LAW RESTRICTIONS APPLIED TO THIS CASE.

The Court can act in consumers' interest by merely affirming the holding of the Appeals Court that the Defendant's actions fall within the *pro se* exemption to the prohibition on unauthorized practice of law. The Plaintiffs in this case argue that mortgage preparation conducted by qualified non-lawyers is an unauthorized practice of

law violation and a form of deception. *King v. First Capital Financial Services Corp.*, 343 Ill. App. 3d 404, 405, 798 N.E. 2d 118, 119 (2004). The trial court dismissed the lender's motion to dismiss the UPL charges against the lender. *Id.* Upon interlocutory review, the Appeals Court held that mortgage preparation conducted by individuals solely for their own business use, who did not hold themselves out as legal representatives or advisors and who did not prevent the mortgagee from seeking his own counsel to review the documents, were not engaged in the unauthorized practice of law; instead, the court considered these actions *pro se*, and therefore legal. *Id.* The *pro se* exemption with regard to mortgage preparation was developed in *First Federal Savings and Loan Association of Bureau County v. Sadnick*, 162 Ill. App. 3d 581, 515 N.E. 2d 1354 (1987).

In *Sadnick*, the defendant-mortgagee failed to make his contracted mortgage payments, and as a result, the lender-corporation filed a complaint for foreclosure on the property. *Id.* at 581. The mortgagee then filed a motion to dismiss the complaint, arguing that the mortgage was invalid because it was not prepared by an attorney; thus, the lender's actions would constitute unauthorized practice. *Id.* The Circuit Court denied the motion and entered a decree for foreclosure. Subsequently, the mortgagee moved to vacate the decree for foreclosure and it was also denied. *Id.* The mortgagee appealed to the Appeals Court, offering this Court's holding in *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, as support for his argument. 34 Ill. 2d 116, 214 N.E. 2d 771 (1966).

In *Quinlan & Tyson, Inc.*, the trial court framed the issue as whether a real-estate broker could fill in the blanks on forms customarily used in his line of business. The forms were connected with negotiating purchases and sales of real estate for clients. *Id.*

at 118-19. The trial court enjoined the firm's brokers from filling in the blanks on all forms except the customary offer forms, or negotiating forms. *Id.* However, the Appeals Court reversed the lower court's finding, holding that none of the services could be performed by a layperson. *Id.* This Court found that even when the actions were not directly compensated, "[t]he drawing or filling in of blanks on deeds, mortgages or other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitute the practice of law…" *Id.* at 120-23. However, the use of the offer forms, as granted by the trial court, was approved because "bringing together the buyer and the seller," were reasonably within the scope of real-estate broker's capacities. *Id.* While providing guidance on the distinction between the legally acceptable actions of a non-lawyer service provider and a lawyer during the mortgage preparation process, this court reasoned that:

> [a]nyone who wants to pay the price may purchase a set of form books and read and copy them. *He may use them in his own business if he so desires.* But when he advises others… [on] the law or…the [selection of the] proper form…he is doing all that a lawyer does…."

(emphasis added). *Id.* at 122-23.

The language in *Quinlan & Tyson* was interpreted by the Appeals Court and used to establish the aforementioned factual elements to determine whether the exception was applicable. Thus, (1) if the documents were prepared for the lender's own purpose; (2) if the lender did not provide legal advice; and (3) if the lender did not attempt to prevent the plaintiff from seeking independent counsel, then the lender's acts were considered *pro se* and would not be considered a practice of law. *Sadnick*, 162 Ill. App. 3d at 583. . *See Johnson v. Pistakee Highlands Community Association,* 72 Ill. App. 3d 402, 390 N.E. 2d

648 (1979) (finding that a corporation acting for its own benefit was analogous to the actions of an individual preparing documents for his own personal transactions).

The facts necessary to invoke the *pro se* exemption are present in the instant case. Here, the mortgagee secured a mortgage loan from the lender and the lender prepared the documents, charging a fee to recoup the costs incurred. *King,* 343 Ill. App. 3d at 405. The Appeals Court found the lender's actions of reviewing and preparing the documents were for the lender's "own protection in the transaction" and for the lender's use alone. *Id.* at 407. Moreover, the Appeals Court distinguished the lender's actions from incidents where a defendant in a UPL charge prepared documents that were to be used by another person or entity. *Id. See Chicago Bar Ass'n v. Quinlan & Tyson, Inc*., 34 Ill. 2d 116, 214 N.E. 2d 771 (1966). In addition, the justices concluded that the facts simply did not indicate that the lender misrepresented itself as a legal representative or advisor, and similarly, that the lender had not prevented the plaintiff from seeking independent counsel. *Id.* Finally, the Appeals Court held that charging a fee to compensate for the preparation costs was not determinative in the finding of a UPL violation. *Id. construed in First Federal Savings and Loan Association of Bureau County v. Sadnick*, 162 Ill. App. 3d 581, 515 N.E. 2d 1354 (1987). The Appeals Court properly applied the test for UPL violations in this instance and their decision should be upheld.

II. EVEN IF THE PRO SE EXEMPTION TO THE UNAUTHORIZED PRACTICE OF LAW RESTRICTIONS DOES NOT APPLY, PUBLIC POLICY CONSIDERATIONS DEMAND THAT NON-LAWYERS BE ALLOWED TO COMPLETE MORTGAGE FORMS.

Although HALT believes that the Court can resolve this case by merely affirming that the Defendants' actions fall under the *pro se* exemption to unauthorized practice

restrictions, we urge the Court to follow the trend of state supreme courts that have held that most standard real estate closing procedures are not the practice of law.

Even if this Court holds that non-lawyer mortgage document preparation is not subject to the *pro se* exemption but is instead the direct provision of a service to consumers, the Supreme Court's concern for protecting the public interest requires that non-lawyers be allowed to continue providing mortgage preparation services. Consumers benefit from the availability of non-lawyer mortgage preparers because using qualified non-lawyers reduces the cost of purchasing a home without detriment to the consumer. There has been no evidence presented that non-lawyer service providers, on the whole, are more harmful than attorneys. To restrict access to a whole category of service providers based on anecdotes and unsubstantiated claims about potential harm would hurt consumers more than allowing non-lawyers to continue providing these services.

A. The Public Benefits from the Ability to Hire Non-lawyer Mortgage Preparers with Regard to Price.

If filling in the blanks on standardized mortgage forms is found to be the practice of law, the price of purchasing a home will increase for consumers. Mortgage companies will be forced to pay lawyers to fill in the blanks—a service that is clearly ministerial in nature. This would be a waste of an attorney's expertise and add an unnecessary cost to the overall expenditure of purchasing a home.

This burden of higher prices and decreased convenience will be borne disproportionately by low and moderate-income consumers, making a bad situation even worse. A 1994 study by the American Bar Association on Comprehensive Legal Needs found that the most-often cited unmet legal need for middle income consumers is real estate transaction services. American Bar Association Consortium on Legal Services and

the Public, Legal Needs and Civil Justice: A Survey of Americans (1994), 11. If Illinois prohibits qualified non-lawyers from providing real estate transaction services, the cost of purchasing a home will increase and further reduce the availability of a service that the ABA has already determined is unmet by current legal practitioners. If the basic purpose of the rule against unauthorized practice of law is the protection of consumers' interests, then the Appeals Court's decision must be affirmed.

Recognizing the importance of reducing the cost of legal services, several states have recently acted to explicitly protect the ability of non-lawyers to conduct real estate transactions, including Kentucky, Michigan, New Jersey and Virginia. In these states, real estate transaction costs, on average, are lower whether a person chooses a lawyer or a qualified non-lawyer. In 1995, for example, the Supreme Court of New Jersey found that the average homebuyer in northern New Jersey, where attorneys conduct most of the real estate closings, pays $250 more than the average person in southern New Jersey, where there is free competition for these services. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995) (Supreme Court of New Jersey).

The results of a 1996 survey in Virginia are equally revealing. Since 1981, when the state legislature rejected a Virginia Supreme Court decision declaring lay closings the unauthorized practice of law, non-lawyers have competed with attorneys on the same footing. The result is that legal consumers in Virginia are able to hire a qualified layperson for nearly half the price of an attorney. The average consumer in Virginia pays $451 for closing costs if she hires an attorney and $272 if she hires a lay service provider. Letter from Jessica N. Butler-Arkow, Attorney, United States Department of Justice

Antitrust Division and Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission to North Carolina State Bar Ethics Committee 6 (Dec. 14, 2001).

On the whole, low and moderate income consumers will be hurt more by an increase in the cost of purchasing a home than by any potential harm from the services of a qualified non-lawyer. Requiring consumers to pay for the cost of having an attorney fill in the blanks on a mortgage form is an unnecessary cost and a waste of a consumer's money.

B. There Must Be A Showing of Harm to Justify Denying Access to All Non-lawyer Mortgage Preparers.

Although "unauthorized practice of law" rules ostensibly exist to protect consumers, there has been no evidence put forth to substantiate the claim that non-lawyer mortgage preparers are more detrimental to the public than attorney service providers. More specifically, in the case currently before this court, there has been no harm found as a result of the mortgage preparers' actions. Absent any evidence showing harm, the Court should not restrict access to a whole class of service providers based on anecdotal evidence and the mere possibility of impropriety.

In fact, the first comprehensive study on the provision of real estate services by mortgage companies and attorneys found that non-lawyer mortgage preparers account for only a small portion of complaints. In her study, University of Oklahoma Professor of Law Joyce Palomar discovered that there are actually 2.8 percent more problems when an attorney completes a real estate transaction than when a mortgage company performs the same service. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423, 493 (1999). In addition, Palomar remarked that:

> One of the most notable findings in [the study] is that there was only a 4% greater incidence of claims for errors in judgment when reviewing legal instruments and failures to apply correctly a legal principle in title company-closing states than in attorney-closing states. This small difference defeats another assumption of proponents of unauthorized practice laws, i.e., that laypersons' knowledge of and competence in residential real estate transactions is significantly inferior to attorneys'. If that assumption were correct, the percentage of claims in this category should be significantly higher in title company-closing states than in attorney-closing states. *Id.* at 508.

Professor Palomar debunked the bar's often-voiced warning that homeowners suffer serious harm when laypersons conduct real estate transactions. In fact, homeowners using a mortgage closing company were in no greater risk of harm than those using an attorney in any of the categories she studied.

The New Jersey Supreme Court reached a similar conclusion in 1995. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995) (Supreme Court of New Jersey). In this case, the Court compared southern New Jersey, which allowed lay participation in real estate transactions, with northern New Jersey, which did not. The Court noted that:

> The record fails to demonstrate that the public interest has been disserved by the South Jersey practice over the many years it has been in existence. While the risks of non-representation are many and serious, the record contains little proof of actual damage to either buyer or seller. Moreover, the record does not contain proof that, in the aggregate, the damage that has occurred in South Jersey exceeds that experienced elsewhere. *Id.* at 1346.

Finding that there was no more harm from non-lawyer mortgage closings than attorney closings, the New Jersey Supreme Court held that there was no reason to prohibit laypersons from preparing mortgage documents.

Unless this Court is able to demonstrate that the public's interest would be better served by denying consumers access to qualified non-lawyer mortgage form preparers that are no more likely to harm consumers, there is no reason to support such a draconian change of law in Illinois.

III. RESTRICTIONS ON UNAUTHORIZED PRACTICE PROTECT LAWYERS, NOT CONSUMERS.

An overbroad interpretation of the definition of the practice of law serves to protect lawyers at the expense of consumers. Consumers are already adequately protected against fraudulent or incompetent lay service providers. The mortgage industry has safeguards in place to ensure the quality of layperson employees. If an individual company doesn't police the quality of its lay employees, it runs the risk of going out of business because consumers will not choose to purchase services from a company with a poor reputation. The federal government has also created laws that protect consumers from fraudulent lay service providers. Unfortunately, safeguards against fraudulent or incompetent attorneys are not as rigorous as those regulating laypersons and provide little recourse to the victimized consumer. The attorney discipline system, common law legal malpractice suits and consumer fraud laws are unable to effectively discourage recklessness by lawyers and fall short of offering legal consumers viable remedies. Prohibiting consumers from using layperson real estate service providers will increase the likelihood that a consumer will be unable to receive compensation if she is victimized. This cannot be in the public interest.

A. Consumers Have Adequate Recourse Against Fraudulent or Incompetent Non-Lawyer Service Providers.

Proponents of an expansive interpretation of the prohibitions against unauthorized practice would have the Court believe that they are trying to protect consumers from unethical paralegals. While there may be some isolated instances where consumers have not been well-served by non-lawyer real estate services providers, there is no evidence that this is a common or significant occurrence in Illinois or across the nation. Under any circumstances, such misconduct is already actionable under consumer fraud statutes or as common law fraud in every state. It is hypocritical to claim that paralegals and others must be banned from participating in real estate transactions because of the speculative harm created by a few bad actors, when lawyers (who in most jurisdictions are not even subject to consumer fraud laws) face over 121,000 complaints to state disciplinary agencies in a typical year. *See* American Bar Association, Survey on Lawyer Discipline (2002), *www.abanet.org/cpr/discipline/sold/sold-home.html.*

In addition, as the Kentucky Supreme Court recently noted, consumers are already adequately protected from fraudulent or incompetent laypersons. *Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al.*, 113 S.W.3d 105, 121 (Ky. 2003) (Supreme Court of Kentucky). The mortgage industry monitors the performance of their non-lawyer employees to ensure that there are no incompetent service providers. The Court also noted that normal market forces would eliminate incompetent service providers over time. "[T]he nature of our economy is such that incompetent and unethical closing agents, whether attorneys or non-attorneys, will be nudged aside by consumers who will choose the most effective and efficient providers." *Id.* at 120.

Market forces work in concert with industry regulation to ensure the high-quality of non-lawyer service providers. Therefore, there is no need to ban all qualified laypersons from participating in real estate document preparation.

In addition to market forces and industry regulation, consumers are protected from fraudulent and incompetent real estate service providers by the Real Estate Settlement Procedures Act, Home Mortgage Disclosure Act, and Consumer Credit Protection Act. 12 USCS § 2601-17 (2004); 12 USCS § 2801-11 (2004); 15 USCS § 1601-1667 (2004). Consumers are also protected from layperson fraud and misrepresentation under the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 505/1-12 (2004). All of these measures ensure that consumers are protected from fraudulent or incompetent lay service providers. There is no need to deny access to all lay mortgage preparers because consumers are already adequately protected.

B. Conversely, Consumers Are Not Sufficiently Protected Against Fraudulent or Incompetent Attorneys.

The bar would have this Court believe that attorneys who prepare mortgage documents, unlike their non-lawyer counterparts, are regulated by a dependable system of internal oversight. They would argue that the attorney discipline system, client security funds, legal malpractice lawsuits and consumer fraud statutes successfully protect consumers from incompetent lawyers and deter unsavory conduct by attorneys. Unfortunately, our research demonstrates that these systems typically give reckless lawyers a free pass and offer little recourse to victimized consumers.

The attorney discipline system, plagued by inadequate resources and hamstrung by secrecy requirements, rarely metes out meaningful sanctions. The ABA's most recent survey shows that Illinois lags even further behind than most states; out of the 6,912

complaints investigated, Illinois' Attorney Registration and Disciplinary Commission formally charged only 11 unethical lawyers—less than 0.2 percent of those investigated. *See* American Bar Association, Survey on Lawyer Discipline (2002), *www.abanet.org/cpr/discipline/sold/sold-home.html*. Ultimately, this trickle of discipline results in a regulatory body that fails to hold fraudulent lawyers accountable.

In Illinois, the rigorous standard for proving legal malpractice places an often impracticable burden on individuals who have been mistreated by a lawyer. This Court ruled that a client only receives restitution if she can demonstrate that "but for" an attorney's misconduct, she would have prevailed in her underlying suit. *See Eastman v. Messner*, 188 Ill. 2d 404, 411, 721 N.E. 2d 1154, 1158 (1999). To make this showing, the client must present a "suit within a suit" – a hypothetical version of the underlying trial as it would have been conducted had the attorney refrained from misconduct. *See Nika v. Danz,* 199 Ill. App. 3d 296, 308, 556 N.E. 2d 873, 882 (1990). This demanding method requires a plaintiff to undergo enormous speculation and present evidence from former opposing parties, former counsel for former opposing parties and equally adverse witnesses. The length of such litigation can make a malpractice suit cost-prohibitive for many, if not most, Illinoisans. Therefore, the sheer existence of a legal malpractice cause of action does little to deter misconduct by lawyers.

Unlike non-lawyer mortgage lenders, attorneys are immunized from liability under Illinois' consumer fraud law. Although mortgagors are not liable where their conduct complies with a federal statute, this Court has acknowledged that the state's Consumer Fraud and Deceptive Practices Act otherwise holds non-lawyer mortgage lenders accountable for deceptive practices. See *Weatherman v. Gary-Wheaton Bank of*

Fox Valley, 186 Ill. 2d. 472, 480, 713 N.E. 2d 543, 547 (1999). The same does not hold true for their lawyer counterparts. In *Cripe v. Leiter*, 184 Ill. 2d 185, 703 N.E. 2d 100 (1998), this Court held that the Consumer Fraud Act was not intended to apply to lawyers because "an attorney's billing of a client is not simply a 'business' aspect of the practice of law, but is tied to the attorney's fiduciary duty to the client." Id. at 198-199. The discrepancy is plain: deceptive practices by non-lawyer mortgagors are regulated by Illinois' Consumer Fraud Act, but those same fraudulent acts committed by attorneys go unchecked by the statute.

Unfortunately, the attorney discipline system, common law legal malpractice suits and Illinois' consumer fraud law fail to effectively discourage recklessness by lawyers and fall short of offering legal consumers viable remedies. Non-lawyer mortgage lenders receive far better oversight than their lawyer counterparts.

IV. QUALIFIED NON-LAWYERS CAN PREPARE MORTGAGE DOCUMENTS COMPETENTLY AND DO SO IN MANY STATES WITHOUT ADVERSE CONSEQUENCES.

Since the 1950s, numerous tasks traditionally performed by attorneys in connection with a mortgage have increasingly been performed by non-lawyers. Mortgage forms approved by the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Association (Freddie Mac) are used in a majority of the mortgage transactions nationwide and vary little between residential real estate transactions. Palomar, *supra* at 442. Consequently, mortgage companies have been able to reduce the amount of money they spend on lawyers by using these standard fill-in-the-blank forms pre-approved by the government—passing on the savings to consumers. Mortgage

companies now provide a variety of services that were formerly the sole domain of lawyers at an enhanced level of quality and a diminished cost.

Through decades of experience, numerous states all over the country have found that non-lawyers can effectively perform real estate closing activities without injuring consumers. Although not a comprehensive list, non-lawyers are allowed to participate in some aspects of the real estate closing process in Arizona, Colorado, Kansas, Kentucky, Ohio, Michigan, Missouri, New Jersey, Pennsylvania, Virginia and Washington. Palomar, *supra* at 489. Qualified non-lawyer mortgage preparers perform an important function in the real estate closing process and should be allowed to provide a low-cost service that consumers clearly want. A sample of recent state supreme court opinions dealing with non-lawyer participation in the real estate closing process may provide guidance in the case before this Court.

In a case strikingly similar to the one currently before this Court, in 1999 the Washington Supreme Court held that a mortgage company did not engage in the unauthorized practice of law by allowing its non-lawyer employees to enter data in standardized mortgage financing documents. *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93 (1999) (Supreme Court of Washington). Echoing the Illinois Appellate Court's opinion in the case currently before this Court, the Washington Supreme Court rejected the mortgagees' argument that the lay preparation of legal instruments becomes unauthorized practice of law when the mortgage company charged a separate fee for the service. In addition, the Washington Supreme Court concurred with the Illinois Appellate Court that a mortgage company, as a party to the real estate transaction, may prepare legal documents for itself without fear of the unauthorized practice of law.

> [The Washington Supreme Court's] decision provides that a real estate broker or salesperson is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions….*Id.* at 100.

In another case analogous to the one currently before this Court, the Supreme Court of Michigan addressed the issue of non-lawyer mortgage document preparation in *Dressel v. Ameribank*, 664 N.W.2d 151 (2003) (Supreme Court of Michigan). In this case, the defendant mortgage company was accused of the unauthorized practice of law for charging a fee for the completion of standard mortgage documents by non-lawyers. The Michigan Supreme Court held that: "the preparation of ordinary mortgages is not the practice of law…the bank's employees did not draft the mortgage document. They merely completed a standard form document that the federal government compiled and that is readily available to the public." *Id.* at 567. Additionally, the Court noted that charging a fee for filling in these blanks does not "transmogrify" the service into the practice of law and that no legal knowledge or discretion was exercised in the preparation of these forms. Consequently, the Court held that filling in blanks on standardized forms is ministerial in nature—regardless of the nature of the forms.

The Kentucky Supreme Court has also recently addressed the question of whether laypersons may participate in the real estate closing process. In 2003, the Court unanimously overturned Advisory Opinion U-58 of the Unauthorized Practice of Law Committee and ruled that laypersons should be allowed to continue conducting real estate closings. *Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al.*, 113 S.W.3d 105 (Ky. 2003). (Supreme Court of Kentucky). Specifically, the Court held that

"[b]ecause lay closing agents conduct closings in a nearly identical fashion [as attorneys], the supervision or even presence of an attorney at the closing offers no more protection to the parties with regard to their unasked questions." *Id.* at 123. In short, the Court held that "point and sign" real estate closings are not the practice of law and, barring evidence that the practice injures consumers more than attorney closings, there is no just reason for disallowing the practice.

In a broader holding than that necessitated by the case before this Court, the New Jersey Supreme Court held that consumers should have the choice to purchase non-lawyer real estate closing services as long as they are made aware of the risks involved. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995) (Supreme Court of New Jersey). Ultimately, the Court's decision was based not on anecdotal evidence and dire predictions supplied by bar organizations, but on the research of the special master appointed by the Court to study this issue. The special master's research found that not only were prices for both attorney and non-lawyer real estate services lower in Southern New Jersey, where lay closings were allowed, but also that there was no demonstrable harm from this practice. Specifically, the special master concluded:

> [T]here had been no proof of actual damage resulting from the South Jersey practice, or more accurately that whatever problems existed did not in the aggregate exceed those in matters where the parties were represented by counsel, that many of the activities undertaken by brokers and title officers, taken in isolation, did not involve the practice of law in any sense. *Id.* at 1347.

Again citing a lack of evidence showing the necessity for banning all qualified laypersons, the Court held that consumers should have the right to choose.

Experiences nationwide have shown that non-lawyers perform a valuable function in real estate closings. Yet, state bar associations and lawyers continue to bring suits that pretend to be in the "public interest." On this subject, the New Jersey Supreme Court offered this opinion:

> 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 when that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public.

In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d at 1360-1361 (Supreme Court of New Jersey).

The Illinois Supreme Court should likewise recognize the lack of a public mandate for restricting access to lay mortgage document preparers and decide not to "fix" a system that few think is broken.

CONCLUSION

This case presents the Court with an opportunity to reject protectionist arguments and to embrace consumer choice. The Court will be acting in the public's best interest if it recognizes that requiring an attorney to fill-in-the-blanks on a mortgage document is a waste of an attorney's skills and adds an unnecessary cost to purchasing a home. By upholding the Appellate Court's decision, the Court can send a clear message that acting in the consumers' best interest is more important than protecting the lawyer monopoly on legal services.

For the foregoing reasons, *amicus curiae* HALT, Inc. respectfully requests that this Court either affirm the decision of the Appeals Court or hold that the act of preparing mortgage documents and charging a fee for their preparation is not the practice of law.

Respectfully Submitted,

Thomas M. Gordon
(District of Columbia Bar #454949)
Counsel for *Amicus Curiae*
HALT, Inc.
1612 K Street NW, Suite 510
Washington, DC 20006-2802
(202) 887-8255

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Participation pursuant to Supreme Court Rule 707, and Motion for Leave to file Brief *Amicus Curiae* of HALT, Inc. were served by first-class mail, postage prepaid on June 1, 2004, upon each of the following:

Mr. Daniel A. Edelman
Edelman, Combs & Latturner
120 S. LaSalle Street
18th Floor
Chicago, IL 60603
Attorney for Appellant

Mr. Steven A. Levy
Goldberg, Kohn, Bell, Black,
Rosenbloom & Moritz
55 E. Monroe Street
Suite 3700
Chicago, IL 60603
Attorney for Appellee

Mr. Richard A. Davidson
Lane & Waterman
220 North Main Street
Suite 600
Davenport, IA 52801
Attorney for Appellee

Mr. Ronald D. Menna, Jr.
Fischel & Kahn
190 South LaSalle Street
Suite 2850
Chicago, IL 60603-3412
Attorney for Appellee

Mr. Richard L. Fenton
Sonnenschein Nath &
Rosenthal
8000 Sears Tower
Chicago, IL 60606
Attorney for Appellee

Mr. David M. Schultz
Hinshaw & Culbertson
222 North LaSalle Street
Suite 300
Chicago, IL 60601-1081
Attorney for Appellee

Mr. David P. Sanders
Jenner & Block
One IBM Plaza
Chicago, IL 60611
Attorney for Appellee

Ms. LeAnn Pedersen Pope
Burke Warren Mackay & Serritella
PC
One IBM Plaza
22nd Floor
330 N. Wabash Ave
Chicago, IL 60611
Attorney for Appellee

Mr. Scott C. Solberg
Eimer Stahl Klevorn & Solberg
224 South Michigan Avenue
Suite 1100
Chicago, IL 60604
Attorney for Appellee

Ms. Michele Odorizzi
Mayer, Brown, Rowe & Maw
190 S. LaSalle St.
Chicago, IL 60603
Attorney for Appellee

Mr. Steven P. Handler
McDermott Will & Emery
227 W. Monroe St.
Chicago, IL 60606
Attorney for Appellee

Mr. Mark B. Blocker
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S Dearborn Street
Chicago, IL 60603
Attorney for Appellee

Mr. Raymond J. Ostler
Gomberg Sharfman Gold & Ostler, P.C.
208 S. LaSalle Street
Suite 1200
Chicago, IL 60604
Attorney for Appellee

Ms. Linda B. Dubnow
McGuire Woods LLP
77 West Wacker Drive
Suite 4500
Chicago, IL 60601
Attorney for Appellee

Mr. Howard L. Teplinsky
Seidler & McErlean
One North Wacker Drive
Suite 4125
Chicago, IL 60606-2834
Attorney for Appellee

Mr. Thomas M. Hefferon
Goodwin Procter & Hoar
1717 Pennsylvania Avenue NW
Washington, DC 20006
Attorney for Appellee

Mr. Mark S. Bernstein
Barack Ferrazzano Kirschbaum
Perlman & Nagelberg LLC
333 W. Wacker Drive
Suite 2700
Chicago, IL 60606
Attorney for Appellee

Mr. Daniel E. Compton
Brittain & Ketcham, PC
85 Market Street
Elgin, IL 60123
Attorney for Appellee

Ms. Sallie G. Smylie
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
Attorney for Appellee

Mr. James P. Ziegler
Stone Pogrund & Korey
221 North LaSalle Street
Suite 3200
Chicago, IL 60601
Attorney for Appellee

Mr. James V. Noonan
Noonan & Lieberman, Ltd.
105 West Adams
Suite 300
Chicago, IL 60603
Attorney for Appellee

Ms. Marta A. Stein
Ross & Hardies
150 N. Michigan Avenue
Suite 2500
Chicago, IL 60601
Attorney for Appellee

Mr. William K. Holmes
Warner Norcross & Judd
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, MI 49503
Attorney for Appellee

Ms. Dianne E. Rist
Chapman and Cutler
111 West Monroe Street
18th Floor
Chicago, IL 60603
Attorney for Appellee

Mr. Frank J. Saibert
Ungaretti & Harris
Three First National Plaza
Suite 3500
70 W. Madison St.
Chicago, IL 60602
Attorney for Appellee

Mr. J. Steven Butkus
Guerard Kalina & Butkus
100 W. Roosevelt Road
Suite A-1
Wheaton, IL 60187
Attorney for Appellee

Mr. Michael A. Kraft
United Financial Mortgage Corp.
815 Commerce Drive
Suite 100
Oak Brook, IL 60523
Attorney for Appellee

Mr. David B. Goroff
Foley & Lardner
321 N. Clark Street
Suite 2800
Chicago, IL 60610
Attorney for Appellee

Mr. Konstantinos Armiros
Arnstein & Lehr
120 S. Riverside Drive
Suite 1200
Chicago, IL 60606
Attorney for Appellee

____
Thomas M. Gordon

DISTRICT OF COLUMBIA, TO WIT:

Taken, subscribed and sworn to before me this ____ day of ____________, 2004.

____

Notary Public, _________________________

My Commission Will Expire:
____