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NOTE

All Aboard? Missouri Statute Risks Failing to Protect Consumers from Hidden Fees and Deceptive Practices of Prominent Companies

McKeage v. TMBC, LLC, 847 F.3d 992 (8th Cir. 2017).

*Ethan E. Schroeder**

I. INTRODUCTION

At some point, every consumer has bought something and then found themselves surprised by the hidden fees and countless documents that must be signed as part of the purchase. It may even lead to some level of buyer's remorse. However, it is not often that buyer's remorse gives rise to a class action lawsuit brought by over 100,000 consumers against an affiliate of one of Missouri's largest private corporations.¹ Consumers, such as Robert and Janet McKeage, are often forced to choose between holding retailers accountable for their deceitful practices or paying increased transaction costs when dealing with Missouri retailers. With some of Missouri's bordering states having more comprehensive unauthorized practice of law statutes and punishments,² Missouri's General Assembly should reevaluate the state's own laws in light of a movement toward enhanced consumer protection laws. Sections 484.010 and 484.020 of the Missouri Revised Statutes define what conduct constitutes the practice of law, who is authorized to practice law, and what punishments are levied against anyone engaging in the unauthorized

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¹ See *McKeage v. TMBC, LLC*, 847 F.3d 992, 997 (8th Cir. 2017).

² ARK. CODE ANN. § 16–22–211 (2022); KAN. STAT. ANN. §§ 50–634, 50–636 (2022).

practice of law.³ If the General Assembly does not act, retailers, such as TMBC, LLC, may be enticed to continue deceitful business practices such as profiting off of unlawful charges and hidden fees.

This Note analyzes the application of Missouri’s prohibitions on the unauthorized practice of law to retailer-consumer transactions and how Missouri might look to amend its statutes to balance consumer protection with the need for efficiency in retail transactions. Part II details the facts and holding from *McKeage v. TMBC, LLC*. Part III examines Missouri’s unauthorized practice of law statute and compares it to similar statutes in states like Arkansas and Kansas. Additionally, it focuses on the Eighth Circuit’s analysis of what actions constitute the unauthorized practice of law in Missouri—most notably, the applicability of the statute to retailer-consumer transactions. Part IV explains the decision in *McKeage v. TMBC, LLC*. And finally, Part V discusses how lenient penalties under Missouri’s unauthorized practice of law statute increase the risk that retailers will employ unethical business practices as a means to further deceive consumers.

II. FACTS AND HOLDING

TMBC, LLC (“TMBC”), a corporation headquartered in Springfield, Missouri, sells boats and trailers through dealerships across the nation, many of which are located within Bass Pro Shops.⁴ In 2008, Robert and Janet McKeage bought a boat, motor, and trailer from the TMBC dealership in St. Charles, Missouri.⁵ The purchase was memorialized in a

³ See MO. REV. STAT. § 484.010 (2016). Section 484.010 states in relevant part: The ‘law business’ is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights. . . .

Id.

MO. REV. STAT. § 484.020 (2016). Section 484.020 states in relevant part:

No person shall engage in the practice of law or do law business . . . unless he shall have been duly licensed therefor and while his license therefor is in full force and effect. . . . Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section . . . shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation. . . .

Id. All statutory cites are to the Revised Statutes of Missouri (2016), unless otherwise noted.

⁴ *McKeage*, 847 F.3d at 996; Brief for Defendant–Appellant at 8, *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017). “TMBC, LLC’s parent company is Tracker Marine Retail, LLC. Tracker Marine Retail, LLC’s parent company is Bass Pro Group, LLC.” *McKeage*, 847 F.3d at 995 n.2.

⁵ *Id.* at 996; Brief for Defendant–Appellant, *supra* note 4, at 10.

standard form contract used by TMBC nationwide.⁶ As part of the transaction, TMBC charged the McKeages a \$75 “document fee.”⁷ This fee covered the cost of preparing documents such as the form sale contract itself, a bill of sale, a power of attorney form, and title, license, and registration documents.⁸

Claiming the boat was defective and wishing to rescind the sale, the McKeages filed suit against TMBC in the Circuit Court for St. Charles County, Missouri.⁹ The McKeages alleged that TMBC’s practice of charging a “document fee” constituted unauthorized law business in violation of sections 484.010 and 484.020 of the Missouri Revised Statutes.¹⁰ Per the contract’s choice-of-law provision, the case was transferred to Greene County, Missouri, where the McKeages requested that the state court certify a nationwide class action to include other TMBC customers who were charged a “document fee” and whose sale contract contained a Missouri choice of law provision.¹¹ The court determined that the class consisted of approximately 100,000 TMBC customers.¹²

Following certification of the class, TMBC removed the action to federal district court under the Class Action Fairness Act of 2005.¹³ The parties filed cross-motions for summary judgment.¹⁴ TMBC alleged that charging a document fee did not constitute the unauthorized practice of law because TMBC’s employees exercised no legal judgment while filling out documents.¹⁵ TMBC also argued that customers who signed contracts with TMBC outside of Missouri should not be subject to Missouri law.¹⁶ Finally, TMBC argued that damages should not be calculated based on the entire document fee because portions of the fee went to services that did

⁶ *McKeage*, 847 F.3d at 996; Brief of Plaintiff–Appellee at 9, *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017). Included in the standard form contract was a choice-of-law provision that states, in relevant part:

GOVERNING LAW. THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI. The venue for any action or proceeding arising from this Agreement . . . shall be in Greene County, Missouri. The prevailing party in any such action or proceeding shall be entitled to recover all litigation costs and expenses, including reasonable attorneys’ fees at all levels of litigation. . . .

McKeage, 847 F.3d at 996.

⁷ *McKeage*, 847 F.3d at 996.

⁸ *Id.*

⁹ *Id.*; Brief for Defendant–Appellant, *supra* note 4, at 11.

¹⁰ *McKeage*, 847 F.3d at 996. *See* MO. REV. STAT. §§ 484.010, 484.020.

¹¹ *McKeage*, 847 F.3d at 997.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

not constitute unauthorized law business under sections 484.010 and 484.020.¹⁷

The district court rejected TMBC's arguments and granted the McKeages' motion for summary judgment.¹⁸ According to the district court, TMBC engaged in the unauthorized practice of law when it charged a document fee, Missouri law applied to transactions that occurred outside Missouri, and the damages award should be based on the entire "document fee."¹⁹ The district court then awarded treble damages under section 484.020.²⁰ Based on the number of members in the class, the damages, including treble damages, were calculated to be \$21,735,754.²¹

On appeal to the Eighth Circuit, TMBC contended three issues.²² First, TMBC argued that the court should not have certified the class because individualized proof of Missouri choice of law provisions in each customer's contract was required.²³ Second, TMBC argued that the district court misinterpreted Missouri case law regarding unauthorized law business in granting summary judgment to the class.²⁴ Finally, TMBC alleged that the district court erred in applying Missouri law to conduct that occurred outside of Missouri.²⁵

The McKeages filed a cross-appeal challenging the district court's award of attorneys' fees.²⁶ Specifically, they argued that the district court should have enforced the fee-shifting provision in TMBC's standard form contract and that the fee award should have been based on the entire common fund rather than the un-trebled damages.²⁷

Reviewing the lower court's judgment de novo, the Eighth Circuit held that (1) the district court properly certified the nationwide class action based on the requirements of Federal Rule of Civil Procedure 23,²⁸ (2) the "document fee" charged by TMBC was a legal document and the document's preparation constituted unauthorized law business under

¹⁷ *Id.*

¹⁸ *Id.* The district court determined that the class members were properly identified, TMBC's conduct in charging a document fee constituted unauthorized law business, Missouri law applied to transactions that occurred outside of Missouri, and damages should be awarded based on the entire document fee. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 998.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1000.

section 484.020,²⁹ and (3) Missouri law could be applied to sales that occurred outside of Missouri.³⁰

III. LEGAL BACKGROUND

Missouri's unauthorized practice of law statute is similar to that of its neighboring states, such as Arkansas and Kansas. Some differences in penalties, however, impact the deterrence effect of each state's statute, and such differences may incentivize companies to include choice of law provisions in their contracts to take advantage of lower risk.

A. Missouri's Unauthorized Practice of Law Statutes

The Missouri General Assembly determined that the unauthorized practice of law is a danger to Missourians.³¹ Missouri law prohibits an unlicensed individual from engaging in the "practice of law" or "law business."³² The unauthorized practice of law is punishable as a misdemeanor and subject to a fine of up to \$100 and liability for damages equal to treble the amount charged for the services the offender provides.³³ Although the "practice of law" includes acts committed both in and out of court, "law business," in particular, implies that a nonlawyer has "held himself out" in a business, "by repeated acts" or "by the exaction of a consideration," in which he acts in the same capacity as a lawyer.³⁴ Missouri's unauthorized practice of law statutes are "primarily intended to protect the public from the rendition of certain services, deemed to require special fitness and training on the part of those performing the same, by persons not lawfully held to possess the requisite qualifications."³⁵ In applying these statutes, Missouri courts have attempted to create a

²⁹ *Id.* at 1001.

³⁰ *Id.* at 1002.

³¹ *In re Mid-Am. Living Tr. Associates, Inc.*, 927 S.W.2d 855, 859 (Mo. 1996).

³² MO. REV. STAT. § 484.020.

³³ *Id.* Certain statutes require that after the jury has determined the amount of the plaintiff's actual damages, the court must award three times that amount. *See, e.g.*, *Cohen v. De La Cruz*, 523 U.S. 213 (1998). The primary purpose of Missouri's unauthorized practice of law statute is to protect the public from the rendition of services deemed to require special fitness and training by those not possessing the required legal qualifications. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 704 (Mo. 2008) (citing *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. Ct. App. 2001)). An award of treble damages directing compensates harmed consumers while also collaterally deterring the unauthorized practice of law by increasing the potential penalty above simple actual damages. *See Student Note, Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501, 518 (1962).

³⁴ *Liberty Mut. Ins. Co. v. Jones*, 130 S.W.2d 945, 955 (Mo. 1939) (en banc).

³⁵ *State ex inf. Miller v. St. Louis Union Tr. Co.*, 74 S.W.2d 348, 357 (Mo. 1934) (en banc).

“workable balance” between protecting the public and maintaining the efficiency required for a competitive marketplace.³⁶ This balance between efficiency and consumer protection has grown particularly contentious in recent years as standard form contracts become more prevalent.

In *Eisel v. Midwest BankCentre*, the Supreme Court of Missouri illustrated the analysis required under sections 484.020 and 484.010 to determine whether preparation of standard form documents constitutes the “practice of law.”³⁷ In *Eisel*, bank employees prepared several pre-printed, standard documents when processing mortgage loans.³⁸ These forms included documents such as a deed of trust and a promissory note, which the Supreme Court of Missouri has concluded constitute legal documents because their preparation requires the exercise of legal judgment or discretion.³⁹ By analogy, the *Eisel* court held that the bank’s practice of charging a fee for completing the pre-printed forms was unauthorized law business because the “charging of a separate additional charge tends to [place emphasis on] conveyancing and legal drafting as a business rather than on the business of being a [banker].”⁴⁰

In subsequent cases, Missouri courts have clarified the analysis of *Eisel*. Missouri courts now hold that “charging a separate fee for the completion of legal forms by non-lawyers constitutes the unauthorized practice of law business.”⁴¹ Determining whether a particular form is legal in nature requires the court to “balance the protection of the public against a desire to avoid unnecessary inconvenience and expense.”⁴² A key factor in this inquiry is the level of legal judgment or discretion required to prepare the form.⁴³ However, once it is determined that a particular document is legal in nature, the act of charging a fee for the preparation or completion of that document constitutes unauthorized law business, even where a non-lawyer does not exercise any legal judgment in completing the form.⁴⁴ In *McKeage*, it was undisputed that TMBC could have hired attorneys to prepare the documents, filled in the forms without charging a fee, or required customers, such as the McKeages, to fill out their own

³⁶ *In re Mid-Am. Living Tr. Associates, Inc.*, 927 S.W.2d at 859.

³⁷ *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 337–39 (Mo. 2007) (en banc).

³⁸ *Id.* at 337.

³⁹ *Id.* at 337 n.3; see also *id.* at 337 (citing *In re First Escrow*, 840 S.W.2d 839, 846 (Mo. 1992) (en banc)).

⁴⁰ *Eisel*, 230 S.W.3d at 339.

⁴¹ *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702 (Mo. 2008) (en banc).

⁴² *Hargis v. JLB Corp.*, 357 S.W.3d 574, 584 (Mo. 2011) (en banc) (quoting *In re First Escrow*, 840 S.W.2d 839, 843 (Mo. 1992) (en banc)).

⁴³ See *Hargis*, 357 S.W.3d at 584; *In re First Escrow*, 840 S.W.2d at 843; *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855, 861 (1952).

⁴⁴ *McKeage v. TMBC, LLC*, 847 F.3d 992, 1000 (8th Cir. 2017).

documents.⁴⁵ Missouri law prohibited TMBC merely from charging customers a fee for a *non-attorney* salesperson's preparation of legal documents incidental to each sale.⁴⁶

As previously mentioned, Missouri imposes potentially significant penalties for the unauthorized practice of law to deter future violations.⁴⁷ Specifically, violation of the statute constitutes a misdemeanor punishable by a fine of up to \$100 and subject to treble damages.⁴⁸ Though the language of Missouri's statute states that the corporation "may be subject to be sued,"⁴⁹ the Supreme Court of Missouri has held that the trebling provision "sets out the legislative prescribed penalty" and has interpreted this provision as imposing *absolute liability* regardless of mental culpability.⁵⁰

B. Unauthorized Practice of Law Statutes in Arkansas and Kansas

Some of Missouri's neighboring states, like Arkansas and Kansas, have similar unauthorized practice of law statutes.⁵¹ Missouri's statute differs, however, because it imposes less severe penalties for violations.⁵² Because Missouri's scheme struggles to achieve the same level of deterrence as neighboring states, companies may include choice of law provisions to take advantage of Missouri's law as a cost-reducing and risk-mitigation strategy.

In Arkansas, any corporation that engages in the unauthorized practice of law shall be "punished by a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000)."⁵³ Arkansas

⁴⁵ Brief for Plaintiff–Appellee, *supra* note 6, at 39–40.

⁴⁶ MO. REV. STAT. § 484.010.

⁴⁷ *Id.* § 484.020.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 702–03 (Mo. 2008) (en banc).

⁵¹ See ARK. CODE ANN. § 16–22–211 (2017) ("It shall be unlawful for any corporation or voluntary association to . . . render legal services of any kind in actions or proceedings of any nature or in any other way or manner"). See also KAN. STAT. ANN. § 50–6,142 (2017) ("A person who is not licensed or otherwise authorized by the Kansas supreme court to practice law in this state shall not do any of the following: (1) Commit any act or omission that is prohibited. . . as being the unauthorized practice of law" or "(3) solicit payment or other consideration, whether in cash or in-kind, for services that would constitute the unauthorized practice of law in this state if performed at or about the time of such solicitation. . . . A violation [of Kansas' unauthorized practice of law statute] constitutes an unconscionable act or practice in violation of K.S.A. 50–627.").

⁵² MO. REV. STAT. § 484.020; ARK. CODE ANN. § 16–22–211 (2017); KAN. STAT. ANN. §§ 50–634, 50–636 (2017).

⁵³ ARK. CODE ANN. § 16–22–211 (2017).

courts apply a similar analysis to determine what constitutes the unauthorized practice of law.⁵⁴ A few years before *McKeage*, the Arkansas Supreme Court analyzed a class action unauthorized-practice-of-law claim against an auto dealership concerning the completion of standardized forms necessary for the purchase of motor vehicles.⁵⁵ In *Campbell v. Asbury Automotive Inc.*, customers of Asbury alleged that Asbury charged an illegal document preparation fee for the vehicle installment contract required to purchase a vehicle.⁵⁶

Similar to courts in Missouri, Arkansas courts have “uniformly held that many activities, such as writing and interpreting wills, contracts, trust agreements and the giving of legal advice in general, constitute practicing law.”⁵⁷ In *Campbell*, the Arkansas Supreme Court held that Asbury’s fee for the completion of instruments “by filling in the blank spaces” of “standardized and approved prepared forms” constituted the practice of law.⁵⁸ Some of the standard form documents Asbury prepared, including bills of sale and power of attorney forms, are the same types of documents TMBC drafted.⁵⁹

In Kansas, the “practice of law” is not expressly defined by statute. Instead, the definition has largely developed from caselaw involving suspended or disbarred lawyers who continue to provide legal services.⁶⁰ In *State ex rel. Boynton*, for example, the court observed:

As the term is generally understood, the “practice of law” is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.⁶¹

By also categorizing the unauthorized practice of law as “an unconscionable act or practice” under the Kansas Consumer Protection Act (“KCPA”),⁶² Kansas affords consumers with a unique opportunity to

⁵⁴ MO. REV. STAT. § 484.020; ARK. CODE ANN. § 16–22–211 (2017). *See Campbell v. Asbury Auto., Inc.*, 381 S.W.3d 21, 38 (Ark. 2011).

⁵⁵ *See Campbell*, 381 S.W.3d at 38.

⁵⁶ *Id.* at 26.

⁵⁷ Ark. B. Ass’n v. Union Nat’l Bank of Little Rock, 273 S.W.2d 408, 412 (Ark. 1954).

⁵⁸ *Campbell v. Asbury Auto., Inc.*, 381 S.W.3d 21, 41–42 (Ark. 2011).

⁵⁹ *Id.* at 26 n.6.

⁶⁰ *State ex rel. Boynton v. Perkins*, 138 Kan. 899, 907–08 (1934).

⁶¹ KAN. STAT. ANN. § 50–6,142 (2017); *State ex rel. Boynton v. Perkins*, 138 Kan. 899, 907–08 (1934) (quoting *Eley v. Miller*, 34 N.E. 836, 837–838 (1893)).

⁶² KAN. STAT. ANN. § 50–634 (2017).

recover the full amount of their damages or, if greater, a civil penalty of up to \$10,000 per violation.⁶³ The KCPA does not allow for consumers to recover in class actions.⁶⁴ Instead, aggrieved consumers or the State must recover in individual actions.⁶⁵

IV. INSTANT DECISION

With an understanding of how Missouri and select surrounding states treat penalties for the unauthorized practice of law, this Part considers the court's review of the district court's grant of summary judgment and the court's interpretation and application of the choice-of-law provision in TMBC's standard form contract. First, this Part gives the court's reasoning in reaching its decision that TMBC's charging of a "document fee" for the preparation of standard form documents incident to retail sales constituted the unauthorized practice of law under Missouri law.⁶⁶ Second, it explains the court's calculation of treble damages. And finally, it illustrates the court's decision to uphold TMBC's choice of venue provision and apply Missouri law to sales that occurred outside of Missouri.⁶⁷

A. Conduct That Constitutes the Unauthorized Practice of Law in Missouri

Two groups of forms were at issue in *McKeage*: those previously labeled legal documents in *Eisel*—namely, power of attorney forms—and those yet to be analyzed under Missouri law.⁶⁸ As a consequence, the court first concluded that TMBC's practice of charging a separate fee for the completion of those forms constituted the unauthorized practice law "whether or not the act of completing the forms required the exercise of legal judgment or discretion."⁶⁹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *McKeage v. TMBC, LLC*, 847 F.3d 992, 1000–01 (8th Cir. 2017).

⁶⁷ *Id.* at 1001–02.

⁶⁸ *Id.* at 1000; *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. 2007) (prohibiting companies and their non-lawyer agents "from drawing, preparing, or assisting in the preparation of trust workbooks, trusts, wills, and powers of attorney for valuable consideration") (citing *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 871 (Mo. 1996) (en banc)).

⁶⁹ *McKeage*, 847 F.3d at 1001; see *Eisel*, 230 S.W.3d at 339.

B. Calculation of Treble Damages

Next, the court addressed TMBC's claim that the district court misconstrued Missouri law when it calculated damages based on the entire document fee because some of the forms were not legal documents.⁷⁰ Relying on *Bray v. Brooks*, TMBC argued that the district court was required to parse the document fee to calculate damages only for fees allotted to *legal* documents.⁷¹ According to the *McKeage* court, however, TMBC incorrectly interpreted *Bray*, which the court noted does not mandate such a procedure.⁷² *Bray* involved a real estate broker who charged a single fee for all of his services, which included the unauthorized drafting of several legal documents as well as legitimate broker services, without making a defined separate charge for document preparation.⁷³ In deciding whether damages for the violation of section 484.020 should be based upon the broker's entire fee, the Missouri Court of Appeals for the Western District stated that a distinction must be made between the legitimate and unauthorized services the broker provided.⁷⁴

In this case, the Eighth Circuit affirmed the district court's determination because it concluded that the issues involved were distinguishable from the facts of *Bray*.⁷⁵ Specifically, TMBC did not charge the McKeages a single contract price for the sale of the boat.⁷⁶ Rather, the unauthorized fee for document preparation charged by TMBC was separate from the valid portions of the contract.⁷⁷ Thus, there was no need for the court to square its decision in this action with the holdings of *Bray*.⁷⁸ Concluding its analysis, the court held that, "[i]n situations where the unauthorized charge is separate from the legitimate portions of the parties' transaction, damages may be based upon the entire unauthorized fee, even if some of the documents are not legal in nature."⁷⁹

C. Application of Missouri Law to Sales Made Outside of Missouri

Finally, the court addressed TMBC's claim that the district court erred in applying Missouri law to sales that occurred outside Missouri.⁸⁰

⁷⁰ *McKeage*, 847 F.3d at 1000–01.

⁷¹ *Id.* at 1001.

⁷² *Id.*

⁷³ *Bray v. Brooks*, 41 S.W.3d 7, 10–11 (Mo. Ct. App. 2001).

⁷⁴ *Id.* at 14.

⁷⁵ *McKeage*, 847 F.3d at 1001.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

The court reviewed this issue *de novo* as it involved the interpretation and application of the choice-of-law provision in TMBC's standard form contract.⁸¹ TMBC characterized the issue as one of an "unconstitutional extra-territorial application of Missouri penal law."⁸² Relying on section 484.020(2)—which gives the Missouri attorney general the right to sue for treble damages in the event the parties "neglect and fail to sue for or recover such treble amount"—TMBC argued that allowing Missouri to regulate what constitutes the practice of law in other states would be unprecedented and violative of the Commerce and Full Faith and Credit Clauses of the United States Constitution.⁸³

The court noted a fundamental flaw in TMBC's argument: Missouri was not a party to the action.⁸⁴ TMBC was not charged with any crimes, nor had Missouri's attorney general pursued any claim against TMBC arising out of the transactions with the class members at issue.⁸⁵ Missouri's lack of involvement in this action meant Missouri did not attempt to enforce its law extra-territorially.⁸⁶

Instead, the court turned its attention to the question of whether a corporation headquartered in Missouri can elect to have Missouri law govern its conduct in standard form contracts that it uses nationwide.⁸⁷ As the court stated, the traditional rule is that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."⁸⁸ The court concluded that there was nothing inherently unconstitutional about enforcing a corporation's choice to have its contractual duties governed by the law of a particular state.⁸⁹ Aside from its argument that the application of section 484.020 in this case constituted the unconstitutional extra-territorial application of Missouri penal law, TMBC did not challenge the validity or enforceability of the choice-of-law clause.⁹⁰ Therefore, the

⁸¹ *Id.*; See *Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 595–96 (8th Cir. 2007).

⁸² *McKeage*, 847 F.3d at 1001.

⁸³ *Id.* at 1001–02.

⁸⁴ *Id.* at 1002.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931)); *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. 2012) ("Generally, parties may choose the state whose law will govern the interpretation of their contractual rights and duties. A valid choice of law provision in a contract binds the parties.").

⁸⁹ *McKeage*, 847 F.3d at 1002.

⁹⁰ *Id.*

court held that the district court did not err in applying Missouri law to sales that occurred outside of Missouri.⁹¹

V. COMMENT

Though the court correctly applied sections 484.010 and 484.020 and ultimately found in favor of the plaintiff consumers, Missouri's unauthorized practice of law statutes do not properly protect most consumers.⁹² As articulated in *Eisel*, the “workable balance” between consumer protection and market efficiency has shifted too far in favor of corporations and leaves consumers with few options.⁹³ By simply wanting to make a purchase, Missouri consumers may be deceived and defrauded in the form of hidden charges for services, such as legal document preparation, that constitute violations of Missouri's unauthorized practice of law statutes. Given the hidden nature of these fees, consumers may not know they were charged until it is too late.

Missouri does not offer adequate incentives to encourage individual consumers and attorneys to bring actions under the state's unauthorized practice of law statutes. The potential damages that a plaintiff may recover are insignificant compared to the amount that is typically charged by such hidden fees and will also not encourage attorneys to bring such cases. This lack of incentives for individual, small-value consumers to sue for the unauthorized practice of law insulates Missouri retailers from accountability for their deceptive business practices.

Although *McKeage* demonstrates courts' willingness to find the unauthorized practice of law under section 484.020, this Comment illustrates that Missouri's statutes may not go far enough in terms of deterrence. Instead, by imposing relatively small penalties, Missouri's statutes may effectively provide an *incentive* for retailers to charge illegal fees related to their unauthorized practice of law. By amending Missouri's unauthorized practice of law statute, customers—such as the McKeages—would have actual incentive to hold retailers accountable for deceptive practices which, in turn, would protect future consumers.

A. Missouri's Limited Analysis of Deceptive Document Fees and the Unauthorized Practice of Law in Retail Transactions

Missouri courts have analyzed the application of Missouri's unauthorized practice of law statutes in retail transactions in a limited

⁹¹ *Id.*

⁹² *Id.*

⁹³ *In re Mid-Am. Living Tr. Associates, Inc.*, 927 S.W.2d 855, 859 (Mo. 1996).

number of cases.⁹⁴ Hidden fees, such as the document preparation fee TMBC charged, are likely to go unnoticed by the average consumer because consumers are often unaware of the existence and nature of hidden fees.⁹⁵ Even if attentive consumers discover hidden fees, they are unlikely to bring an action against the retailer because their treble damage award under Missouri's unauthorized practice of law statute is too insignificant to justify litigation.⁹⁶

Customers like the McKeages often have little to no notice that they are being charged a document fee—and even less notice that those fees may violate Missouri's unauthorized practice of law statutes. Retailers frequently take calculated measures to hide these illegal fees from their customers.⁹⁷ Before 1997, TMBC operated the same business selling boats but did not charge its customers add-on document fees.⁹⁸ When TMBC did not charge a fee, it required the same expenses and documents to complete transactions but “absorb[ed] that as a cost of doing business.”⁹⁹ TMBC trained its salespeople to describe the fees as taxes.¹⁰⁰ TMBC also failed to disclose to customers that the company profited from the charge.¹⁰¹ TMBC's executives highlighted the retailer's exploitive behavior as well.¹⁰² For example, while discussing “document fees,”

⁹⁴ For examples of Missouri cases applying Missouri's unauthorized practice of law statutes, see *Pierce v. Vroom, Inc.*, 2022 WL 6990590 (Mo. Ct. App. 2022); *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. Ct. App. 2009); *Rizzo v. Hendrick Auto. Group Corp., Inc.*, 2009 WL 10672208 (Mo. Ct. App. 2009); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. 2010); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712 (Mo. Ct. App. 2008).

⁹⁵ For example, TMBC did not disclose that the fees were being charged for a profit, instead TMBC lead customers such as the McKeages to believe that the document fees are government-required taxes. Brief for Defendant–Appellant, *supra* note 4, at 19.

⁹⁶ See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307 (2010).

⁹⁷ For examples of Missouri consumers alleging that a retailer has charged a hidden fee related to the unauthorized practice of law, see *Pierce v. Vroom, Inc.*, 2022 WL 6990590 (Mo. Ct. App. 2022); *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. Ct. App. 2009); *Rizzo v. Hendrick Auto. Group Corp., Inc.*, 2009 WL 10672208 (Mo. Ct. App. 2009); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. 2010); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712 (Mo. Ct. App. 2008).

⁹⁸ Brief for Plaintiff–Appellee, *supra* note 6, at 18.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 20.

¹⁰¹ *Id.*

¹⁰² *Id.*

TMBC's corporate designee admitted that TMBC would charge "what[ever] the market would bear."¹⁰³

A combination of deceptive practices by retailers, and a lack of incentive for aggrieved consumers to sue, discourages Missouri consumers from holding retailers legally accountable for their actions. The dearth of case law in Missouri concerning the unauthorized practice of law in retail transactions is indicative of the problem itself. If individual, aggrieved consumers are unaware of the hidden, deceptive practices of retailers and are not incentivized to sue, few suits are likely to be brought. As a consequence of this lack of precedent, retailers engaging in deceptive practices largely remain free to continue their fraudulent behavior at the expense of Missouri consumers. This result is in direct conflict with the General Assembly's declared public policy of protecting consumers from misleading and deceptive practices.¹⁰⁴

B. Arkansas and Kansas Provide Examples of What Missouri's Statutes Should Be

Compared to its neighbors, Arkansas and Kansas, Missouri has insubstantial penalties for violations of its unauthorized practice of law statutes. Though treble damages may sound like an effective deterrent, many cases applying Missouri's statutes concern illegal fees, with arguably insignificant amounts, often ranging from \$65 to \$100.¹⁰⁵ These trivial amounts, even trebled, do not come close to the maximum potential penalties of a \$5,000 fine per violation that Arkansas can impose,¹⁰⁶ or a maximum civil penalty of \$10,000 per violation that Kansas can impose.¹⁰⁷ Though courts in Arkansas and Kansas have the discretion to grant lesser awards,¹⁰⁸ the mere *risk* of increased liability serves as an effective deterrent, even for small-value claims individual customers bring.¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Whitney v. Alltel Commun., Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005). Missouri seeks to "protect the public from being advised or represented in legal matters by incompetent or unreliable persons" by restricting the practice of law only to licensed attorneys. *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855, 857–58 (Mo. 1952).

¹⁰⁵ *McKeage v. TMBC, LLC*, 847 F.3d 992, 996 (8th Cir. 2017); *Rizzo v. Hendrick Auto. Group Corp., Inc.*, 08-00137-CV-W-JTM, 2009 WL 10672208, at 1 (Mo. Ct. App. 2009); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 558 (Mo. Ct. App. 2009); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 714 (Mo. Ct. App. 2008).

¹⁰⁶ ARK. CODE ANN. § 16–22–211 (2017).

¹⁰⁷ KAN. STAT. ANN. §§ 50–634, 50–636 (2017).

¹⁰⁸ ARK. CODE ANN. § 16–22–211 (2017); KAN. STAT. ANN. §§ 50–634, 50–636 (2017).

¹⁰⁹ *Gilles*, *supra* note 96, at 324.

Heavy fines for corporate violators or harsher penalties for recidivists, as authorized by some statutes, would operate as effective deterrents if diligently and consistently applied.¹¹⁰ Critics argue that even the large fines authorized by unauthorized practice of law statutes are poor deterrents because unauthorized practice may be so lucrative an enterprise as to make continued operation more profitable than cessation despite the risk of penalties.¹¹¹ In cases such as *McKeage*, where the amount the retailer charges is often less than \$100,¹¹² large fines are more likely to be an effective deterrent because the fines outweigh any would-be profits.

By amending its statutes to better match the punishments its neighboring states impose, Missouri can ensure that individual consumers have adequate incentives to hold accountable retailers that engage in the unauthorized practice of law. Heightened punishments also better deter retailers from continuing their deceptive conduct. If the General Assembly better incentivized individuals to hold retailers accountable by providing remedies such as those imposed in Arkansas and Kansas, the potential liability for retailers would outweigh the benefits associated with the relatively small fee they charge their customers.¹¹³ Amending Missouri's unauthorized practice of law statutes to include a more significant penalty for violations would better serve the purposes of the statute, protecting Missouri's consumers from fraudulent and deceptive business practices.

C. Without Amending Missouri's Statutes, Consumers Will Be Forced to Rely on Class Actions

As currently written, Missouri's unauthorized practice of law statutes do not provide small-value consumers an adequate incentive to pursue a claim, leading to further exploitation by retailers. Therefore, class actions are "the only effective way to stop and redress the corporate wrongdoing" that occurs when companies expose a mass of consumers to the same deceptive practice.¹¹⁴ Should Missouri not amend its unauthorized practice of law statutes, the deterrent prospect of class treatment remains the only option available for consumers to force retailers to cease the improper practice of charging processing fees for document preparation.¹¹⁵

¹¹⁰ Student Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501, 504 (1962).

¹¹¹ *Id.*

¹¹² *McKeage v. TMBC, LLC*, 847 F.3d 992, 996 (8th Cir. 2017).

¹¹³ Gilles, *supra* note 96, at 324.

¹¹⁴ Stephanie Starek, *Navigating the Ascertainability Spectrum: Analyzing the Policy Rationales Behind the Various Ascertainability Standards As Applied to Small-Value Consumer Class Actions*, 68 CASE W. RES. L. REV. 213, 233 (2017).

¹¹⁵ *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 560 (Mo. Ct. App. 2009).

In the absence of incentives for individual consumers to check retailers, class actions are often the only effective way to prevent and redress retailers' exploitative conduct. When a company wrongfully exacts a small dollar amount from each of its millions of customers, those small amounts accumulate, resulting in a massive profit for the retailer.¹¹⁶ Each Missouri consumer victimized by such wrongful conduct may recover treble the amount they paid to the retailer.¹¹⁷ This may sound like an adequate remedy, but, when the amounts consumers pay to retailers are often less than \$100, the damages recovered are still too small to incentivize individual plaintiffs to bring suit.¹¹⁸ “[S]mall recoveries do not provide an incentive for any individual to bring a solo action prosecuting his or her rights.”¹¹⁹ Individual plaintiffs may not be willing to spend the time and resources to litigate a dispute to recover less than \$300.¹²⁰ It is equally unlikely that many lawyers would accept these cases when the potential recovery is so small.¹²¹ Class actions are meant to overcome this problem by “aggregating the relatively paltry potential recoveries into something worth someone's, usually an attorney's, labor.”¹²²

Amending Missouri's statute is unlikely to impact the ability of aggrieved consumers to bring class-action suits. Arkansas has long imposed a maximum potential penalty of a \$5,000 fine per violation of the state's unauthorized practice of law statute,¹²³ and this penalty structure has not presented a substantial barrier to plaintiffs bringing class actions.¹²⁴ As shown by the presence of cases in Arkansas, such as *M.S. Wholesale Plumbing, Inc. v. Gen-Kal Pipe & Steel, Corp.* and *Campbell v. Asbury Automotive, Inc.*,¹²⁵ increasing the available penalties for Missouri's unauthorized practice will provide an incentive for individual suits while also maintaining the ability for a class of plaintiffs to aggregate their claims.

Retailers such as TMBC are in a position to wrongfully obtain massive profits by charging consumers hidden fees for actions that

¹¹⁶ For example, TMBC received a total of roughly \$7,500,000 in “document fees” from the approximately 100,000 consumers which composed the class in *McKeage*, 847 F.3d at 996.

¹¹⁷ MO. REV. STAT. § 484.020.

¹¹⁸ *Shaffer*, 300 S.W.3d at 560.

¹¹⁹ Starek, *supra* note 114, at 233–34.

¹²⁰ Gilles, *supra* note 96, at 315.

¹²¹ *Id.*

¹²² Starek, *supra* note 114, at 234.

¹²³ ARK. CODE ANN. § 16–22–211 (2017).

¹²⁴ See *M.S. Wholesale Plumbing, Inc. v. Gen-Kal Pipe & Steel, Corp.*, 2019 WL 189914, *1 (N.J. Super. Ct. App. Div. Jan. 15, 2019); see also *Campbell v. Asbury Auto., Inc.*, 381 S.W.3d 21 (Ark. 2011).

¹²⁵ See *M.S. Wholesale Plumbing*, 2019 WL 189914 at *1; *Campbell*, 381 S.W.3d at 26.

constitute the unauthorized practice of law.¹²⁶ Without firmer penalties and the deterrent prospect of both individual suits and class actions, retailers such as TMBC have no incentive to cease the improper practice of charging consumers a processing fee for document preparation.¹²⁷

VI. CONCLUSION

Missouri's ability to protect consumers has fallen behind some of its neighboring states by failing to provide adequate deterrents against retailers' unauthorized practice of law. *McKeage* illustrates how Missouri retailers are often left unchecked, continuing their exploitive practice of charging hidden fees due to the lack of incentive for individual small-value consumers to sue.¹²⁸ Likewise, retailers' hidden fees, ranging from \$65 to \$100,¹²⁹ are unlikely to be significant enough to encourage the same small-value consumers to aggregate and bring a class action, given the limited damage award and significant expense and commitment that comes with litigation.¹³⁰ By amending its unauthorized practice of law statutes to more closely align with its neighboring states, Missouri can better protect consumers from predatory practices. The court in *McKeage* indicated a return to the "workable balance" between protecting the public and maintaining marketplace efficiency.¹³¹ Increasing the liability for penalties under Missouri's unlawful practice of law statutes to levels similar to those of its neighboring states will ensure that aggrieved customers deceived by Missouri's retailers have an incentive to hold those retailers accountable.

¹²⁶ *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 560 (Mo. Ct. App. 2009) (citing *Woods v. QC Fin. Services, Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008)).

¹²⁷ *Id.* at 560.

¹²⁸ See generally *McKeage v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017).

¹²⁹ *Id.* at 996; *Rizzo v. Hendrick Auto. Group Corp., Inc.*, 2009 WL 10672208, at *1 (Mo. Ct. App. 2009); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 558 (Mo. Ct. App. 2009); *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 714 (Mo. Ct. App. 2008).

¹³⁰ MO. REV. STAT. §§ 484.020, 484.010; ARK. CODE ANN. § 16-22-211 (2017); KAN. STAT. ANN. §§ 50-634, 50-636 (2017).

¹³¹ *McKeage*, 847 F.3d at 1000.