

In The Supreme Court of Florida
Case No. SC08-1360

Lower Court Case No. 4D07-1490

HAROLD GOLDBERG and ARLENE GOLDBERG,

Petitioners,

v.

MERRILL LYNCH CREDIT CORPORATION,

Respondent.

Consolidated with Lower Court Case No. 4D07-2436

AMY SUE FORMAN,

Petitioner,

v.

WORLD SAVINGS BANK, FSB,

Respondent.

**ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL**

* * * * *

BRIEF OF AMICUS CURIAE THE FLORIDA BAR

* * * * *

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SUMMARY OF THE ARGUMENT

The opinion of the district court upon which this matter is based is unclear regarding the type of finding that is necessary for an individual harmed by the unlicensed practice of law to maintain an action for damages. The opinion is not clear on whether one needs a finding of unlicensed practice of law from this Court in the specific case where the victim is seeking damages or a finding of unlicensed practice of law supported by the case law in general. It is The Florida Bar's position that a general finding in the case law is all that is necessary, not a finding by this Court as to the specific case. If a specific finding were required, many individuals would be left without a remedy as not all unlicensed practice of law cases are brought before this Court. Past precedent also shows that a general finding is all that is required.

It is also the position of The Florida Bar that adequate remedies exist for individuals who have been harmed by the unlicensed practice of law. Cases have been brought for negligence, disgorgement of fees and to void a contract. The cases are based on causes of action existing in the common and statutory law. With the exception of an action seeking an injunction to prohibit the unlicensed practice of law, all civil remedies are available. In addition, the individual harmed by the unlicensed practice of law may file

criminal charges and/or a complaint with The Florida Bar, both which may result in an award of restitution.

ARGUMENT

I. THE OPINION OF THE DISTRICT COURT IS NOT CLEAR REGARDING WHAT THOSE CLAIMING TO HAVE BEEN HARMED BY PERSONS ENGAGING IN THE UNLICENSED PRACTICE OF LAW MUST SHOW IN ORDER TO BRING AN ACTION SEEKING REMEDIES.

This Court has asked The Florida Bar to file an amicus brief in this matter "focusing on the existence and adequacy of remedies that may be available to those claiming to have been harmed by persons engaging in the unauthorized practice of law." In order to respond to this issue, it is necessary to address when an individual may bring an action where unlicensed practice of law is an element as this goes to the existence of remedies. The district court's opinion is not clear on this issue.

The opinion of the district court holds that a party may file suit to recover fees paid for alleged unlicensed practice of law only after this Court decides that the conduct constitutes the unlicensed practice of law.

Goldberg v. Merrill Lynch Credit Corporation, 981 So. 2d 550 (Fla. 4th DCA 2008). The opinion is not clear on whether one needs a finding of unlicensed practice of law from this Court in the specific case where the victim is seeking damages or a determination of unlicensed practice of law in the case law in general. Without clarification by this Court, there will be

confusion and those claiming to be harmed by the unlicensed practice of law may be left without a remedy.

- A. The District Court's Opinion Can Be Read To Require A Specific Finding Of The Unlicensed Practice Of Law By This Court In The Specific Case Where The Person Harmed Is Seeking A Remedy In Order To Bring An Action.

One interpretation of the district court's opinion is that a person claiming to have been harmed by persons engaging in the unlicensed practice of law must have a prior finding by this Court in their particular case before an action may be maintained. Both Petitioners and Respondents appear to interpret the opinion as having this requirement although Respondents phrase it a bit differently. Petitioners appear to read the district court's opinion as requiring a finding of unlicensed practice of law by this Court as to the parties and the transaction before an action for damages may be maintained. In other words, Petitioners interpret the district court's opinion as requiring a finding by this Court that Merrill Lynch and World Savings Bank engaged in the unlicensed practice of law when they prepared the documents for the Goldbergs and Ms. Forman and charged a separate fee for the preparation before a private cause of action may be maintained.

Respondents' interpretation is similar in that a specific finding is required but not necessarily as to the parties involved. As applied to this

case, Respondents argue that in order Petitioners to bring an action for damages, they would need a finding by this Court that a nonlawyer corporate lender engages in the unlicensed practice of law when the nonlawyer prepares various legal documents for a borrower and charges a separate fee for the preparation. All of the elements must be present in one opinion before a civil action may be maintained. Although Respondents' appear to argue that all that is required is a specific finding but not necessarily as to the parties involved in the civil suit, their reliance on *Gonzi v. Countrywide Home Loans, Inc.*, 271 Fed. Appx. 928, 2008 WL 835251 (11th Cir. Mar. 31, 2008) (unpublished) shows that their interpretation of the district court's opinion is the same as that of Petitioners', that a specific finding by this Court as to the parties and facts is required before an action claiming damages for the unlicensed practice of law may be brought. It is The Florida Bar's position that this interpretation of the district court's opinion is too restrictive and would deny a remedy to many individuals.

B. The District Court's Opinion Can Be Read To Require A Finding Of Unlicensed Practice Of Law In The Case Law In General In Order For One Claiming To Be Harmed By The Unlicensed Practice Of Law To Bring An Action.

Another interpretation of the district court's opinion, and one supported by The Florida Bar, is that a general finding that similar conduct by other nonlawyers constitutes the unlicensed practice of law is all that is

necessary for an action to be maintained, not a finding by this Court as to the specific case. As with other bodies of law, as long as there is precedent in the case law in general, an action for damages may proceed. The general finding may be in several cases, not one specific case. It will then be up to the trier of fact to tie the cases together and apply the general law to the specific facts before it. Therefore, if case law holds that the activity is the unlicensed practice of law, a party harmed by the unlicensed practice of law may maintain an action seeking remedies. Finding otherwise would leave many individuals harmed by the unlicensed practice of law without a means to seek redress through civil proceedings for the simple reason that not all unlicensed practice of law investigations result in cases brought before this Court.

This Court has delegated to The Florida Bar the "duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders." R. Reg. Fla. Bar 10-1.2. Chapter 10 of the Rules Regulating The Florida Bar sets forth the procedures for carrying out this duty. Among the procedures is The Florida Bar's authority to close cases not warranting further investigation and to close cases on the acceptance of a cease and desist affidavit. R. Reg. Fla. Bar 10-6.3 While The Florida Bar also has the

authority to file cases with this Court seeking injunctive relief or indirect criminal contempt, The Florida Bar is not limited to these remedies. R. Reg. Fla. Bar. 10-7.1 and 10-7.2. Thus, not all allegations of unlicensed practice of law, even if there is a finding of unlicensed practice of law, result in an action being brought before this Court. Therefore, a requirement that this Court must find the unlicensed practice of law in the specific matter in which the individual wishes to bring a civil action prior to the action being brought would deny a remedy to many individuals. Such a denial would be contrary to this Court's pronouncement in rule 10-7.1, Rules Regulating The Florida Bar that the grant of restitution in an unlicensed practice of law case brought by The Florida Bar shall not "preclude an individual from seeking redress through civil proceedings to recover fees or other damages." R. Reg. Fla. Bar 10-7.1(d)(3).

Not only would a requirement of a finding by this Court in the specific case deny a remedy to many individuals, it would put an extra burden on this Court. If it were a requirement that a finding by this Court was necessary, The Florida Bar would be compelled to file more actions with this Court so that a victim's civil remedies could be protected. Currently, the majority of unlicensed practice of law investigations are not brought before this Court. Most cases are resolved short of litigation.

However, if a finding were necessary, cases that would otherwise be concluded without litigation before this Court would be litigated. The increase could be substantial.

The confusion caused by the district court's opinion and the possibility that more cases will be brought before this Court is evident by a letter recently received by The Florida Bar. The letter is from Florida Bar members requesting "a written opinion that [a nonlawyer] committed the unlicensed practice of law in order for us to proceed against her pursuant to *Goldberg v. Merrill Lunch (sic) Credit Corporation*, 981 So. 2d 550 (Fla. 4th DCA 2008)." (A copy of the letter is attached hereto in Appendix "A." As the matter is confidential under The Florida Bar's rules, the identifying information has been redacted.) The Florida Bar responded that it was not authorized to render such an opinion and provided a complaint form to initiate an investigation. If the district court's opinion is interpreted to require a finding as to the parties before an action may be brought, The Florida Bar may feel obligated to file litigation with this Court in a matter that could otherwise be resolved with a cease and desist affidavit.

The Florida Bar's position that a finding in the specific case by this Court is not necessary is supported by the case law. All parties and the district court cite to *Vista Designs, Inc. v. Silverman, P.C.*, 774 So. 2d 884

(Fla. 4th DCA 2001) to support their argument or decision. The Silverman court held that the nonlawyer, Mr. Silverman, had engaged in the unlicensed practice of law and required the disgorgement of fees. The Florida Bar did not prosecute Mr. Silverman prior to the court's decision nor did this Court find that Mr. Silverman had engaged in the unlicensed practice of law. The Florida Bar did have an investigation on Mr. Silverman and closed the case after Mr. Silverman signed a cease and desist affidavit on October 16, 2000. Had suit by The Florida Bar and a finding by this Court been necessary, the district court's order could not have been entered.

Similarly, in *Buscemi v. Intachai*, 730 So. 2d 329 (Fla. 2d DCA 1999) The Florida Bar did not prosecute the nonlawyer and this Court did not make a finding before the district court held the nonlawyer, Mr. Buscemi, liable for damages as a result of giving negligent legal advice. As with Mr. Silverman, The Florida Bar did have an investigation on Mr. Buscemi which was closed with the signing of a cease and desist affidavit on June 17, 1997. Had suit by The Florida Bar and a finding by this Court been necessary, the victim in the case would have been left without a remedy and would have been unable to recover fees or damages.

Nor did The Florida Bar prosecute the nonlawyer in *Preferred Title Services, Inc. v. Seven Seas Resort Condominium, Inc.*, 458 So. 2d 884 (Fla.

5th DCA 1984) prior to the district court affirming the trial court's dismissal of the suit on the basis that the title insurance company was attempting to recover fees for activities that constituted the unlicensed practice of law. As The Florida Bar did not bring an action for unlicensed practice of law, this Court did not make a finding as to the parties or transaction. Again, had suit and a finding been necessary, the district court's order could not have been entered.

There are numerous cases not involving damages where a court other than this Court determined that the conduct was the unlicensed practice of law and took action. These cases support The Florida Bar's position that a general finding of unlicensed practice of law is all that is required to bring an action where unlicensed practice of law is an element.

The trial court in *Gemini Ventures of Tampa, Inc. v. Hamilton Engineering & Surveying, Inc.*, 784 So. 2d 1179 (Fla. 2d DCA 2001) was faced with the interpretation of a contract to determine whether it involved the unlicensed practice of law. The trial court interpreted the contract as contemplating the unlicensed practice of law and found it void and unenforceable. The district court interpreted the contract and disagreed. Neither The Florida Bar nor this Court were involved in the interpretation of

the contract. It was interpreted by two courts who came to two different conclusions.

A case from the Fourth District Court of Appeal applied prior case law from this Court to find that the conduct was not the practice of law. In *Oakland Consolidated Corporation v. Southern States Land Company*, 234 So. 2d 384 (Fla. 4th DCA 1970) the plaintiff brought an action to enforce the payment of a real estate commission. The defendant argued that the commission was the result of the unlicensed practice of law thereby voiding the contract and negating the payment. The trial court did not pass on the issue instead finding that at most the contract would have been voidable, not void. The Fourth District Court of Appeal looked to two prior decisions of this Court involving different facts and different parties to find that the conduct did not constitute the practice of law. As with the other cases, there was no prior action by The Florida Bar or this Court.

Perhaps the most common type of case where courts other than this Court have applied general unlicensed practice of law case law to determine the issue before the court is in the area of a corporation practicing law. Generally, the cases involve the question of whether an action can be brought or maintained by a corporation appearing *pro se*. See, *Richter v. Higdon Homes, Inc.*, 544 So. 2d 300 (Fla. 1st DCA 1989); *Punta Gorda*

Pines Development v. Slack Excavating, 468 So. 2d 438 (Fla. 2d DCA 1985); *Szteinbaum v. Kaes Invecciones Valores*, 476 So. 2d 247 (Fla. 3d DCA 1985); *Daytona MiGi Corporation v. Daytona Automotive Fiberglass, Inc.*, 417 So.2d 272 (Fla. 5th DCA 1982). None of the cases involved a suit in this Court prior to the lower court's action.

As amicus for the specific question asked by this Court, The Florida Bar is not taking a position on whether the unlicensed practice of law took place in this matter, in large part because The Florida Bar does not have the facts necessary to make this determination. The opinion of the district court is unclear and subject to various interpretations. Is a specific finding required or does a general finding suffice? If those claiming to have been harmed by persons engaging in the unlicensed practice of law were required to have a finding by this Court as to their case before an action for damages could be maintained, the existence of remedies would be very limited. This perhaps unintended result should be avoided and can be avoided if the district court's opinion is interpreted to require a general finding of unlicensed practice of law. The Florida Bar believes that this later interpretation is the correct interpretation and the one supported by case law.

II. WITH THE EXCEPTION OF AN ACTION SEEKING AN INJUNCTION PROHIBITING THE UNLICENSED PRACTICE OF LAW, ALL CIVIL REMEDIES, THE FILING OF A CRIMINAL COMPLAINT, AND THE FILING OF A COMPLAINT WITH THE FLORIDA BAR ARE AVAILABLE TO INDIVIDUALS CLAIMING TO BE HARMED BY THE UNLICENSED PRACTICE OF LAW.

As noted above, this Court has asked The Florida Bar to file an amicus brief in this matter "focusing on the existence and adequacy of remedies that may be available to those claiming to have been harmed by persons engaging in the unauthorized practice of law." It is the position of The Florida Bar that individuals seeking civil redress for the unlicensed practice of law have all civil remedies available in the common and statutory law with the exception of an action seeking an injunction to prohibit the unlicensed practice of law.¹ The individual may also file criminal charges against the nonlawyer and file a complaint with The Florida Bar. Whether these remedies are adequate will depend on the type of action brought and whether the defendant is able to pay any damages awarded. As this will vary from case to case and party to party, The Florida Bar cannot answer this question with any specificity. However, the existence of remedies is clear.

¹ In *Dade-Commonwealth Title Insurance Co. v. North Dade Bar Association, Inc.*, 152 So. 2d 723 (Fla. 1963) this Court was faced with the issue of a local bar association bringing suit to enjoin the unlicensed practice of law. This Court held that the local bar association was not authorized to bring suit seeking to enjoin the unlicensed practice of law. Only The Florida Bar is authorized to bring such a suit.

In arguing that a general finding of unlicensed practice of law is all that is necessary to maintain an action seeking civil damages, several cases were cited. Each case illustrates the existence of remedies that may be available to those claiming to have been harmed by the unlicensed practice of law. The remedies are those found in the general civil law.

Vista Designs, supra, involved a suit for legal fees. Mr. Silverman, an attorney licensed in a state other than Florida and therefore a nonlawyer, sued his former client for unpaid legal fees. R. Reg. Fla. Bar 10-2.1 (c) (defining nonlawyer as lawyers admitted in other jurisdictions). The client, Vista Designs, Inc., countersued seeking to void the contract as involving the unlicensed practice of law and the reimbursement of legal fees already paid to Mr. Silverman. The district court agreed with the client and remanded with direction to require the disgorgement of the fees. The civil remedies successfully pursued in this case sought to void a contract and disgorge the gains from the voided contract.

Buscemi, supra, was an action for negligence. The client sued Mr. Buscemi, a nonlawyer, alleging that he gave her incorrect legal advice in connection with a dissolution of marriage. The client relied upon the legal advice to her detriment. The jury awarded the client \$675,000.00 in damages. In upholding the verdict on appeal, the court noted that Mr.

Buscemi was subject to a standard of due care. The general case law regarding negligence was applied, the nonlawyer was found to be negligent, and the client was awarded damages.

Preferred Title Services, supra is comparable to Silverman in that the nonlawyer was seeking to collect fees. The court held that the nonlawyer was not entitled to the fees as the fees were for services which involved the unlicensed practice of law. Although not an action brought by someone claiming to be harmed by the unlicensed practice of law, it illustrates that general legal principles are applied in actions involving the unlicensed practice of law. Similarly, *Gemini Ventures*, supra involved voiding a contract which the trial court found contemplated the unlicensed practice of law.

Another case involving civil remedies available to those who have been harmed by the unlicensed practice of law is *Yanakakis v. Chandris*, 97 F.3d 448 (11th Cir. 1996). The genesis of the suit was a claim for tortious interference with contract. Mr. Yanakakis, an out-of-state attorney, was retained by Nikolas Miliarexis to bring suit against Chandris for injuries suffered on the job. A Florida law firm was later brought into the action. The client ultimately settled directly with his employer without the involvement of the out-of-state lawyer or the Florida law firm. This resulted

in an action for tortious interference with contract. A Motion for Summary Judgment was filed by the plaintiff. The client filed a cross-motion seeking to void the contract for legal services as the contract called for the unlicensed practice of law. Prior to reversing the judgment of the lower court and awarding judgment in favor of the client, the Federal court certified two questions to this Court as the court felt it was a matter of state law. The first question asked whether an out-of-state attorney engaged in the unlicensed practice of law by providing legal services in Florida thereby rendering the fee agreement void. This Court answered the question in the affirmative. *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1996). Again, this case involved an action to void a contract, a civil remedy, as the contract was based on the unlicensed practice of law.

While the examples given above are not exhaustive, they do show that remedies for those claiming to have been harmed by the unlicensed practice of law are available. Actions for negligence and arguments seeking to void a contract and for the disgorgement of fees have been brought and successfully maintained in Florida. Therefore, as found by this Court, "victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees and other damages [as] the civil courts have adequate resources and efficient procedures for resolving

such issues and enforcing their judgments." *The Florida Bar re: Amendments to Rules Regulating The Florida Bar (Proceedings Before a Referee)*, 685 So. 2d 1203 (Fla. 1996).

In addition to civil remedies, those claiming to have been harmed by someone engaging in the unlicensed practice of law can file a criminal complaint. Pursuant to Florida Statute §454.23 engaging in the unlicensed practice of law is a third degree felony. §454.23, Fla. Stat. (2006). Criminal charges are filed by the State Attorney's Office. The punishment can include an order of restitution to the victim. §775.089, Fla. Stat. (1999).

A victim of unlicensed practice of law may also file a complaint with The Florida Bar. As noted above, the complaints do not always result in litigation being brought before this Court. However, if litigation is filed, The Florida Bar may seek restitution for the complainant. R. Reg. Fla. Bar 10-7.1. Although restitution is available, the remedy is limited. Restitution can only be made to the complainant. *Id.* The victim is not always the individual to complain. For example, a judge seeing the unlicensed practice of law in the courtroom may file a complaint with The Florida Bar. While The Florida Bar attempts to have the victim file a complaint, this does not always occur. If litigation were brought against the nonlawyer based on the judge's complaint, restitution could not be awarded to the victim. If the

victim does file the complaint, The Florida Bar will seek reimbursement for any fees paid to the nonlawyer, a remedy for the individual claimed to be harmed by the unlicensed practice of law.

That remedies are available to individuals claiming to be harmed by persons engaging in the unlicensed practice of law is clear. The adequacy of the remedies will vary from case to case and party to party. However, if the burden to bring or maintain an action is too high, adequate remedies will all but cease to exist.

CONCLUSION

As this brief is being filed at the request of this Court, The Florida Bar is not seeking specific relief. However, it is the position of The Florida Bar that adequate remedies exist for those claiming to have been harmed by persons engaging in the unlicensed practice of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief was formatted in 14-point Times New Roman font in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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