IN THE

Supreme Court of Florida

Case No. SC08-1360
District Court Case Nos. 4D07-1490 & 4D07-2436

HAROLD GOLDBERG, ET AL.,

Petitioners,

vs.

MERRILL LYNCH CREDIT CORPORATION, ET AL.,

Respondents.

On Review from the Fourth District Court of Appeal

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Background.

This review proceeding arises from a decision of the Fourth District Court of Appeal in Goldberg v. Merrill Lynch Credit Corp., 981 So. 2d 550 (Fla. 4th DCA 2008). The Fourth District posed the issue and its holding as follows:

> *When may a party file suit to recover fees paid for the alleged unauthorized practice of law*-that is the question.
>
> Our answer: *Only after the Supreme Court of Florida decides the conduct constitutes the unauthorized practice of law.*

Id. at 551 (emphasis in original).

The Fourth District explained that "the plaintiffs are pursuing an affirmative claim using the defendants' alleged unauthorized practice of law in preparing documents as the basis." Id. at 552. Specifically at issue are form residential mortgage documents in mortgage lending transactions that Plaintiffs vaguely described below as documents "related to the issuance of mortgage loans. . . ." (Goldberg R1.1; Forman R1.1).[1]

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[1] All citations to the record shall be in the form of "Ry.z," where "y" indicates the volume number and "z" indicates the page number. The record for Forman v. World Savings Bank, FSB, Case No. 4D07-2436 below, will be referred to as "Forman Ry.z," and the record for Goldberg v. Merrill Lynch Credit Corporation, Case No. 4D07-1490 below, will be referred to as "Goldberg Ry.z." All emphasis is supplied unless otherwise indicated.

The Fourth District affirmed the trial court's orders dismissing Plaintiffs' claims. Id. at 553. It explained that "[n]o case has approved of using the alleged unauthorized practice of law as a sword prior to a determination by the Supreme Court of Florida that the services actually constitute the unauthorized practice of law." Id. at 552.

The Fourth District wrote that "[r]equiring a supreme court determination on the unauthorized practice of law as a prerequisite for a suit to recover fees and costs makes sense, practically and technically. Practically, it insures consistency in what conduct constitutes the unauthorized practice of law. To allow other courts or juries to randomly make the decision would lead to inconsistent results on the same set of facts. . . . Technically, it reinforces the exclusive jurisdiction of the supreme court over the unauthorized practice of law." Id.

Both the Fourth District and the respective trial courts necessarily recognized that the conduct at issue in this lawsuit has never been prosecuted by The Florida Bar, and this Court has never made a determination as to this conduct, whether by these Defendants or any other entities. And Plaintiff Amy Sue Forman ("Forman") conceded below that there are no cases in Florida holding that a lender's preparation of documents memorializing its own mortgage constitutes the unauthorized practice of law. (Forman R3.41).

The Eleventh Circuit Court of Appeals has reached a conclusion similar to that reached by the Fourth District in two of four nearly identical cases filed at the same time in Broward and Palm Beach Counties (the instant cases are the other two). See Gonczi v. Countrywide Home Loans, Inc., 271 Fed. Appx. 928, 2008 WL 835251 (11th Cir. Mar. 31, 2008) (unpublished). It affirmed the dismissal of the plaintiffs' claims based upon this Court's exclusive jurisdiction to determine whether certain conduct constitutes the unlicensed practice of law.

After the Fourth District denied rehearing, rehearing en banc, clarification, and certification, Plaintiffs petitioned this Court to review the decision. On November 18, 2008, this Court "accept[ed] jurisdiction to consider the decision rendered by the Fourth District Court of Appeal as expressly construing a provision of the Florida Constitution and in express conflict with Florida Bar re Amendments to Rules Regulating the Florida Bar, 685 So. 2d 1203 (Fla. 1996), and Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995)."

B. Statement of Facts.

In her complaint, Plaintiff Forman alleged that, as part of the refinancing of a residential mortgage loan, World Savings Bank, FSB ("World Savings") charged a fee of $50 for the preparation of loan and mortgage documents. (Forman R1.1).

Plaintiffs Harold and Arlene Goldberg (the "Goldbergs") similarly alleged that Merrill Lynch Credit Corporation ("MLCC") charged a fee of $150 for the preparation of loan and mortgage documents. (Goldberg R1.1).

Forman and the Goldbergs (collectively, "Plaintiffs") each contend that the document preparation fees were prohibited by Florida law because, once a lender charges for filling in form loan documents, an otherwise permissible transaction is transformed into the unauthorized practice of law—they do not contend that it is the unauthorized practice of law if no fee is charged. (Forman R1.1; Goldberg R1.1; see also Forman R3.83-84 (transcript of hearing on World Savings' motion to dismiss)).

Plaintiffs each asserted two common law claims—unjust enrichment and money had and received—both of which were wholly dependent upon a finding that World Savings and MLCC (collectively referred to as "the Lenders") engaged in the unauthorized practice of law when they charged a fee for completing form residential mortgage documents in their own mortgage lending transaction. (Forman R1.3-4; Goldberg R1.3-4).

Plaintiffs do not allege that (1) the Lenders told them that the documents were prepared by an attorney, or that they believed that to be the case, (2) the Lenders told them that they were acting as Plaintiffs' attorney, or even for their

benefit, or that Plaintiffs believed that to be the case, or (3) the Lenders prevented Plaintiffs from retaining their own lawyer.

The Lenders moved to dismiss both complaints on the grounds that: (1) the trial court lacked subject matter jurisdiction because this Court has exclusive jurisdiction to decide whether particular conduct constitutes the unauthorized practice of law, (2) the conduct here is not the unauthorized practice of law under Florida's "pro se" exception, (3) Plaintiffs' claims to recover the fees charged are precluded by the voluntary payment doctrine, and, (4) with respect to Forman's claims against World Savings, the trial court lacked subject matter jurisdiction because the claims are preempted by federal law. (Forman R1.13-20, 23-24; Goldberg R1.11-15, 19-20).

After hearing argument, both trial courts dismissed Plaintiffs' complaints, holding that this Court has exclusive jurisdiction to determine whether the alleged conduct, if proven, constitutes the unauthorized practice of law. (Forman R2.316-18; Goldberg R1.73-76). Plaintiffs opted to stand on their original complaints and the trial courts then each entered final judgments in the Lenders' favor. (Forman R2.319; Goldberg R1.81).

SUMMARY OF THE ARGUMENT

The Fourth District properly analyzed and enforced this Court's exclusive jurisdiction, as did the Eleventh Circuit Court of Appeals in a virtually identical

case that proceeded on a parallel track. Plaintiffs sought to have trial courts across Florida invade this Court's exclusive jurisdiction and to determine, as an issue of first impression, whether the Lenders' conduct was the unauthorized practice of law and, if so, whether a public policy exception should apply such that the conduct should nonetheless be permitted. Both the Fourth District and the Eleventh Circuit recognized that only this Court has jurisdiction to make the threshold determination in the first instance.

Plaintiffs cast a wide net here in explaining the import of the Fourth District's decision (Plaintiffs do not even cite the Eleventh Circuit opinion). Plaintiffs set forth a scenario in which no plaintiff would have a private cause of action for damages unless and until this Court determines that a particular defendant's conduct constitutes the unlicensed practice of law. They see unfairness and inefficiencies in such a process.

As will be shown below, Florida law certainly supports that process as being proper. But this Court need not embrace such a process to approve the Fourth District's conclusion in this case. The issue here is not whether a private right of action exists in favor of victims of the unauthorized practice of law. Instead, the issue is whether this Court has exclusive jurisdiction to determine, as a matter of first impression, whether certain specific conduct constitutes the unauthorized practice of law and, if so, whether any public policy exceptions apply.

Let us be clear: This Court has held that a direct action can be brought in a trial court for damages after this Court itself has determined that conduct constitutes the unauthorized practice of law. Florida Bar v. Warren, 661 So. 2d 304, 305 (Fla. 1995). No case holds, however, that a private party has standing to bring claims in instances where this Court has never found the conduct in question to be the unauthorized practice of law.

To be sure, the conduct at issue in Plaintiffs' lawsuit has not been prosecuted by The Florida Bar in this case or any previous case, and this Court has never made a determination as to such conduct, whether by these Defendants or any other entities. Under these circumstances, the issue is not whether a trial court has jurisdiction to apply a prior determination by this Court that certain conduct constitutes the unlicensed practice of law. Rather, the issue is whether a trial court has jurisdiction to determine in the first instance whether certain conduct constitutes the unlicensed practice of law. It does not.

At bottom, the Florida Constitution grants this Court "exclusive jurisdiction" to regulate the practice of law. In defining the scope of its authority, this Court has, in turn, expressly held that its exclusive jurisdiction includes the power to define what is or is not the unauthorized practice of law. This Court has also provided a detailed process, as set forth in Chapter 10 of the Rules Regulating the Florida Bar, for those seeking a determination as to whether certain conduct is the

unauthorized practice of law. With a factual record developed by that process to examine, this Court then makes two distinct inquiries. This Court not only determines whether the activity in question constitutes the practice of law, but also decides (if necessary) whether the activity, even if found to constitute the practice of law, should nonetheless be permitted. Plaintiffs, however, refused to avail themselves of this Court's process.

Under Plaintiffs' theory, properly rejected by both the Fourth District and the Eleventh Circuit, a plaintiff could maintain an action merely by claiming that a defendant engaged in the unauthorized practice of law, even if this Court had never decided in the first instance whether the conduct was, in fact, prohibited. The trial court in such a case would then have to step into the shoes of both this Court and the Florida Bar to make a threshold determination, as a matter of first impression, of whether the alleged conduct constitutes the unauthorized practice of law and, if so, whether a public policy exception should be authorized. That would foster confusion and chaos. Both of those determinations are exclusively reserved for this Court.

Moreover, beyond the jurisdictional issue, the Lenders raised other grounds to support dismissal of Plaintiffs' claims in both the trial court and in the Fourth District. Plaintiffs have chosen to preemptively brief those issues in this Court. Although the record is not yet developed to allow this Court to make a

determination as to whether the conduct at issue could constitute the unlicensed practice of law (that is what the neutral factual record developed under Chapter 10 of the Rules Regulating the Florida Bar would provide), the record already supports approval of the Fourth District's conclusion on other grounds under the "tipsy coachman" doctrine. Specifically, with regard to World Savings, controlling federal law expressly preempts the claims brought against it. Further, as to both Lenders, the "pro se" exception and the voluntary payment doctrine bar Plaintiffs' claims.

ARGUMENT

I. STANDARD OF REVIEW

This is a question of law subject to the de novo standard of review. See D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003) ("The standard of review for the pure questions of law before us is de novo.").

II. THIS COURT HAS EXCLUSIVE JURISDICTION TO DECIDE WHETHER PARTICULAR CONDUCT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

This Court has exclusive jurisdiction to determine whether particular conduct constitutes the unlicensed practice of law in the first instance. No private civil action based upon such conduct may be prosecuted in the absence of such a determination by this Court. Nothing in Florida Bar re Amendments to Rules

Regulating the Florida Bar, 685 So. 2d 1203 (Fla. 1996), Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995), or any other case changes that fact.

Here, the conduct at issue in Plaintiffs' lawsuit has not been prosecuted by The Florida Bar and this Court has never made a determination as to such conduct, as to these particular Defendants or any other entities. Plaintiffs are not in the shoes of a party simply seeking to have a trial court apply this Court's existing precedent on the unauthorized practice of law as to one entity to another entity engaged in the same conduct. Whether or not this Court would allow such subsequent actions to proceed in the trial court, the Fourth District's conclusion must be approved here, where no threshold determination has ever been made by this Court that the conduct at issue constitutes the unlicensed practice of law.

A. The Florida Constitution Grants This Court Exclusive Jurisdiction To Determine Whether Conduct Is The Unauthorized Practice Of Law.

1. This Court's precedent requires that the constitutional grant of exclusive jurisdiction be given its full meaning.

Article V, Section 15 of the Florida Constitution states: "The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." In applying this jurisdictional mandate, this Court has recognized that this exclusive grant of authority to regulate the practice of law includes the singular "power to define the

practice of law." Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980); see also Dade-Commonwealth Title Ins. Co. v. N. Dade Bar Ass'n, Inc., 152 So. 2d 723, 724-25 (Fla. 1963) (holding that the constitutional grant of "exclusive" jurisdiction must be given its "full meaning"); Florida Bar v. Catarcio, 709 So. 2d 96, 99 n.1 (Fla. 1998) (quoting In re Losee, 195 B.R. 785, 786 (M.D. Fla. Bankr. 1996), for the proposition that the determination of the "'unauthorized practice of law is a question which must be resolved by the Supreme Court of this State upon the recommendation of the Florida Bar and not by this Court'").

Moses' recognition of this Court's exclusive jurisdiction to define the practice of law stems directly from the Florida Constitution and the Court's prior decisions such as Dade-Commonwealth. The Fourth District correctly examined that case as follows:

> And, when asked to address an issue similar to the one in this case, the supreme court affirmed the dismissal of a complaint and expressly guarded its exclusive jurisdiction. Dade-Commonwealth, 152 So.2d at 724 (quoting Art. V, § 15, Fla. Const.). In that case, the North Dade Bar Association sued title companies, alleging that they were preparing legal documents. The bar association sought a declaration from the trial court that the defendants were involved in the unauthorized practice of law.
>
> The chancellor held that neither the bar association nor an individual had standing to bring such a suit because the supreme court had exclusive jurisdiction of the issue. The Third District reversed, holding that the supreme court's exclusive jurisdiction to punish for the unauthorized practice of law did not preclude other courts from ruling on this issue. Our supreme court then reversed and held that the bar association could not bring the suit. To hold otherwise would

> require the court to "ignore the word 'exclusive' in the relevant Constitutional provision." *Id.* at 725. This it refused to do, and so do we.

981 So. 2d at 553.

Numerous other decisions have followed this precedent in recognizing that only this Court has jurisdiction to pass on whether particular conduct constitutes the unauthorized practice of law. See, e.g., Sigma Fin. Corp. v. Inv. Loss Recovery Servs., Inc., 673 So. 2d 572, 573 (Fla. 4th DCA 1996); Heilman v. Suburban Coastal Corp., 506 So. 2d 1088, 1089 (Fla. 4th DCA 1987); Metro. Dade County v. Dade County Employees, Local 1363, AFSCME, 376 So. 2d 1206, 1209 (Fla. 1st DCA 1979); In re Losee, 195 B.R. at 786.

These cases do not admit of the distinction Plaintiffs attempt to force upon them. Specifically, Plaintiffs' suggest that, because those cases dealt with actions to enjoin the unauthorized practice of law, rather than actions for damages, all the pronouncements in those decisions regarding this Court's exclusive jurisdiction apply only to actions for injunctions. The Eleventh Circuit made short work of this exact argument:

> Plaintiffs seek to distinguish Dade-Commonwealth and its progeny by observing that injunctive relief is different than the disgorgement relief sought in their complaint. Injunctive relief is a form of equitable relief other than the equitable relief sought by Plaintiffs in this case. What we fail to see is how that distinction supports a different result. Imposing an "injunctive relief" limitation on the exclusivity of the Supreme Court's jurisdiction over these matters is unsupported in the caselaw and would foster the very "confusion, if not chaos" from

> independent proceedings that the Supreme Court eschewed in Dade-Commonwealth.

271 Fed. Appx. at 930.

The source of this Court's exclusive jurisdiction—the Florida Constitution—does not contain a proviso whereby its use of the term "exclusive" is limited to actions where injunctions are sought, rather than damages or other relief. See Art. V, § 15, Fla. Const.

Plaintiffs' attempts to compartmentalize this Court's authority over unlicensed practice of law determinations is unavailing. First, the implication that criminal law prosecutions for the unlicensed practice of law may proceed without regard to this Court's exclusive authority to define the unlicensed practice of law, see In. Br. at 12, is wrong. Even in the criminal context, although distinguishable in the sense that the separation of powers doctrine is at issue, see State v. Palmer, 791 So. 2d 1181, 1184-85 (Fla. 1st DCA 2001), courts recognize that a defendant can be criminally liable for the unauthorized practice of law only if this Court has already established that the particular conduct at issue constitutes the unauthorized practice of law. See, e.g., State v. Foster, 674 So. 2d 747, 749 (Fla. 1st DCA 1996) (relying on the holding in Florida Bar v. Riccardi, 304 So. 2d 444, 445 (Fla. 1974), that the questioning of witnesses in a deposition constitutes the unauthorized practice of law).

Second, the analogy to battery or wrongful death actions in cases where no criminal prosecution has occurred, see In. Br. at 12, also is misplaced. Unlike those situations where parallel civil and criminal causes of action exist and the elements of the causes of action are well established, the very core issue in an unauthorized practice of law proceeding is whether the conduct at issue constitutes the unlicensed practice of law and, if so, whether the conduct justifies a public policy exception. That determination can only be made by this Court, as explained in section I.A.2. below, after an analysis on a developed factual record.

So, this Court has responsibility for defining the critical element of any action for the unlicensed practice of law, criminal, civil, or administrative. That Constitutional truth sets this case apart from Plaintiffs' attempted analogies.

Simply put, this Court alone has jurisdiction to decide, as a matter of first impression, whether the Lenders' alleged conduct constitutes the unauthorized practice of law.

2. Public policy mandates that only this Court has jurisdiction to define the practice of law and to authorize the practice of law by lay persons.

The unmitigated line of authority recognizing this Court's exclusive jurisdiction is not detached from reason. In fact, there are strong public policy reasons animating the conclusion that there should be a sole arbiter to make the threshold unauthorized practice of law determinations in Florida. As recognized in

Dade Commonwealth, 152 So. 2d at 726-27, "confusion, if not chaos" could result from inconsistent court-by-court decisions in various courts throughout Florida.

As sole arbiter, this Court can maintain consistency and avoid chaos. To that end, this Court has promulgated extensive rules and processes, embodied in Chapter 10 of the Rules Regulating the Florida Bar, and has created standing bodies devoted to analyzing unauthorized practice of law issues. See R. Regulating Fla. Bar. Ch. 10; see also Metro. Dade County, 376 So. 2d at 1209 & n.4 (acknowledging this Court's "greater resources to determine whether particular activities constitute the unlawful practice of law" and that this Court "typically operates with the benefit of assistance by The Florida Bar and its Unauthorized Practice of Law Committees"). Through these efforts, this Court has mustered the substantial resources necessary to build a well-developed neutral factual record before asserting its constitutional decision-making authority.

Thereafter, with reports, recommendations, and factual findings in hand, this Court makes two distinct inquiries. First, this Court determines whether the activity in question constitutes the practice of law. Second, this Court decides whether the activity, even if found to constitute the practice of law, should nonetheless be permitted. See Moses, 380 So. 2d at 417 ("The unauthorized practice of law and the practice of law by non-lawyers are not synonymous.").

In the context of this two-part analysis, this Court has recognized not only that it has the exclusive power to define the practice of law, but also that it can authorize exceptions. As this Court in Moses stated: "Implicit in the power to define the practice of law, regulate those who may so practice and prohibit the unauthorized practice of law is the ability to authorize the practice of law by lay representatives." Id.

In exercising this discretionary power to allow laypersons to engage in the practice of law, this Court has, over the years, created exceptions under which non-lawyers are permitted to perform activities that might otherwise constitute the unauthorized practice of law. An important example is the "pro se" exception, discussed in detail in section III.B. below, whereby this Court has allowed unlicensed practitioners to prepare legal documents for themselves. The contours of that exception must necessarily be for this Court to decide, not to be left to trial courts throughout Florida.

As another example, in Florida Bar in re Advisory Opinion—Nonlawyer Preparation of Notice to Owner & Notice to Contractor, 544 So. 2d 1013, 1016 (Fla. 1989), after weighing the purposes behind the prohibition against the unauthorized practice of law, this Court concluded that nonlawyers may communicate with customers and prepare notice to owner and notice to contractor forms under the mechanics' lien laws.

This Court also determined that non-lawyer "property managers are . . . authorized to complete, sign and file complaints for eviction and motions for default and to obtain final judgments and writs of possession on behalf of landlords in uncontested residential evictions for nonpayment of rent." Florida Bar in re Advisory Opinion—Nonlawyer Preparation of & Representation of Landlord in Uncontested Residential Evictions, 605 So. 2d 868, 871 (Fla. 1992); see also Florida Bar in re Advisory Opinion—Nonlawyer Preparation of Residential Leases Up to One Year in Duration, 602 So. 2d 914, 916 (Fla. 1992) (permitting non-lawyers to complete form lease agreements).

If these determinations did not rest exclusively with this Court, various courts throughout Florida would, based on the skill of counsel, the resources of the parties, or for other unknown reasons, invariably come to different and possibly conflicting conclusions as to whether a particular activity constitutes the practice of law and, if so, whether the activity should nonetheless be permitted on public policy grounds.

Thus, under Plaintiffs' view, a defendant performing the same conduct throughout the state might be engaging in the unauthorized practice of law in one part of Florida, but not in another. Likewise, one defendant could prevail at trial while another suffers a defeat, thereby creating the bizarre situation where, for example, one lender could charge document preparation fees and another could

not. This anomalous result is exactly what the framers of Florida's Constitution sought to avoid by vesting this Court with "exclusive jurisdiction" to regulate the practice of law.

Notably, this Court confronted an analogous situation in United Services Automobile Ass'n v. Goodman, Case No SC01-1700 (Fla. Apr. 19, 2002). There, the Court granted an All Writs petition and directed the vacation of a series of Orders entered by a trial court addressed to insurance company staff counsel. Those trial courts Orders attempted to regulate the way certain attorneys practiced in their insurance defense cases in one local jurisdiction. In quashing the Orders, this Court wrote:

> We grant the writ and direct that Judge Siegel vacate each of the orders prohibiting defense counsel who are employed as full-time insurance company staff counsel from using their individual firm names in pleadings and correspondence, or requiring insurance company staff counsel to disclose their insurance company affiliation in filing pleadings and other papers in Division 27 litigation over which Judge Siegel presides. We determine that these prohibitions encroach upon this Court's ultimate jurisdiction to adopt rules for the courts, see article V, section 2(a), specifically Rules of Judicial Administration, Rules of Civil Procedure, and Rules Regulating The Florida Bar.

Goodman, Case No SC01-1700 (Fla. Apr. 19, 2002) (Order granting All Writs petition). In the same way, local orders determining what is and is not the practice of law would encroach upon this Court's exclusive jurisdiction.

It remains only to note that out-of-state precedent from other state supreme courts is in accord with existing Florida jurisprudence. See, e.g., Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602, 607 (Ind. 2007); King v. First Capital Fin. Servs. Corp., 828 N.E.2d 1155, 1163-64 (Ill. 2005); Dressel v. Ameribank, 664 N.W.2d 151, 157-58 (Mich. 2003); Perkins v. CTX Mortgage Co., 969 P.2d 93, 99-100 (Wash. 1999). Cf. Am. Abstract & Title Co. v. Rice, 186 S.W.3d 705 (Ark. 2004) (determining that, under Arkansas law, Arkansas Supreme Court Committee on the Unauthorized Practice of Law did not have exclusive jurisdiction over unlicensed practice of law determinations); Eisel v. Midwest BankCentre, 230 S.W.3d 335, 338 (Mo. 2007) (holding that state statutory law precluded lender from charging document preparation fees), superseded by Mo. Rev. Stat. § 484.025 (2005) (expressly permitting lenders to charge document preparation fees).

B. Neither Florida Bar re Amendments to Rules Regulating the Florida Bar, 685 So. 2d 1203 (Fla. 1996), Nor Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995) Supports Plaintiffs' Arguments.

In the Order granting review, this Court expressly referenced two cases: Florida Bar re Amendments to Rules Regulating the Florida Bar, 685 So. 2d 1203 (Fla. 1996), and Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995). These two cases are entirely consistent with the Fourth District's decision and with this

Court's exclusive jurisdiction to decide whether certain conduct is the unauthorized practice of law.

Florida Bar re Amendments does not support Plaintiffs' position. At issue in Florida Bar re Amendments was whether the Rules Regulating the Florida Bar should be amended to permit this Court to order restitution to a complainant in a Bar proceeding. 685 So. 2d at 1203. This Court determined that court-ordered restitution was not necessary due to existing remedies and, therefore, disapproved the amendment.[2] Id. In making its decision, this Court stated:

> In [Florida Bar v.] Warren, [661 So. 2d 304 (Fla. 1995),] we stated that those aggrieved by an unlicensed practitioner's misconduct may seek redress through civil proceedings. For instance, victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees and other damages. The civil courts have adequate resources and efficient procedures for resolving such issues and enforcing their judgments.

Florida Bar re Amendments, 685 So. 2d at 1203 (footnote omitted).

Reading this decision in the light of existing precedent and the Florida Constitution, the decision can only be read as reaffirming this Court's decision in Warren, in which this Court authorized civil proceedings after there had been an

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[2] In a subsequent amendment, this Court authorized the referee to recommend that the Court order a respondent to pay restitution. See Amendment to the Rules Regulating The Florida Bar, 875 So. 2d 448 (Fla. 2004).

express finding that the conduct at issue constituted the unauthorized practice of law.

Indeed, a review of Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995) confirms that this Court was not attempting to depart from decades of established precedent in a decision where its exclusive jurisdiction was only peripherally related to the issue before the Court. In Warren, this Court began by noting that, in its prior decision (which was the result of a petition filed by the Florida Bar), it enjoined the respondent from engaging in the unauthorized practice of law. 661 So. 2d at 305. With a prior determination regarding the respondent's conduct having already been made, this Court authorized private suits by those damaged by the respondent's actions. Id.

Thus, if a defendant is alleged to have engaged in conduct that has already been determined by this Court to be the unauthorized practice of law, an aggrieved plaintiff can seek redress through a direct action. In such an action, the trial court's only function would be to determine whether the defendant did, in fact, both lack a license to practice law and engage in conduct specifically prohibited by this Court in its threshold determination under its exclusive jurisdiction.

To escape the only logical interpretation of the Florida Bar re Amendments decision, Plaintiffs ask this Court to make a Herculean leap based on this Court's use of the word "allegedly" in the one sentence they grasp for support. In

particular, Plaintiffs assert that, by using the term "allegedly" to modify "unlicensed practitioner," this Court must have intended to let trial courts decide, as a matter of first impression, whether conduct is the unauthorized practice of law. Florida Bar re Amendments, 685 So. 2d at 1203. This argument, however, ignores both established law and simple rules of grammatical construction.

The Florida Bar re Amendments decision used the word "allegedly" to modify "unlicensed practitioner," not to modify "the unlicensed practice of law," as Plaintiffs would like this Court to believe. Accordingly, the decision accords with the trial court's limited function of deciding whether, as a factual matter, the defendant was engaging in conduct already determined by this Court to constitute the unauthorized practice of law.

Further, even if this Court had used the term "allegedly" to modify "the unlicensed practice of law," this Court would have to conclude that it intended to abandon its Constitutional authority and overturn, sub silentio, decades of precedent. This Court has expressly stated that it does not make such drastic reversals sub silentio. Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002).

In fact, the decision on review is fully consistent with this Court's precedents. The Fourth District never says that victims of the unlicensed practice of law are not free to sue the allegedly unlicensed practitioner directly to recover fees. Instead, it embraces that fact: "While we agree that the Rule provides for

such claims, we hold that the claims must await a decision by the Supreme Court of Florida as to whether the conduct constitutes the unauthorized practice of law." 981 So. 2d at 551. At the same time, the Fourth District's decision also maintains consistency with longstanding precedent and respects this Court's exclusive jurisdiction to determine what conduct constitutes the unauthorized practice of law.

Whether this Court would insist that a prior determination as to the unlicensed practice of law be (1) specific to an individual defendant (which Florida law currently supports), or (2) simply a general pronouncement as to particular conduct, the Fourth District's decision should be approved. That is because this Court has never made a previous determination, whether specific or general, as to the conduct at issue here.

C. The Other Authorities Relied On By Plaintiffs Are Consistent With This Court's Exclusive Jurisdiction.

Plaintiffs also assert that Rule 10-7.1(d)(3) of the Rules Regulating the Florida Bar supports their argument. Plaintiffs are wrong. Rule 10-7.1 governs the procedure for unauthorized practice of law proceedings brought in this Court. Subsection (d)(3) of that Rule grants the referee authority to recommend that this Court order the respondent to pay restitution to the complainant. Within that provision, the Rule states: "Nothing in this section shall preclude an individual from seeking redress through civil proceedings to recover fees or other damages." R. Regulating Fla. Bar. 10-7.1(d)(3).

This provision, appearing in a subsection of a Rule outlining the referee's authority to recommend restitution to an aggrieved party simply assures this remedy does not preclude a separate suit for damages if this Court makes a determination that the unlicensed practice of law occurred. It was plainly not meant to, nor could it, displace the Florida Constitution and the long line of precedent prescribing the scope of this Court's constitutionally-granted exclusive jurisdiction. Instead, consistent with Warren, this Rule merely confirms that, where this Court has declared conduct to be the unauthorized practice of law, a plaintiff can seek redress in a civil proceeding, and Rule 10-7.1(d)(3) will not stand in the way of recovering damages.

Finally, Plaintiffs say that "[s]ince 1996, district courts have also recognized claims for restitution of fees for unlicensed practice." In. Br. at 9. They cite only one case, Vista Designs, Inc. v. Silverman, 774 So. 2d 884, 885 (Fla. 4th DCA 2001), for this sweeping statement. Of course, the Fourth District itself did not find its earlier case to be a hurdle to reaching the correct decision that is on review here. See 981 So. 2d at 552. Neither should this Court.

At the outset, Vista Designs never addressed the issue of whether the trial court lacked jurisdiction over the parties' claims. More importantly, Vista Designs did not even address the key issue in this review proceeding, which is whether a trial court can determine as a matter of first impression whether certain conduct

constitutes the unauthorized practice of law. In particular, Vista Designs alleged that Silverman agreed to be its lawyer, that he was unlicensed, and that he engaged in conduct that this Court had already found to be the unauthorized practice of law, namely engaging in active litigation in Florida on behalf of a client without a license to practice law in Florida. See, e.g., Florida Bar v. Davide, 702 So. 2d 184, 184 (Fla. 1997) (preparation of complaint for third-party was the unauthorized practice of law); Florida Bar v. Miravalle, 761 So. 2d 1049, 1051 (Fla. 2000) (performing legal research for third-party was the unauthorized practice of law); Florida Bar v. Riccardi, 304 So. 2d 444, 445 (Fla. 1974) (taking of deposition for third-party was the unauthorized practice of law).

Thus, the Vista Designs decision, which involved only a factual dispute over whether the defendant engaged in conduct that had previously been determined by this Court to constitute the unauthorized practice of law (i.e., drafting complaints for third-parties, taking depositions), does not run afoul of the this Court's exclusive jurisdiction. Here, however, it was conceded below that there are no cases in Florida holding that a lenders' preparation of documents memorializing its own mortgage constitutes the unauthorized practice of law. (Forman R3.41). Accordingly, where the issue is whether, as a matter of first impression, the Lenders' conduct constitutes the unauthorized practice of law, the case falls squarely into this Court's exclusive jurisdiction.

III. THERE ARE NUMEROUS ALTERNATIVE REASONS WHY PLAINTIFFS ARE NOT ENTITLED TO RELIEF.

The Lenders raised the following three grounds to support dismissal of Plaintiffs' claims in both the trial court and in the Fourth District. Plaintiffs have preemptively briefed these issues. Despite Plaintiffs' arguments to the contrary, the motion-to-dismiss record already supports approval of the Fourth District's conclusion on other grounds under the "tipsy coachman" doctrine. See Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999).

In contrast, the record is not yet factually developed so as to allow this Court to make an ultimate determination as to whether the conduct at issue actually could constitute the unlicensed practice of law and, even if the Court were to determine that it could, whether a public policy exception is warranted. Indeed, that is what the rules and processes embodied in Chapter 10 of the Rules Regulating the Florida Bar would do, by allowing the development of a neutral factual record with input from multiple sources of information.

In such a proceeding, the Lenders would be able to offer evidence, for example, as to whether (1) the Lenders ever actually allow unlicensed individuals to prepare deeds, as alleged, (2) the forms used in these transactions are customary and consistent with federal law, (3) the use of the forms is often mandated by federal agencies; and (4) the benefit to the public of this conduct exceeds any risk to the public. The Lenders would also offer evidence as to what tasks and costs

might be included in the document preparation fee (e.g. printing, paper, photocopying, computer usage) so that any decision would be based on fact, rather than merely untested allegations in a complaint. Further, Plaintiffs would be obligated to specifically identify the documents at issue. At the initial pleadings stage, these documents have only been vaguely identified as documents "related to the issuance of mortgage loans. . . ." (Goldberg R1.1; Forman R1.1). That evidence has not been developed yet, on this motion-to-dismiss record. Many of Plaintiffs' allegations are sharply disputed. For instance, the Lenders contend that no deeds were prepared in these refinance transactions.

And, finally, interested third parties could participate in the proceeding. For instance, not only do the federal laws and regulations applicable to federal savings and loans preempt the claims here, as explained below, but the National Bank Act likewise preempts these claims against banks governed by that Act. See, e.g., Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (explaining preemptive effect of National Bank Act).

A. Plaintiff Forman's Claims Are Preempted By Federal Law.

Even if the trial court had jurisdiction under Florida law, the court would still lack jurisdiction over Plaintiff Forman's claims because those claims are preempted by federal law (this argument is limited to the claims that were appealed in Case No. 4D07-2436 below).

World Savings is a federal savings bank chartered under the federal Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq. As such, World Savings is regulated by the Office of Thrift Supervision ("OTS"). See Turner v. First Union Nat'l Bank, 740 A.2d 1081, 1088 n.2 (N.J. 1999).

Pursuant to its authority under HOLA, the OTS has issued comprehensive and binding federal regulations that, pursuant to the Supremacy Clause of the United States Constitution, preempt Forman's claims and, therefore, the trial court lacked subject matter jurisdiction. See Florida Bar Re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1184 (Fla. 1997) (a federal agency may preempt this Court's authority to regulate the unauthorized practice of law); Boca Burger, Inc. v. Forum, 912 So. 2d 561, 568 (Fla. 2005) ("the issue of federal preemption is a question of subject matter jurisdiction").

Specifically, regulations issued by OTS state that all loan-related fees are exclusively regulated by the OTS, and any attempt by states to regulate the charging of such fees, whether by statute or common law, is expressly preempted. See 12 C.F.R. § 560.2; (Forman R1.37-38 (OTS Amicus Curie Brief, submitted in

Jenkins v. Concorde Acceptance Corp., No. 02-2738 (Ill. App. Ct.) (hereinafter, the "OTS Brief"))).[3]

Through HOLA, Congress has afforded OTS uniquely broad preemptive powers to carry out its regulatory charge. 12 U.S.C. §§ 1462a & 1463(a)(2); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 160-67 (1982). Unlike many other areas where state and federal laws intersect, OTS's exceptionally broad preemptive powers engender a presumption in favor of federal preemption when construing the preemptive reach of OTS regulations, and any doubt over whether a state law has been preempted is resolved in favor of preemption. Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008); Crespo v. WFS Financial, Inc., 580 F. Supp. 2d 614 (N.D. Ohio 2008) (quoting OTS statement that when analyzing whether HOLA preempts a particular state law, "[a]ny doubt should be resolved in favor of preemption." 61 Fed. Reg. 50951, 50966-67).

Plaintiffs engage in semantics in attempting to circumscribe the broad presumption in favor of preemption. They argue that the presumption does not apply to the clear categories of activities that are expressly preempted, but rather

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[3] Recognizing that a court may go beyond the "four corners" of a complaint where the court's subject matter jurisdiction has been called into question, Mancher v. Seminole Tribe of Florida, Inc., 708 So. 2d 327, 328 (Fla. 4th DCA 1998), without objection, the trial court took judicial notice of the OTS Brief.

only to those activities that must necessarily be preempted to effectuate the federal policy. See In. Br. at 15 n.2. That, of course, ignores that a presumption in favor of preemption for conduct that is not expressly listed in the statute must necessarily signal a presumption in favor of preemption in general. There is no reason why a presumption should be discarded when the core activities that are expressly preempted are at issue. That makes no sense.

Indeed, the United States Supreme Court has not only acknowledged the extraordinarily broad preemption power granted to the OTS, but has expressly held that "a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the [OTS] unquestionably has jurisdiction." de la Cuesta, 458 U.S. at 161, 167. The purpose of this broad preemptive power is to empower OTS to establish uniform nationwide standards for residential home loans to promote the stability and solvency of savings associations and to protect the public. See id. at 166.

To effectuate its expansive preemptive authority, in 1996, OTS promulgated 12 C.F.R. § 560.2, which pronounces that OTS's authority extends to all "state laws affecting the operations of federal savings associations." 12 C.F.R. § 560.2(a). For purposes of section 560.2, "'state law' includes any state statute, regulation, ruling, order or judicial decision." 12 C.F.R. § 560.2(a).

Moreover, beyond OTS's initial statement of its expansive preemptive authority in section 560.2(a), section 560.2(b) provides a detailed list of areas where specific state laws are expressly preempted. On point here, section 560.2(b)(5) expressly preempts any state law purporting to regulate in any way "[l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees." 12 C.F.R. § 560.2(b)(5). Also relevant, section 560.2(b)(10) expressly preempts state laws regulating the "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." 12 C.F.R. § 560.2(b)(10).

Any state law falling into one of these enumerated categories is expressly preempted, and no further inquiry is necessary. As the OTS recognized when it issued part 560: "When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted." 61 Fed. Reg. 50951, 50966 (Sept. 30, 1996); Weiss v. Wash. Mut. Bank, 147 Cal. App. 4th 72, 77 (Cal. Ct. App. 2007) ("It is only if the law is not covered by paragraph (b) that the inquiry continues to determine whether the particular state law affects lending.").

In this case, Forman asserts that World Savings is prohibited under Florida law from charging a document preparation fee in connection with her mortgage. See In. Br. at 2. Yet, the fee targeted by Forman is indisputably a "loan-related

fee" under section 560.2(b)(5), as the disputed charge is, as alleged, directly connected with the preparation of the loan documents. As the OTS has explained, if an activity is an "integral part of the lending process," it is preempted. Munoz v. Financial Freedom Senior Funding Corp., 573 F. Supp. 2d 1275 (C.D. Cal. 2008) (quoting an April 2000 OTS Opinion Letter). The preparation of documents forming the lending relationship is an integral part of the lending process.

Plaintiffs' citation of Konynenbelt v. Flagstar Bank, 617 N.W.2d 706 (Mich. App. 2000), see In. Br. at 15, does not provide support to the contrary. First, Konynenbelt involved the recording of a mortgage satisfaction, a transaction much different than the preparation of the very documents forming the lending relationship. Second, Konynenbelt has been recently discredited by later persuasive authority. See McCurry v. Chevy Chase Bank, F.S.B., 193 P.3d 155, 161 (Wash. App. Div. 1 2008) ("the Konynenbelt court expressly based its holding upon the rationale advanced in Siegel v. American Savings & Loan Association, 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (1989), which was (correctly) recognized as abrogated by 12 C.F.R. § 560.2 in [Lopez v. World Savings & Loan Association, 105 Cal. App. 4th 729, 740, 130 Cal. Rptr. 2d 42 (2003)]"). The same is true of Plaintiffs' citation of Pinchot v. Charter One Bank, 792 N.E.2d 1105 (Ohio 2003), see In. Br. at 14-15, which the McCurry court also distinguished as being a dissimilar "mortgage satisfaction statute" case. See 193 P.3d at 160.

In addition, Forman's claims also fall under the provision expressly preempting state laws purporting to regulate the origination of mortgages. 12 C.F.R. § 560.2(b)(10). Again, it is definitional that a fee charged to originate the formative mortgage documents is a fee relating to the origination of the mortgage.

Therefore, under both sections 560.2(b)(5) and 560.2(b)(10), Forman's claims are expressly preempted by federal law. See Fuchs v. Wachovia Mortgage Corp., 2005 WL 3076343, *4-5 (N.Y. Sup. Nov. 15, 2005) (holding that claims that charging of document preparation fees constituted unauthorized practice of law were preempted by OCC regulations), aff'd 41 A.D.3d 424 (N.Y. Sup. App. 2007);[4] Haehl v. Wash. Mut. Bank, F.A., 277 F. Supp. 2d 933, 940 (S.D. Ind. 2003) ("Section 560.2 expressly preempts state laws purporting to regulate loan-related fees and the processing and servicing of mortgages"). Plaintiffs ignore Fuchs altogether in their Initial Brief and oddly acknowledge that Haehl is an express preemption case, which is exactly Lenders' argument. See In. Br. at 17 n.4

In fact, the OTS itself has taken the position that document preparation fees identical to those at issue here fall within the preemptive scope of section 560.2.

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[4] "The extent of Federal regulation and supervision of Federal savings associations [by the OTS] under the Home Owners' Loan Act is substantially the same as for national banks [by the OCC] under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized activities of both types of entities." 69 Fed. Reg. 1904-01, 1912 n.62 (Jan. 13, 2004).

Specifically, in litigation nearly identical to this case, the OTS submitted an amicus curiae brief, of which the trial court below took judicial notice, wherein the OTS explained that document preparation fees are "loan-related fees" within the meaning of section 560.2(b)(5). OTS Brief at 2 (Forman R1.35). To this, Plaintiffs offer no direct response as to why OTS's position is unreasonable, but simply argue that it should not be given deference. See In. Br. at 16.

To the contrary, the position espoused in the OTS Brief represents OTS's official position and should be afforded great deference. See Auer v. Robbins, 519 U.S. 452, 462 (1997) (holding that an agency's position set forth in a legal brief, in a case in which the agency is not a party, is entitled to deference); Navellier v. Sletton, 262 F.3d 923, 945 (9th Cir. 2001) ("An agency's interpretation of one of its own rules, including an interpretation expressed in an *amicus* brief, is controlling unless plainly erroneous or inconsistent with the rule.").

Plaintiffs also argue that the documents at issue are for preparing instruments to "exchange land," not a charge for lending money. See In. Br. at 15. Putting aside that this argument conflicts with the allegations of their Complaints in which they claim that all documents relating to the issuance of mortgage loans are at issue in this case, not just documents that "exchange land," a mortgage and promissory note are not instruments that exchange land—that is what a deed does.

And, it is axiomatic that in mortgage refinance transactions such the ones at issue here, no deed would be prepared, as there is no conveyance of property.

Finally, even if Forman's claims could escape express preemption pursuant to the specifically enumerated categories in subsection (b) of section 560.2, her claims are still preempted. If a state law does not fall into one of the specifically enumerated categories in subsection (b), the preemption analysis moves to subsection (c). See 61 Fed. Reg. at 50966; Weiss, 147 Cal.App.4th at 77. Subsection (c) provides that certain state laws "are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations." 12 C.F.R. § 560.2(c).

In this case, Forman's requested relief—to require that all residential loan and mortgage documents in Florida be prepared by a lawyer or to require the lender to absorb the costs for non-lawyer preparation—will have direct and substantial impact on the lending operations of federal savings associations. Her claims are therefore preempted, even under subsection (c). OTS Brief at 17 (Forman R1.50) ("under Plaintiffs' approach, these state laws [restricting the document preparation fees a lender can charge] would have more than an incidental effect on the lending operations of" federally chartered savings associations); Santana v. CitiMortgage, Inc., 2006 WL 1530083, *5, 41 Conn. L. Rptr. 372 (Conn. Super. May 22, 2006) ("the determination of loan-related fees [is

an] activit[y] that [is] properly characterized as financial in nature, and, accordingly, ha[s] an impact on the lending activities of [a] thrift").

In sum, if section 560.2 did not preempt Forman's claims, "federal savings associations would be subject to a host of regulations that varied by state. That practical consequence is precisely what the OTS sought to prevent in establishing a uniform scheme of regulation for savings associations." Haehl, 277 F. Supp. 2d at 943. Forman, however, is not without a remedy. OTS has promulgated a comprehensive regulatory scheme to address disputes such as this on a national, uniform basis. See OTS Regulatory Handbook, Section 370 "Enforcement Actions." Forman, therefore, has a remedy; she has just failed to use it.

B. The "Pro Se" Exception Applies To The Lenders' Preparation Of Mortgage Documents.

Under Florida law, and as a matter of practical sense, a party to a transaction can prepare its own documents without engaging in the unauthorized practice of law. In this case, the Lenders prepared documents to secure their own interests in a residential loan and mortgage, not the interests of Plaintiffs. In fact, it would be in a borrower's best interest to obtain a loan with no documentation at all, rather than having a lien placed on the borrower's house.

This Court has long-recognized a "pro se" exception to the rule precluding the unauthorized practice of law. Under this exception, as Plaintiffs acknowledged below (Forman R3.83-84), a corporation that prepares documents attendant to a

transaction to which it is a party is not engaged in the unauthorized practice of law. Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605, 607 (Fla. 1950) (noting that restrictions on drafting real estate transfer documents "do not affect one who is . . . dealing with property which he owns or partly owns"); Cooperman v. W. Coast Title Co., 75 So. 2d 818, 820 (Fla. 1954) ("to practice law one must have a client"; "corporations cannot be said to be engaging in the practice of law . . . in such instances [where] their clients are themselves"); see also Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978) (the constitutional right to represent oneself should not be unduly restricted by the prohibition against the unauthorized practice of law).

The logic behind this exception is self-evident. The prohibition on the unauthorized practice of law is designed to protect the public. Brumbaugh, 355 So. 2d at 1192. When a party drafts its own documents to protect its own interests, there is no harm to the public. Therefore, to the extent the Lenders' alleged conduct could even be deemed the practice of law, their conduct would be authorized. This is underscored by a recent opinion from Ohio. See Ohio Sup.Ct., Bd. on the Unauthorized Practice of Law, Op. UPL 2008-02 (Dec. 12, 2008). There, the Ohio Supreme Court Board on the Unauthorized Practice of Law concluded that

> a form mortgage document prepared by a bank or lender has an obvious direct and primary benefit to the party that prepared it.

> Therefore, the completion of a form mortgage document by a bank or a licensed lender to lend its money and secure property as collateral is not the preparation of a legal instrument for another and consequently the Board concludes it is not the practice of law in Ohio. A nonattorney of a bank or lending institution may perform the act of completing a standard form mortgage document by filling in blanks for his/her mortgagee employer without the supervision of an attorney admitted to practice law in Ohio.

Plaintiffs point to several decisions where unlicensed persons were prohibited from charging fees to persons they represented or acted for in a transaction. See In. Br. at 20-21. These cases, however, have no application here because, in the absence of specific allegations to the contrary, the Lenders are presumed to have been acting on their own behalf and not representing or acting on behalf of the Plaintiff borrowers. See Watkins v. NCNB Nat'l Bank of Fla., N.A., 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) ("To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party")(quotation omitted)); First Nat'l Bank & Trust Co. of Treasurer Coast v. Pack, 789 So. 2d 411, 414 (Fla. 4th DCA 2001). Cases where attorney-client or fiduciary relationships were alleged are, therefore, not relevant.

Forman is also simply wrong that, somehow, upon payment of a document preparation fee by a borrower, the adverse, debtor-creditor relationship between lender and borrower evaporates and the lender becomes the borrower's lawyer in an attorney-client relationship. (Forman R4.84); see Amey, Inc. v. Henderson,

Franklin, Starnes & Holt, P.A., 367 So. 2d 633, 635 (Fla. 2d DCA 1979) (holding that borrower's payment of lender's attorney's fees did not create attorney-client relationship); Condra, 865 N.E.2d at 606 ("payment of compensation does not convert an otherwise proper activity by a layperson into the practice of law"); Perkins, 969 P.2d at 96 ("We have firmly rejected the notion that a lay person's authority to prepare legal instruments turns on whether a fee is charged.").

Likewise, under settled precedent, a lender is entitled to pass on costs to a borrower as a condition of the transaction. See Amey, 367 So. 2d at 635 (lender permitted to pass costs on to borrower as condition of loan). Therefore, case law negates Plaintiffs' claim that, by charging them a fee, the Lenders transformed an adverse relationship into one where the Lenders became Plaintiffs' attorneys. See also King, 828 N.E.2d at 1167 (rejecting the argument "that the mere charging of a fee for document preparation, when the conduct is otherwise within the pro se exception, changes the nature of the transaction to one that becomes the unauthorized practice of law"); Perkins, 969 P.2d 93, 99 (holding "a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice" and may charge the other party for same).

Accordingly, under the facts alleged, Plaintiffs' claims are barred. As was acknowledged below, and as settled precedent holds, the Lenders were permitted to prepare their own loan documents under the "pro se" exception. Likewise, the

Lenders were also permitted to pass costs on to Plaintiffs in the form of document preparation fees without Plaintiffs becoming their "clients."

Simply put, there is not a single case in Florida that supports Plaintiffs' foundational proposition that by passing their costs on to Plaintiffs, the Lenders somehow formed an attorney-client relationship with the Plaintiff borrowers. Instead, Florida law consistently recognizes the adverse nature of lender/borrower transactions and recognizes that, absent unique circumstances not alleged here, there are two distinct sides in the transaction—the creditor side and the debtor side. Amey, 367 So. 2d at 635; Pack, 789 So. 2d at 414.

Finally, Plaintiffs' suggestion that this Court may have already determined that the conduct at issue constitutes the unlicensed practice of law is completely unfounded. See In. Br. at 20. First, the cases cited for the proposition that the preparation of legal instruments by a non-lawyer "to a greater extent than typing or writing information provided by the customer on a form constitutes the unlicensed practice if law" all involve non-lawyers preparing legal instruments for third-party clients. See, e.g., Florida Bar v. Davide, 702 So. 2d 184, 184 (Fla. 1997) (preparation of complaint for third-party was the unauthorized practice of law); Florida Bar v. Miravalle, 761 So. 2d 1049, 1051 (Fla. 2000) (performing legal research for third-party was the unauthorized practice of law). That is not this case. Plaintiffs' citation of Cooperman v. West Coast Title Co., 75 So. 2d 818

(Fla. 1954) in fact underscores that this Court has allowed non-lawyers to prepare legal instruments for the benefit of their own employers.

Second, Forman conceded below that there are no cases in Florida holding that a lender's preparation of documents memorializing its own mortgage constitutes the unauthorized practice of law. (Forman R3.41). And there are no allegations in this case that the Lenders told Plaintiffs that they were acting as Plaintiffs' attorney or even for their benefit, much less that Plaintiffs believed that to be the case.

Third, it was acknowledged below that, in the absence of the fee charged to them as borrowers, Forman believes it would have been perfectly appropriate for the Lenders to prepare the mortgage documents pursuant to the "pro se" exception under which parties are permitted to represent themselves in transactions. (Forman R3.83-84). Plaintiffs are incorrect in asserting that Cooperman stands for the proposition that the Lenders cannot charge for the cost of document preparation. Cooperman arose in a very different factual context involving title insurance. In that case, this Court allowed non-lawyers to perform the legal services at issue there after a careful evaluation of the exact facts and circumstances involved. In sum, this Court allowed the title companies to charge a premium for their services. The issue of document preparation fees charged by a party to the transaction such as here was not present in that case. See Cooperman, 75 So. 2d at 821.

C. Plaintiffs Cannot Challenge The Document Preparation Fee Because They Voluntarily Paid The Fee With Full Knowledge Of The Facts.

Yet another ground for approving the Fourth District's decision is the voluntary payment doctrine. The voluntary payment doctrine provides that, "where one makes a payment of any sum under a claim of right with knowledge of the facts, such a payment is voluntary and cannot be recovered." City of Miami v. Keton, 115 So. 2d 547, 551 (Fla. 1959); see also Tirri v. Estate of Batchelor, 898 So. 2d 1125, 1126 (Fla. 3d DCA 2005) (precluding recovery of $1 million under voluntary payment doctrine).

If a payment is made without compulsion and with knowledge of the surrounding factual circumstances, that payment cannot be recovered, regardless of the legality of the underlying transaction. "It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion." King, 828 N.E.2d at 1170 (quotation omitted); see also Pac. Mut. Life Ins. Co. of Cal. v. McCaskill, 170 So. 579, 582 (Fla. 1936); Hassen v. Mediaone of Greater Fla., Inc., 751 So. 2d 1289, 1290 (Fla. 1st DCA 2000) (compulsion must be "of such a degree as to impose a necessity of payment sufficient to overcome the mind and will of a person of ordinary firmness").

In a recent case where the claims mirror those here, the Illinois Supreme Court, using the same definition of the voluntary payment doctrine used by Florida courts, held that the doctrine barred borrowers from seeking recovery of a document preparation fee charged by their lender. King, 828 N.E.2d at 1170. In King, just as in this case, there was no allegation that the lender represented to the borrowers that an attorney prepared the documents, or that the borrowers believed that to be the case. Id. at 1172-73. As in this case, there were also no allegations that the borrowers were compelled under duress to pay the fee. Id. at 1173. Finally, as in this case, there was no allegation that the borrowers were precluded from having their own attorney prepare the documents. Id.

The result reached in King is also compelled under Florida law. Plaintiffs' attempt to distinguish the King case is unsupported by Plaintiffs' Complaints. Plaintiffs say that their "complaints allege that Homeowners could not have known the facts that made the fee illegal." In. Br. at 23. Nowhere in either Complaint is such an allegation made. In any event, in Florida ignorance or mistake of the law by one who makes a voluntary payment on an illegally imposed charge may not recover that charge. N. Miami v. Seaway Corp., 9 So. 2d 705, 707 (Fla. 1942).

Plaintiffs' citation of Ruiz v. Brink's Home Sec., Inc., 777 So. 2d 1062 (Fla. 2d DCA 2001) does not overcome this longstanding tenet of Florida law. Notably, in Ruiz the allegation was that the contract said "you will be billed for the amount

required to reimburse Brink's for property tax on the standard protective equipment installed in your location." Id. at 1063. The plaintiffs in Ruiz alleged that they paid an amount in excess of that amount. Thus, those plaintiffs were saying that the excess amount was not paid voluntarily. Here, Plaintiffs voluntarily paid the document preparation fees; they do not allege that the fees were in excess of what they expected to pay.

CONCLUSION

For the foregoing reasons, the Fourth District's decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished by overnight commercial mail carrier this 9th day of February, 2009 to the Clerk of the Court (original and seven copies) and to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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