# In the Supreme Court of Florida

Case No. SC08-1360

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Lower Court Case No. 4D07-1490

**HAROLD GOLDBERG and ARLENE GOLDBERG,**

*Petitioners,*

**v.**

**MERRILL LYNCH CREDIT CORPORATION,**

*Respondent.*

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Consolidated with Lower Court Case No. 4D07-2436

**AMY SUE FORMAN,**

*Petitioner,*

**v.**

**WORLD SAVINGS BANK, FSB,**

*Respondent.*

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

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## PETITIONERS' INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE ISSUE

This Court has held 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."[1] The Homeowners in these consolidated cases brought suits directly in civil court to recover fees based on the unlicensed practice of law. Do the Homeowners have standing to bring these claims in the circuit courts, and does Florida recognize a private cause of action for such claims?

[1] *Fla. Bar re Amendments to R. Regulating Fla. Bar (Proceedings Before a Referee)*, 685 So. 2d 1203, 1203 (Fla. 1996) (footnote omitted).

## STATEMENT OF THE CASE AND OF THE FACTS

The Petitioners in these consolidated appeals are homeowners (the "Homeowners") who received mortgage loans from the Defendant lenders (the "Lenders"). (1 Forman R. 1–8; 1 Goldberg R. 1–7.)[2] Apart from various loan-related fees, the Lenders charged the Homeowners a separately itemized $50 to $150 "document preparation fee" for preparing various legal instruments, including a mortgage, deed, and note. (1 Forman R. 2; 1 Goldberg R. 2.) The Lenders used non-lawyers to prepare these legal instruments but did not disclose that fact to the Homeowners at the time of the transactions. (1 Forman R. 2–3; 1 Golberg R. 2–3.)

The Homeowners brought actions in the circuit courts for unjust enrichment and for money had and received seeking disgorgement of the "document preparation fee." (1 Forman R. 1–8; 1 Golberg R. 1–7.) The Homeowners argued that the Lenders, as non-lawyers, may not charge and retain fees for performing legal services, such as preparing mortgages and deeds.

The Lenders moved to dismiss the Homeowners' complaints for lack of subject matter jurisdiction or standing and for failure to state a claim. (1 Forman R.

[2] The record in *Forman v. World Savings Bank, FSB*, 4th DCA No. 4D07-2436, is cited in the form: "[Volume] Forman R. [Pages]." The record in *Goldberg v. Merrill Lynch Credit Corp.*, 4th DCA No. 4D07-1490, is cited in the form: "[Volume] Goldberg R. [Pages]."

9–26; 1 Goldberg R. 9–22.) Among other things, the Lenders argued that the circuit courts lacked jurisdiction to hear any claims relating to the unlicensed practice of law, and that only the Florida Bar could prosecute such claims.

The circuit courts granted the Lenders' motions to dismiss, holding that only this Court has jurisdiction to hear any claim based on the unlicensed practice of law and that Florida does not recognize a private cause of action to recover fees based upon unlicensed practice. (2 Forman R. 316–20; 1 Goldberg R. 73–76, 81–82.) The Homeowners' timely appealed to the Fourth District, where the appeals were consolidated.

On appeal, the Fourth District recognized that Rule 10-7.1 of the Rules Regulating the Florida Bar, established by this Court, specifically provides for victims to bring private actions to recover fees and damages based on unlicensed practice. *Goldberg v. Merrill Lynch Credit Corp.*, 981 So. 2d 550, 551 (Fla. 4th DCA 2008), *reh'g & reh'g en banc denied*. The district court, however, concluded that the rule was silent as to when such a suit may be brought and held that "a supreme court determination on the unauthorized practice of law is a prerequisite" to such suits. *Goldberg*, 981 So. 2d at 552. The Fourth District affirmed the dismissals because the Lenders had not previously been prosecuted for their conduct by The Florida Bar or disciplined by this Court. The district court also

gave little weight to its prior decision in *Vista Designs, Inc. v. Melvin K. Silverman, P.C.*, 774 So. 2d 884 (Fla. 4th DCA 2001), which upheld a counterclaim for disgorgement of a fee charged by a non-lawyer for legal services where there had been no prior Supreme Court unlicensed practice determination. *Goldberg*, 981 So. 2d at 552.

The Homeowners' moved for rehearing, rehearing en banc, or in the alternative for clarification and certification of a question of great public importance, pointing out, among other things, that the counterclaim upheld in *Vista Designs* was the same as the claim asserted by the Homeowners. The Homeowners' also re-emphasized that this Court held in *Florida Bar re Amendments to the Rules Regulating The Florida Bar (Proceedings Before a Referee)*, 685 So. 2d 1203, 1203 (Fla. 1996) [hereinafter *Florida Bar Amendments (1996)*], that victims are free to sue "allegedly" unauthorized practitioners "directly," and therefore the Fourth District's prerequisite of a prior unlicensed practice prosecution was in conflict. The Fourth District denied the rehearing, clarification, and certification motions. The Homeowners then appealed to this Court, which accepted jurisdiction on November 18, 2008.

## SUMMARY OF THE ARGUMENT

This Court held in *Florida Bar Amendments (1996)* that "victims of the unlicensed practice of law are free to sue the *allegedly* unlicensed practitioner *directly* to recover fees and other damages." 685 So. 2d at 1203 (emphasis added). The Fourth District in this case erred when it deleted the words "allegedly" and "directly" from this holding and when it, for the first time, imposed the requirement that a victim of unlicensed practice may not sue the unlicensed practitioner for damages unless The Florida Bar first prosecutes the unlicensed practitioner and this Court makes an unlicensed practice finding.

The Fourth District erred by relying on a case in which this Court held that only The Florida Bar may file a complaint to *enjoin* the unlicensed practice of law. This case, however, is not an injunctive action, but an action for money damages. This Court's rules expressly provide that while a complaint for *injunctive* relief must be filed by The Florida Bar in this Court, nothing precludes a victim from bringing a private civil action against an unlicensed practitioner to recover fees and damages. R. Regulating Fla. Bar 10-7.1(d).

The Fourth District's decision should be reversed not only because it conflicts with this Court's precedent and rules but also because conditioning the availability of a civil damages remedy on a prior disciplinary adjudication by this

Court will arbitrarily deny some victims relief. The Florida Bar may lack the resources to prosecute every instance of the unauthorized practice of law throughout the State. It certainly may exercise its discretion to decline to prosecute some claims, and to resolve prosecutions as to other claims prior to obtaining a final adjudication in this Court. Making a victim's ability to bring a damages claim contingent upon a prior disciplinary prosecution by The Florida Bar will prevent some victims from obtaining a remedy based on factors outside their control, and undermine this Court's rules permitting such claims.

In addition, the Fourth District recognized below that civil courts may determine whether a party has engaged in unlicensed practice when the unlicensed practice is used as a defense to payment of a fee. The decision below provides no principled basis as to why circuit courts may not make such a determination when it is the basis of an affirmative claim for damages.

Finally, the Lenders on appeal below made several alternative arguments for affirming the trial courts' decisions under the "tipsy coachman" doctrine, arguing that even if the trial court decisions were wrong the outcome should remain. The Fourth District did not make any mention of these alternative bases in its opinion, and none of them support affirming. First, federal regulations on lending activities of federal banks do not preempt this State's regulation of the practice of law.

Second, this Court has recognized that the "pro se" exception to unlicensed practice does not apply when, as alleged, a charge is made for unlicensed practice. Finally, the voluntary payment doctrine is no bar to the Homeowners' claims. Accordingly, the Court should reverse the decision below and remand these actions.

## ARGUMENT

### I. "[V]ictims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees."

This Court has held that "victims of the unlicensed practice of law are free to sue the *allegedly* unlicensed practitioner *directly* to recover fees and other damages." *Fla. Bar Amendments (1996)*, 685 So. 2d at 1203 (emphasis added). This language is clear: such civil damage suits may be brought "directly"—that is, without a prior disciplinary action instituted by The Florida Bar—and such civil suits may be brought against an "allegedly" unlicensed practitioner—that is, against one who has not previously been judged by this Court to have engaged in unlicensed practice.

The right of victims to directly bring private suits for damages and fees based on unlicensed practice, without a prior disciplinary prosecution, was acknowledged in *Florida Bar v. Warren*, 661 So. 2d 304, 305 (Fla. 1995). In *Warren* this Court held that restitution could not be awarded to victims in a

disciplinary action brought by The Florida Bar under the rules then in existence, but that individuals harmed by unlicensed practice were free to bring private civil suits against unlicensed practitioners. The Court made no mention of any prerequisite or other condition to such suits.

In 1996, in response to *Warren*, The Florida Bar petitioned this Court to amend Rule 10-7.1 to permit "this Court to order an unlicensed practitioner to pay restitution and costs to a 'complainant or other person' in cases where The Florida Bar is requesting civil injunctive relief." *Fla. Bar Amendments (1996)*. At that time, this Court rejected the proposed amendment on the grounds that existing civil remedies were adequate and 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 enforcing their judgments.

*Id.*

In 2004, this Court then approved an amendment to Rule 10.7-1 to allow the Court to order an unlicensed practitioner to pay restitution to victims in cases where the Florida Bar requested civil injunctive relief. *Amendments R. Regulating Fla. Bar*, 875 So. 2d 448 (Fla. 2004). But the amended rule also *expressly* provides that "[n]othing 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). Thus, the amendment expressly preserved the right of "victims of the unlicensed practice of law . . . to sue the allegedly unlicensed practitioner directly to recover fees," as established in *Warren* and reaffirmed in *Florida Bar Amendments (1996)*.

Since 1996, district courts have also recognized claims for restitution of fees for unlicensed practice. In *Vista Designs*, a Fourth District case, an unlicensed practitioner performed certain consulting services for a Florida company. 774 So. 2d at 884. When the unlicensed practitioner sued to recover fees for services rendered, the company defended on the basis that the services constituted the unlicensed practice of law. The company also counterclaimed for restitution of the fees it had already paid the unlicensed practitioner. The trial court found for the company on its defense but refused to award restitution for fees already paid. On appeal, the Fourth District upheld the defense but reversed the refusal to order restitution and remanded to the trial court to determine the amount of restitution to be paid. Thus, the Fourth District itself has previously upheld an affirmative claim for restitution of fees paid for unlicensed practice, without imposing the prerequisite of a prior disciplinary action.

Courts in other states have similarly allowed private civil suits for restitution of fees, without prior disciplinary actions, in cases nearly identical to this one. *See, e.g.*, *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. 2007) (upholding a claim for recovery of document preparation fee from lender based on the unlicensed practice of law); *Am. Abstract & Title Co. v. Rice*, 186 S.W.3d 705, 708 (Ark. 2004) (holding that victims of unlicensed practice seeking recovery of document preparation fee from lender were not required to file complaint with UPL committee prior to bringing private civil suit for recovery of fee).

Despite this Court's holding in *Florida Bar Amendments (1996)*, despite Rule 10-7.1(d) of the Rules Regulating the Florida Bar, and despite its prior decision in *Vista Designs*, the Fourth District below held that the Homeowners were prohibited from bringing their claims for restitution of the fees they were charged because there had been no prior disciplinary prosecution by The Florida Bar and decision by this Court. But no case supports such a jurisdictional prerequisite.

The Fourth District relied on *Dade-Commonwealth Title Insurance Co. v. North Dade Bar Ass'n*, 152 So. 2d 723 (Fla. 1963). *Dade-Commonwealth*, however, involved a local bar association's suit to *enjoin* the unlicensed practice of law in order to prevent its members from losing business to the unlicensed

practitioner. This Court's requirement that "Complaints for civil *injunctive* relief shall be by petition filed in the Supreme Court of Florida by The Florida Bar" does not apply to a civil *damages* action and does not "preclude an individual from seeking redress through civil proceedings *to recover fees or other damages*." R. Regulating Fla. Bar 10-7.1(a), (d) (emphasis added).

The cases relied upon by the Lenders below also do not support the Fourth District's prerequisite. Those decisions either involve a request for injunctive relief or do not address the issue of subject matter jurisdiction. *See Sigma Fin. Co. v. Inv. Loss Recovery Servs.*, 673 So. 2d 572 (Fla. 4th DCA 1996) (complaint to enjoin unauthorized practice of law); *Heilman v. Suburban Coastal Corp.*, 506 So. 2d 1088, 1099 (Fla. 4th DCA 1987) (disappointed bidder lacks standing to assert winning bidder's agent's unauthorized practice as grounds to set aside bid); *Metro. Dade County v. Dade County Employees*, 376 So. 2d 1206, 1209 (Fla. 1st DCA 1979) (declining to decide whether acts constituted unlicensed practice where the issue was not briefed by the parties); *In re Losee*, 195 B.R. 785 (M.D. Fla. Bankr. 1996) (declining to impose *sanctions* for unauthorized practice because such a violation was not contemplated by the Bankruptcy Code).

The distinction between injunctive, disciplinary relief and civil actions for damages comports with the different functions served by each type of proceeding

and with the language of the Florida Constitution. This Court exercises exclusive jurisdiction to "regulate . . . admission . . . and . . . discipline"—a regulatory function. Art V, § 15, Fla. Const. Just as only the State may bring criminal prosecutions, only The Florida Bar as an arm of the Florida Supreme Court may bring injunctive and disciplinary actions for the unlicensed practice of law. For example, unlicensed practice may be the subject of *either or both* a complaint in this Court or a criminal prosecution. *See* Fla. Stat. § 454.23 (2006). Jurisdiction is vested over particular *types of cases* not over particular *legal questions*, which may arise in different types of cases. Similarly, the legal issue of unauthorized practice may arise in a civil action. *See Florida Bar Amendments (1996)*. Just as trial courts may hear a claim for battery or wrongful death where the conduct alleged is criminal but unprosecuted, trial courts may hear private claims for damages where the underlying conduct is the unlicensed practice of law but there has been no prior prosecution or disciplinary action.

The Fourth District's prerequisite also will serve to arbitrarily deny some victims of the unauthorized practice relief simply because The Florida Bar in its prosecutorial discretion may choose not to prosecute a disciplinary action to this Court. The process for submitting a claim relating to unlicensed practice to the Bar does not provide the victim any substantive right to a hearing, but is like making a

police report. The Florida Bar may choose to close an investigation based on various factors including whether the conduct at issue is limited to past circumstances, and therefore where no injunctive remedy is necessary. The Bar's exclusive ability to seek the *prevention* and *punishment* of the unlicensed practice should not diminish victims' rights to *remedy* the harms done to them by the unlicensed practitioner.

## II. The Lenders' Alternative Arguments Do Not Support Affirming the Decision Below.

On appeal to the Fourth District, the Lenders made several arguments for affirming the trial courts even if the trial courts' reasoning were wrong. The Fourth District did not adopt or even comment on any of these alternative bases. Nevertheless, and anticipating that the Lenders will again raise these alternative arguments in this Court, none supports affirming the opinion below.

### A. The Claims Against World Savings Bank, FSB, Are Not Preempted.

The Court should reject the federal preemption argument made below by Defendant World Savings, which concerns only the *Forman* appeal, because it rests on the flawed premise that the ban on unlicensed practice is a credit-lending regulation rather than regulation of the practice of law. In addition, the ban on unlicensed practice affects a lender's credit activities only incidentally, if at all. Thus there is no preemption.

### 1. Preparing Legal Documents Is Not a Credit Lending Activity.

"[T]he authority of the Federal Home Loan Bank Board [(now OTS)] to pre-empt state laws is not limitless." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 171–72 (1982) (O'Connor, J., concurring). "Nothing in the language of § 5(a) of HOLA . . . remotely suggests that Congress intended to permit the [OTS] to displace local laws . . . not *directly related* to savings and loan practices." *Id.* (emphasis added). Federal savings banks are not exempt from compliance with all state laws; OTS has only occupied the "field of *lending regulation* for federal savings associations." 12 C.F.R. § 560.2(a) (emphasis added).

Preparing legal instruments for a fee is not a credit-lending activity; it is the practice of law. Thus, limits on that practice are not preempted. *See Pinchot v. Charter One Bank*, 792 N.E.2d 1105 (Ohio 2003) (recording mortgage satisfactions is not a credit function, so state rules are not preempted). "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

Contrary to World Savings' arguments below, federal regulations 12 C.F.R. §§ 560.2(b)(5) and (b)(10) do not expressly preempt Florida's regulation of the practice of law, and there is no presumption in favor of express preemption under

HOLA or section 560.2(b). Rather, "the regulation is devoid of presumptive language" regarding express preemption. *Pinchot*, 792 N.E.2d at 1111.[3]

In particular, the document preparation fee here is not a "loan-related fee" like those listed in 560.2(b)(5) ("initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees.") The present fee, which covers preparation of legal instruments conveying and securing real property, is a charge for preparing instruments to exchange land, not a charge for lending money. As the Michigan Court of Appeals held in *Konynenbelt v. Flagstar Bank*, 617 N.W.2d 706, 713 (Mich. App. 2000), *appeal denied*, 623 N.W.2d 596 (Mich. 2001), a similar fee for recording a mortgage satisfaction "has nothing to do with the lending of money."

Likewise, section 560.2(b)(10) does not preempt regulation of the document preparation fee. That section refers to state laws dealing with "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages." Mortgage processing and origination involves gathering the necessary loan application information; servicing involves collecting payments on the loan; and sale, purchase, investment, and participation all refer to transactions involving

[3] *Chaires v. Chevy Chase Bank*, 748 A.2d 34, 46 (Md. Ct. Spec. App. 2000), and *Yonkers v. Savs. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005), cited by World Savings below, do *not* support a presumption of express preemption.

the completed mortgage instrument. Nothing in 560.2(b)(10) authorizes a charge for preparation of legal instruments, and other courts have rejected the similar argument that recording a mortgage satisfaction is "servicing" or "origination." *Pinchot*, 792 N.E.2d at 1112; *Konynenbelt*, 617 N.W.2d at 713.

World Savings' contention below that despite the regulation's language, a brief submitted by OTS in an Illinois case should be afforded "great deference" as the agency's official position is wrong. The court there did not hold that the OTS regulations preempted Illinois law, and World Savings' cited cases do not hold that an agency's interpretation of its regulations in legal briefs should be given "great deference." *See Youakim v. Miller*, 425 U.S. 231 (1976). In fact, the amicus brief of an agency "lacks the credentials of a position that agency heads have staked out after adjudicative or rulemaking procedures allowing a full vetting of alternatives." *Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 840 F.2d 947, 952, (D.C. Cir. 1988). The Illinois brief is also inconsistent with the regulations, because they do not purport to authorize the practice of law. And, under recent United States Supreme Court precedent, no deference is warranted because OTS is not an expert on either the practice of law or preemption. *See Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (no deference where agency has no relevant expertise).

### 2. Florida's Unlicensed Practice Rules Have—at Most—an Incidental Effect on a Lender's Credit Activities.

Because, as shown above, section 560.2(b) does not expressly preempt Florida's unlicensed practice rules,[4] the question is whether Florida law affects a lender's "credit activities." *Pinchot*, 792 N.E.2d at 1115–16. If a state law does not affect a lender's "credit activities" it is not preempted. *Id.*

In *Pinchot*, the Ohio Supreme Court rejected a federal preemption argument, and held that a state law that required a mortgage lender to record a satisfaction of mortgage within 90 days or pay a large penalty did "not affect the lending operations of federal thrift institutions." *Id.* at 1115–16. Likewise, in *Konynenbelt*, the Michigan Court of Appeals held that a state law requiring a lender to absorb the cost of recording a mortgage satisfaction "has nothing to do with the lending of money." 617 N.W.2d at 713. Like *Pinchot* and *Konynenbelt*, Florida unlicensed practice rules have "nothing to do with the lending of money" but regulate the

[4]That fact makes these cases distinguishable from those World Savings cited below, which all involved *express preemption*. *See Haehl v. Wash. Mut. Bank*, 277 F. Supp. 2d 933, 940 (S.D. Ind. 2003) (holding that federal law expressly preempted state law); *Lopez v. World Savings & Loan Ass'n*, 130 Cal. Rptr. 2d 42, 54 (Cal. Ct. App. 2003) (same). This case is also distinguishable from *Florida Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178 (Fla. 1997), where this Court recognized that the federal government *could* expressly preempt a state court's regulation of professionals in federal securities arbitration, but as in this case, had not shown any intent to do so.

practice of law by allowing only lawyers to charge for preparing legal documents. The rules do not affect lenders' credit activities and thus are not preempted.

In addition, a state law is not preempted if it has only an incidental effect on a lender's credit activities. *Id.*; 12 C.F.R. § 560.2(c). In the factually similar case of *Charter One Mortgage Corp. v. Condra*, 847 N.E.2d 207, 215 (Ind. Ct. App. 2006), *vacated on other grounds*, 865 N.E.2d 602 (Ind. 2007), the Indiana Court of Appeals rejected a national bank's preemption argument and held that "requiring national banks either to have attorneys prepare the legal instruments involved in a real estate transaction *or* forego the document preparation fee only incidentally affects the bank's exercise of its powers . . . ." Similarly, Florida's unlicensed practice rules have, at most, an incidental affect on a lender's credit activities—limited to preparation of legal instruments for a fee. Thus, those rules are not preempted. *See also Konynenbelt*, 617 N.W.2d at 713 (requiring lender to absorb cost of mortgage satisfaction recording fee had no substantial effect on lending).[5]

Florida's unlicensed practice rules also fall within several categories listed in 560.2(c) as explicitly *not* preempted. Preparation of a mortgage is part of real

[5]In the only case cited by World Savings below to support its assertion that Florida's ban on the unlicensed practice of law will have a "substantial impact" on lenders' credit activities, the court did *not* find the state law at issue preempted and did *not* find that any impact on lenders was more than incidental. *Santana v. CitiMortgage, Inc.*, No. CV-05-4010607, 2006 WL 1530083 (Conn. Super. May 22, 2006) (holding state law not preempted by Section 560.2(b)).

property law; an agreement to pay a fee under a void contract involves contract law; and the unauthorized practice of law in Florida is a crime. Fla. Stat. Ann. § 454.23 (2006). Thus there is no preemption under sections 560.2(c)(1), (2), and (5).

Finally, lines 1100 to 1113 of the HUD-1 settlement statement specifically provide for title charges and "*charges by attorneys*." 24 C.F.R. Pt. 3500, Appendix A. The regulations contemplate that "[i]n many jurisdictions the same person[,] for example, an attorney," performs several of the services surrounding the real estate transaction, including "title examination, title search, and *document preparation*." *Id.* Florida's requirement that only a licensed lawyer may charge for preparation of deed and mortgage instruments comports with federal law and the acknowledgement that in many States licensed lawyers prepare many of the legal documents involved in a real estate transaction.

### B. Neither the "Pro Se Exception" Nor the Voluntary Payment Doctrine Provides a Basis to Affirm.

#### 1. The "Pro Se Exception" Does Not Permit Non-Lawyers to Sell Legal Services.

This Court has repeatedly held that 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 of law." *Fla. Bar v.*

*Miravalle*, 761 So. 2d 1049, 1051 (Fla. 2000) (citing *Fla. Bar v. Davide*, 702 So. 2d 184 (Fla. 1997); *Fla. Bar v. Smania*, 701 So. 2d 835 (Fla. 1997); *Fla. Bar v. Am. Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997); *Fla. Bar v. Schramek*, 616 So. 2d 979 (Fla. 1993)) (emphasis added). Rule 16-1(a) of the Rules Regulating the Florida Bar, promulgated by this Court, recognizes that preparation of mortgages and deeds—the exact conduct alleged here—is the practice of law. The Rule provides that a person licensed in Florida as a certified foreign legal consultant may not "prepare any deed, mortgage, . . . or any other instrument affecting title to real property," despite being subject to the Rules of Professional Conduct and to discipline by this Court. R. Regulating Fla. Bar 16-1.

The Lenders nonetheless argued below that their activities were permissible under the "pro se exception" to the ban on unlicensed practice. The very cases the Lenders cited below show that the exception does not apply where, as here, a non-lawyer *charges* for legal services.

In *Cooperman v. West Coast Title Co.*, 75 So. 2d 818, 821 (Fla. 1954), this Court held that a title insurance corporation could prepare some documents under the "pro se exception," but emphasized that the exception does not permit non-lawyers to *charge* for legal services without crossing the boundary into the unauthorized practice of law: "[W]hat we have written . . . must not be construed

as sanctioning *a charge of any sort . . . .*" *Id.* at 821 (emphasis added). The Fifth District has likewise recognized that, "The preparation of [mortgages, deeds, and other legal documents affecting title to real property,] and other acts normally constitute the practice of law and would be unauthorized . . . *if a charge was made for such services.*" *Preferred Title Servs., Inc. v. Seven Seas Resort Condo., Inc.*, 458 So. 2d 884, 886 (Fla. 5th DCA 1984) (emphasis added).[6] In *Newman v. Ed Bozarth Chevrolet Co.*, No. 07-cv-969-JLK, 2007 WL 4287478, at *7–8 (D. Colo. Dec. 4, 2007), a federal district court recently rejected a defendant's motion to dismiss based on the pro se exception, where the defendant prepared legal documents in connection with the sale and financing of motor vehicles because the defendant charged a fee for the service. Because the Lenders charged a fee in these cases, the "pro se exception" does not apply.

The Lenders' reliance below on cases involving alleged torts and the existence of duty is also misplaced. In those cases, plaintiffs attempted to impose a

[6] This principle is recognized in many States. *E.g.*, *Pulse v. N. Am. Land Title Co. of Mont.*, 707 P.2d 1105, 1109–10 (Mont. 1985); *Pope Co. Bar Ass'n, Inc. v. Suggs*, 624 S.W.2d 828, 830 (Ark. 1981); *Conway-Bogue Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 1007 (Colo. 1956); *Cain Merchants Nat'l Bank & Trust*, 268 N.W. 719, 723 (N.D. 1936).

duty on a lawyer or agent representing an adverse party in a transaction.[7] Here the claims are quasi-contractual, not tort based, and the Lenders prepared the mortgage instruments and charged the Homeowners for that service. The Homeowners do not claim "third party beneficiary" status or extension of a third party's duty; they merely seek a refund of the fee *they paid the Lenders* for legal services performed *by the Lenders*.

### C. The "Voluntary Payment Doctrine" Is No Defense Because Homeowners Did not Know Facts Making the Fee Unenforceable.

The Lenders' reliance on the "voluntary payment doctrine"[8] is also misplaced. That doctrine only applies where one makes a payment "with full knowledge of the facts" that make the payee's demand for payment unenforceable. *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959). When the Homeowners

[7] *See First Nat'l Bank & Trust Co. of Treasure Coast v. Pack*, 789 So. 2d 411, 414 (Fla. 4th DCA 2001) (tort action for breach of fiduciary duty); *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) (tort action); *Amey, Inc. v. Henderson, Franklin, Starnes & Holt*, 367 So. 2d 633, 634 (Fla. 2d DCA 1979) (tort action to recover for lawyer's negligence); *Adams v. Chenowith*, 349 So. 2d 230 (Fla. 4th DCA 1977) (tort action for negligence).

[8] The "voluntary payment doctrine" is an affirmative defense, which may not be decided on a motion to dismiss unless the allegations of the complaint demonstrate the existence of the affirmative defense on their face. *Ruiz v. Brink's Home Sec., Inc.*, 777 So. 2d 1062, 1064 (Fla. 2d DCA 2001). Unless the facts are undisputed, "the question whether a payment is voluntary or involuntary is for the jury." 66 AM. JUR. 2D RESTITUTION AND IMPLIED CONTRACTS § 109 (2006).

paid the document preparation fee, they had no reason to know that Lenders used non-lawyers to prepare legal documents.

In *Eisel v. Midwest BankCentre,* 230 S.W.3d 335, 339–40 (Mo. 2007), the Missouri Supreme Court held that the voluntary payment defense did not bar a claim for restitution of a "document preparation fee" charged by a lender. The court held that:

> The voluntary payment doctrine is a principle based on waiver and consent. Consequently, [the defendant] cannot benefit from this defense. To hold otherwise—that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized business of law and be barred from recovery due to having made a voluntary payment—would be illogical and inequitable.

This case is distinguishable from *King v. First Capital Financial Services Corp.*, 828 N.E.2d 1155 (Ill. 2005), cited by the Lenders below, where an Illinois court wrongly assumed that the borrower knew the "document preparation fee" included the mortgage, deed, and promissory note, and that the borrower knew those documents were not prepared by a lawyer. Because the complaints allege that the Homeowners could not have known the facts that made the fee illegal, the voluntary payment doctrine is no defense. *Ruiz*, 777 So. 2d at 1064 (reversing trial court's dismissal of complaint based on voluntary payment doctrine where plaintiff could not have known the underlying facts that made fee unenforceable).

Florida courts also recognize that a plaintiff may recover a fee paid under an illegal agreement if the plaintiff is not *in pari delicto* with the payee, especially if the payee's conduct is prohibited by statute or criminal law. *See Cooper v. Paris*, 413 So. 2d 772, 774 (Fla. 1st DCA 1982). "This rule is applied in favor of a person seeking to recover back money for services performed by a person lacking a required license to perform such services." *Id.* This rule applies because "to refuse to return the monies paid would affront this Court's affirmative duty to see that the party violating public policy not benefit in any way as a result of his wrongdoing." *Id.* (citing *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818 (Fla. 1953)). The unauthorized practice of law is a felony. Fla. Stat. § 454.23 (2006). Therefore, as in *Cooper*, the Homeowners can recover the unlawful fee the Lenders collected.

## CONCLUSION

This Court should reverse the decision of the Fourth District Court of Appeal and remand these cases for further proceedings.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2008, I filed this document with the Clerk of the Court via overnight commercial mail carrier, and that one copy is being served this day by the same means on counsel for Appellees, identified below:

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## CERTIFICATE OF COMPLIANCE WITH RULE 9.210

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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