# 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**

*** * * * ***

## PETITIONERS' REPLY BRIEF ON THE MERITS

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## ARGUMENT

The Lenders concede that a private right of action exists to recover a fee paid for the unlicensed practice of law. (Answer Br. at 7 (citing *Fla. Bar v. Warren*, 661 So. 2d 304, 305 (Fla. 1995)). But they ask the Court to invent a *standing* requirement that, as The Florida Bar recognizes, would in practice make it impossible for most victims of the unlicensed practice of law to sue. (Florida Bar Amicus Br. at 5.)

Instead, courts should treat these cases like they do others and apply general legal principles. (*Accord* Florida Bar Amicus Br. at 6.) The question is not one of *standing*; this Court has recognized that victims of the unlicensed practice of law have standing to bring claims to recover fees and damages. *See Fla. Bar re Amendments to Rs. Regulating Fla. Bar (Proceedings Before a Referee)*, 685 So. 2d 1203 (Fla. 1996). Rather, to ensure this Court's power to define the practice of law, while at the same time allowing victims access to a civil remedy, courts in these cases should simply ask if the plaintiff has alleged facts, construed in the light most favorable to him, that if true constitute the unlicensed practice of law under this Court's rules and precedent. If the answer is yes, the trial court should allow the case to proceed. (*Accord* Florida Bar Amicus Br. at 6.)

The courts below, however, did not consider whether the facts alleged by the Homeowners constitute the unlicensed practice of law because they held that the

Homeowners lacked standing to bring this type of claim altogether. That was error, and these cases should be remanded so that the trial courts can engage in the proper inquiry.

In doing so, the trial courts should be governed by the numerous cases holding that a non-lawyer who prepares mortgages and deeds for a fee engages in the unlicensed practice of law, as well as this Court's rules defining the practice of law to include preparation of mortgages and deeds. *See* Part I, below. The trial courts should also be governed by this Court's precedent holding that even where a non-lawyer is authorized to prepare legal instruments incidental to his business, he is not authorized to make a separate charge for those legal services, as the Lenders did. The Lenders' Answer Brief does not address these precedents, pretending that it is an open question whether a non-lawyer can charge for preparing mortgages and deeds.

Finally, none of the Lenders' "tipsy coachman doctrine" arguments support affirming, and none were adopted or even addressed by the District Court. First, appellant Forman's claims are not preempted by the Home Owners Loan Act, and despite that fact that many other states prohibit lenders from charging a fee for non-lawyer prepared mortgages and deeds, the Lenders cannot cite a single case holding that such a state law prohibition is pre-empted by HOLA. Second, the "pro

se" exception expressly does not authorize a non-lawyer *to charge a fee to others*. Third, the affirmative defense of "voluntary payment" does not apply. The Court should reaffirm that victims of the unlicensed practice of law have standing to sue the unlicensed practitioner and should reverse the decision below and remand these cases for further proceedings.

## I. A Trial Court Has Jurisdiction to Hear an Action to Recover a Fee Charged for the Unlicensed Practice of Law Where This Court's Decisions and Rules Hold That the Alleged Activity Constitutes Unlicensed Practice.

The Lenders wrongly claim that the Homeowners are attempting to have trial courts "invade" this Court's jurisdiction to define the practice of law and that under the Homeowners' theory "a plaintiff could maintain an action merely by claiming that a defendant engaged in the unauthorized practice of law." (Answer Br. at 6, 8.) That is not the case. The Homeowners have not only used the magic words "unlicensed practice of law" in their complaints; they have alleged facts that under this Court's precedent constitute the unlicensed practice of law.

The Florida Bar supports the rule that "as long as there is precedent in the case law in general, an action for damages may proceed. The general findings may be in several cases, not one specific case." (Florida Bar Amicus Br. at 6.) "[I]f case law holds that the *activity* is the unlicensed practice of law, a party harmed . . . may maintain an action seeking remedies." (*Id.* at 6 (emphasis added).) "Finding

otherwise would leave many individuals harmed by the unlicensed practice of law without a means to seek redress through civil proceedings . . . ." (*Id.*)

This rule balances the public policy expressed by this Court that victims of the unlicensed practice of law be permitted to seek a civil recovery and this Court's authority to define the practice of law. The Lenders' alternative rule, that a prior specific finding as to a particular defendant or as to a particular type of defendant (for example, a finding as to non-lawyer lenders as opposed to non-lawyer title companies) "would leave many individuals harmed by the unlicensed practice of law without a means to seek redress through civil proceedings . . . ." At the same time, requiring facts sufficient to state a claim under this Court's precedent ensures uniformity and this Court's authority to define the practice of law.[1] The Court should adopt the rule advocated by The Florida Bar and supported by case law. *See, e.g.*, *Vista Designs, Inc. v. Melvin K. Silverman, P.C.*, 774 So. 2d 884 (Fla. 4th DCA 2001).

[1] The Lenders continue to cite *Dade-Commonwealth Title Insurance Co. v. North Dade Bar Ass'n*, 152 So. 2d 723 (Fla. 1963) and other cases of injunctive relief, rather than for the money damages sought in these cases. (*See* Answer Br. 10–13) As the Homeowners and the Florida Bar have pointed out, however, those decisions do not apply because this Court has made a distinction between the two types of relief. (*See* Homeowners' Initial Br. at 11–12; The Florida Bar Amicus Br. at 13.) The Lenders' citation to *United Services Automobile Ass'n v. Goodman*, Case No. SC01-1700 (Fla. Apr. 19, 2002), is also not on point since it involved a trial court's adoption of rules contrary to this Court's rules, not an action for damages based on the unlicensed practice of law.

## II. The Complaints in These Cases Allege Activities That Constitute the Unlicensed Practice of Law Under This Court's Decisions and Rules.

The complaints in these cases allege activities that under this Court's precedent and rules constitute the unlicensed practice of law. The courts below, however, did not consider this Court's decisions on document preparation because the courts below held that the Homeowners lacked standing to bring this type of claim without a prior specific unlicensed practice of law determination against the Lenders. Thus, these cases should be reversed.

This Court has repeatedly held that the unlicensed practice of law includes a non-lawyer preparing mortgages and deeds. For example, in *Florida Bar v. Schoonover*, 662 So. 2d 1237, 1238 (Fla. 1995), this Court issued an injunction against Schoonover, Mel's Document Preparation Service, and DOCU-Prep, all non-lawyers, where the Bar alleged they had "engaged in the unlawful practice of law . . . by preparing warranty deeds, quitclaim deeds, [and] foreclosures." In *Florida Bar v. Lister*, 662 So. 2d 1241, 1241–42 (Fla. 1995), this Court enjoined Lister, a non-lawyer, from "preparing and executing legal documents" where the Bar alleged that he "prepared a mortgage and quitclaim deed." In *Florida Bar v. Irizarry*, 268 So. 2d 377, 379 (Fla. 1972), this Court enjoined a non-lawyer from the unlicensed practice of law where the Bar alleged that he prepared a "deed, mortgages, notes, assignments and satisfactions." The Lenders ignore these cases.

This Court's Rules Regulating the Florida Bar also recognize that the preparation of mortgages and deeds is the practice of law, limited to lawyers. Rule 16-1.3(a) provides that a certified foreign legal consultant may not perform "any activity or any service constituting the practice of the laws of . . . the state of Florida . . . including, but not limited to, the restrictions that such person shall not: . . . (B) prepare any deed, mortgage, assignment, discharge, lease, agreement of sale, or any other instrument affecting title to real property." This rule makes sense because the task often involves selecting from among various mortgage and deed forms and attaching riders, and an improperly prepared mortgage or deed can interfere with a homeowner's ability to transfer his property or obtain subsequent mortgages. The Lenders' Answer completely ignores this Court's rule prohibiting preparation of mortgages and deeds by non-lawyers.

The Lenders instead rely on what they refer to as a concession made in oral argument in the trial court in the Forman case. (Answer Br. at 2 (citing Forman R3.41).) But they do not quote the language they refer to, and in fact the language they cite is not a concession; Forman's counsel stated in relevant part:

> a mortgage document is just like the legal documents in the Miravalle case and the Davide case and the other cases summarized in Miravalle. It involves securing important legal rights and interest[s] in real property, and those services are the practice of law; preparing a deed, preparing a mortgage. So I think there is adequate case law saying that preparation of a legal instrument is the practice of law . . . .

(Forman R3.41–42.) And later in the argument counsel directed the trial court to Rule 16-1.3(a) of the Rules Regulating the Florida Bar as support that preparation of a mortgage by a non-lawyer is unlicensed practice. (Forman R3.52–53.) Thus, there was no concession, and the Lenders do not provide any authority that they may prepare mortgages and deeds for a fee.

The Lenders also argue that even though this Court's rules and decisions consistently hold that preparation of a mortgage and deed by a non-lawyer is the unlicensed practice of law, the Homeowners must nonetheless present a prior case where a mortgage lender in particular was found to be engaging in unlicensed practice by preparing deeds and mortgages for a fee. That rule is not supported by The Florida Bar, however, and the Lenders do not explain why non-lawyer mortgage lenders should be considered differently than non-lawyer real estate brokers, title insurers, or others—nor why the *standing* of a victim to sue should depend on the identity of the non-lawyer.

Even if the Lenders were correct that they may be authorized to prepare mortgage documents or deeds, the complaints in these cases allege that they did so and *charged a separate fee*. This Court has held that even where it authorizes an entity to engage in certain aspects of the practice of law incidental to its business, the entity may *not* charge others separately for performing those services. *See*

*Cooperman v. W. Coast Title Co.*, 75 So. 2d 818, 821 (Fla. 1954) ("[W]hat we have written . . . must not be construed as sanctioning *a charge of any sort* . . . .") (emphasis added); *see also* Part III.B, below. Thus, even if they were otherwise authorized to prepare mortgages and deeds as an incident to their business, the Lenders would not be authorized to *charge a separate fee* to prepare those legal documents.[2]

The Homeowners have presented authority that a non-lawyer's preparation of mortgages and deeds is the unlicensed practice of law, and that even if authorized under the "pro se" exception, is not authorized if a separate fee is charged. Thus, the Homeowners complaints should not have been dismissed. (*Accord* Florida Bar Amicus Br. at 6 ("[A]s long as there is precedent in the case law in general, an action for damages may proceed.").)

In addition, several of the out-of-state authorities cited by the Lenders in fact support the Homeowners. For example, in *American Abstract & Title Co. v. Rice*,

[2] The Lenders citation to *Florida Bar in re Advisory Opinion—Nonlawyer Preparation of & Representation of Landlord in Uncontested Residential Evictions*, 605 So. 2d 868, 871 (Fla. 1992), and *Florida Bar in re Advisory Opinion—Nonlawyer Preparation of Residential Leases Up to One Year in Duration*, 602 So. 2d 914 (Fla. 1992), are inapposite because they do not authorize charging a fee even where they authorize certain practice. (Answer Br. at 17.) *Florida Bar in re Advisory Opinion—Nonlawyer Preparation of Notice to Owner & Notice to Contractor*, 544 So. 2d 1013 (Fla. 1989), is likewise inapplicable because in that case the Court held that the practice at issue was not the practice of law where the industry used forms prescribed by statute.

186 S.W.3d 705 (Ark. 2004), as in these cases, homeowners sued to recover a fee that their non-lawyer settlement and escrow agent charged them for preparing the mortgage, note, and deed for their home loan. The Arkansas Supreme Court held that the state's trial courts had jurisdiction to hear the case and that the homeowners were *not* first required to obtain an opinion or prosecution through the state's Committee on the Unlicensed Practice of Law. *Id.* at 709, 712.

The Lenders also ignore the many other jurisdictions that prohibit non-lawyers from charging fees for preparing legal documents. For example, Texas law prohibits non-lawyers from "charg[ing] or receiv[ing] . . . any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, . . . note, [or] mortgage." Tex. Gov't Code Ann. § 83.001 (Vernon 2003); *see also Pulse v. N. Am. Land Title Co. of Mont.*, 707 P.2d 1105, 1109–10 (Mont. 1985); *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).

## III. The Lenders' Arguments Under the "Tipsy Coachman Doctrine" Do Not Support Affirming the Decision Below.

### A. Forman's Claims Are Not Preempted by Federal Law.

The Lenders are wrong that Appellant Forman's claims are preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §§ 1461–70. Despite the fact that

many other states prohibit lenders from charging a fee for non-lawyer prepared mortgages and deeds, the Lenders cannot cite to a single case holding that such a state law prohibition is pre-empted by HOLA.

While the Lenders cite to opinions holding that items such as fax fees are preempted by HOLA (Answer Br. at 32–33) there is no indication in HOLA that Congress intended to preempt this Court's regulation of the practice of law, which is a matter of traditional state concern. *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("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."); *Fla. Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arb.*, 696 So. 2d 1178, 1184 (Fla. 1997) (holding that federal law did not preempt state regulation of practice of law "in the absence of legislative authorization" of non-lawyer practice). The *de la Cuesta* case the Lenders repeatedly cite in fact makes the point that "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," such as the general licensing requirements to practice law. 458 U.S. 141, 171–72 (1982) (O'Connor, J., concurring).

The Lenders' concern that federal thrifts might be subject to different regulations state-to-state is hollow. Lenders currently are subject to slight variations from state to state. For example, Lenders may *not* charge document preparation fees for non-lawyer prepared documents in many states, such as Texas and Arkansas. In fact, the regulations promulgated by HUD recognize that in many states lawyers are required to complete documents, thus the regulations contemplate some variation in this area. 24 C.F.R. Pt. 3500, Appendix A. ("In 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*." ).

*Fuchs v. Wachovia Mortgage Corp.*, 2005 WL 3076343 (N.Y. Sup. Nov. 15, 2005), cited by the Lenders, is a New York State trial court decision under the National Bank Act, not HOLA. And it was affirmed on separate grounds, not on preemption. *Fuchs v. Wachovia Mortgage Corp.*, 41 A.D.3d 424 (N.Y. Sup. App. 2007). Likewise, *Haehl v. Washington Mutual Bank, F.A.*, 277 F. Supp. 2d 933, 934 (S.D. Ind. 2003), dealt with kickback fees, not legal fees for mortgages and deeds prepared by non-lawyers.

The Lenders' reliance on an amicus brief submitted in a different proceeding is misplaced. First, both *Auer v. Robbins*, 519 U.S. 452 (1997), and *Navellier v.*

*Sletton*, 262 F.3d 923 (9th Cir. 2001), cited by the Lenders, dealt with the case where an agency had submitted a brief in the case before the court. In this case, the OTS has not submitted any brief, and it is not clear whether the OTS's position has changed in the last six years or whether it would be different on the facts of these cases. Second, an agency's interpretation of its own regulation in a brief is afforded deference only when the language of the regulation is ambiguous, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), and courts have found that section 560.2 of HOLA is unambiguous. *Lopez v. World Savs. & Loan Ass'n*, 130 Cal. Rptr. 2d 42, 48 (Cal. Ct. App. 2003).

Finally, in citing to an unauthorized practice of law decision from Ohio that contained facts not in the pleadings in this case, the Lenders neglect to mention that the Ohio opinion expressly did not decide the core issue of whether a fee could be charged by a non-lawyer for preparing mortgages and deeds: "The permissibility of the charging of a fee to the mortgagor for the preparation of the mortgage instrument is not discussed in this opinion." *Ohio Sup. Ct. Bd. on the Unauthorized Practice of Law*, Op. UPL 2008-02 at n.1 (Dec. 12, 2008).

### B. The "Pro Se" Exception Does Not Permit the Lenders to Charge Others a Separate Fee for the Legal Documents They Prepare.

The "pro se" exception permits a non-lawyer to prepare documents for itself, but it does not permit a non-lawyer to charge *others* a fee for the legal documents it

prepares. The Lenders contend that they are permitted to pass costs on to their customers as part of borrowing. But that is only true when they are passing on services that are performed by licensed professionals, not when the lender performs a legal service itself, without a license, under the pro se exception.

The Lenders' own cited case illustrates this point. In *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.*, 367 So. 2d 633, 635 (Fla. 2d DCA 1979), a bank hired a licensed law firm to give an opinion of title relating to a loan. The lawyer's fee was then passed on to the borrower. The court held that the borrower could not sue the lawyer for breach of contract because of a lack of privity. The case did not deal with a lender who had charged a fee for legal documents that it had prepared itself using non-lawyers.

In fact, where this Court and others have found that a non-lawyer was authorized to practice under the "pro se" exception, they have explicitly held that such an authorization does not permit the non-lawyer to charge anyone else; after all, "pro se" literally mean "for oneself," it is not an exception for non-lawyers to go into the business of profiting from their legal services. In *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954), this Court permitted a non-lawyer title company to prepare legal documents under the "pro se" exception, but expressly stated that the authorization did not permit the non-lawyer to charge any separate

fee for those documents. *Id.* at 821 ("[W]hat we have written . . . must not be construed as sanctioning *a charge of any sort* . . . ."). (emphasis added). The Lenders focus on the Court's authorization under the "pro se" exception in *Cooperman* but ignore the Court's express prohibition on charging any separate fee.

In *Preferred Title Services, Inc. v. Seven Seas Resort Condominium, Inc.*, 458 So. 2d 884, 886 (Fla. 5th DCA 1984), the Fifth District likewise held that the "pro se" exception does not permit a non-lawyer to charge for legal document preparation: "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). The Lenders' ignore this case, too.

The prohibition against charging a fee even where an activity is authorized under the "pro se" exception serves several important functions. First, it serves as a bright line rule that allows an entity to prepare documents for itself, while at the same time preventing it from crossing the line into the business of practicing law.

Second, it ensures that the non-lawyer's practice is truly limited to its own benefit; that the activity truly is "pro se," not motivated by an independent profit.[3]

### C. The Voluntary Payment Doctrine Does Not Bar the Homeowners' Claims.

The Lenders arguments on the voluntary payment doctrine were all anticipated and addressed in the Homeowners' Initial Brief. Additionally, it bears note that the Lenders' Answer Brief ignores the Homeowners' arguments under *Cooper v. Paris*, 413 So. 2d 772, 774 (Fla. 1st DCA 1982) (citing *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818 (Fla. 1953)) (holding 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), or *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339–40 (Mo. 2007) (holding that the voluntary payment doctrine does not bar a claim for restitution of a document preparation fee).

## CONCLUSION

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

[3] The contrary foreign opinions cited by the Lenders (Answer Br. at 19) are distinguishable because they fail to recognize the utility of such a rule, and those jurisdictions do not follow the *Cooperman* decision of this Court.

Respectfully submitted,

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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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