

IN THE SUPREME COURT OF OHIO

GARY A. GREENSPAN,

Plaintiff-Appellee,

v.

THIRD FEDERAL SAVINGS & LOAN  
ASSOCIATION,

Defendant-Appellant.

CASE NO. 2008-1568

On Appeal from the Cuyahoga  
County Court of Appeals,  
Eighth Appellate District,  
Case No. 07-89850

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MERITS BRIEF OF APPELLEE  
GARY A. GREENSPAN

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John D. Parker (0025770)

*Counsel of Record*

Thomas D. Warren (0077541)

Brett A. Wall (0070277)

Karl Fanter (0075686)

BAKER & HOSTETLER LLP

1900 East Ninth Street, Suite 3200

Cleveland, OH 44114-3485

Telephone: (216) 861-7528

Facsimile: (216) 696-0740

*Counsel for Appellant, Third Federal Savings  
& Loan Association*

Mark Schlachet (0009881)

*Counsel of Record*

3637 South Green Road—2d Floor

Beachwood, OH 44122

Telephone: (216) 896-0714

Facsimile: (216) 514-6406

Richard E. Shevitz (admitted pro hac vice)

Vess A. Miller (admitted pro hac vice)

COHEN & MALAD, LLP

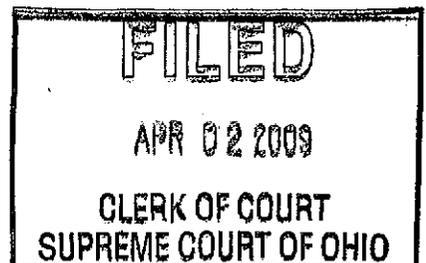
One Indiana Square, Ste. 1400

Indianapolis, IN 46204

Telephone: (317) 636-6481

Facsimile: (317) 636-2593

*Counsel for Appellee, Gary A. Greenspan*



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## INTRODUCTION

Third Federal Savings & Loan Association is a bank. But on top of making its profits legitimately from accounts, investments, and other banking services, it has decided to sell its customers the legal service of preparing promissory notes, mortgages, deeds, and other legal documents—using lay employees that are not licensed to practice law. In this action, Gary A. Greenspan seeks to disgorge the \$300 “document preparation fee” that Third Federal charged Greenspan to prepare these legal documents using undisclosed, non-lawyer employees.

The Eighth District below correctly concluded that Greenspan’s complaint states valid claims against Third Federal for money had and received and for unjust enrichment to recover the \$300 fee. In its opinion, the Eighth District recognized that Third Federal would be unjustly enriched if permitted to profit from the unauthorized practice of law by retaining the “document preparation fee” it charged Greenspan. This Court should affirm the decision below and reject Third Federal’s arguments to the contrary, which are flawed in several respects.

First, the Eighth District properly applied common-law and equitable principles when it held that Greenspan’s complaint states valid claims for money had and received and for unjust enrichment, both of which have long been recognized in Ohio. The Eighth District did not “imply” a new private right of action from statute as Third Federal suggests. The Eighth District expressly held that the statutory action for unauthorized practice of law created by the legislature in 2004 did not apply retroactively to Greenspan’s claims and that he had not brought such a claim. Instead, the Eighth District held, consistent with authority from several districts, that a person charged a fee for legal services performed by a non-lawyer may bring an action to disgorge that fee and prevent the unauthorized practitioner from benefitting from his unauthorized practice.

Second, contrary to Third Federal’s assertions, the Eighth District below did not hold that “every affirmative defense under Ohio law ‘inexorably’ gives rise to a private right of action.” (Appellant’s Br. at 1.) The Eighth District’s holding is limited to Greenspan’s claims in this case, which are based on fees charged for legal work performed by non-lawyers. The decisions of several districts holding that the unauthorized practice of law may provide an affirmative defense to a suit brought by a non-lawyer to recover unpaid legal fees support the Eighth District’s decision in this case that Greenspan stated an equitable claim to recoup the fee collected by Third Federal.

Third, the Eighth District’s decision does not violate this Court’s exclusive jurisdiction. The courts of common pleas have jurisdiction over all civil suits and routinely apply this Court’s unauthorized practice of law decisions when required as part of a civil case. This Court has consistently reviewed those cases without ever suggesting that the lower tribunals lacked jurisdiction or that their decisions infringed upon this Court’s exclusive jurisdiction.

Finally, the Eighth District did not abuse its discretion in declining to hear this case en banc. The court gave a reasoned opinion as to why its earlier opinion in *Crawford v. FirstMerit Mortgage Corp.*, 8th Dist. No. 89193, 2007-Ohio-6074, did not apply to the facts and arguments raised in this case. In addition, the Eighth District’s rules allow *any* panel judge to request hearing en banc, but in this case, not even the dissenting judge requested en banc proceedings—and he was on the panel that decided *Crawford*.

This Court should affirm the Eighth District’s decision below and remand this case to the trial court for further proceedings.

## STATEMENT OF FACTS

Greenspan filed his Complaint on June 13, 2006, seeking to recover the \$300 “document preparation fee” that Third Federal charged to him for preparing legal documents, including mortgages, notes, and deeds, that were prepared by undisclosed, *non-lawyers* in 2002. (Cmplt. ¶1–11, Appellant’s Supp. at 1–3.) The Complaint alleges that Third Federal failed to inform Greenspan that it was using non-lawyers to prepare these legal documents. (Cmplt. ¶11, Appellant’s Supp. at 3.) The Complaint further alleged that, because a non-lawyer may not charge for the preparation of legal documents without engaging in the unauthorized practice of law, and because an agreement to pay a non-lawyer for legal services is unenforceable, Greenspan is entitled to restitution of the \$300 “document preparation fee” under theories of unjust enrichment and money had and received. (Cmplt. ¶19–23, Appellant’s Supp. at 5–6.)

In the trial court Third Federal moved for judgment on the pleadings, though it did not dispute for purposes of that motion that it had engaged in the practice of law by preparing legal documents for a fee. The trial court granted Third Federal’s motion on the grounds that no private cause of action existed. (Apr. 26, 2007 Judgment Entry, Appellant’s App. at 29.)

On appeal the Eighth District reversed and held that the Complaint stated a valid common-law claim for unjust enrichment and for money had and received, and that Greenspan could seek disgorgement of the fee the Third Federal had charged. *Greenspan v. Third Fed. S. & L.*, 177 Ohio App.3d 372, 2008-Ohio-3528, 894 N.E.2d 1250. The Eighth District cited precedent from the Eighth, Ninth, and Tenth Districts in support of its decision, and specifically explained why a prior Eighth District decision relied on by the Third Federal, *Crawford*, supra, was not controlling. *Greenspan* at ¶26–27. Third Federal moved the Eighth District for reconsideration of its decision and suggested that the case be heard en banc as in conflict with

*Crawford*. The Eighth District denied the motion for rehearing, and none of the judges—including the dissenting judge, who was on the *Crawford* panel—invoked the Eighth District’s en banc proceedings. (Appellant’s App. at 31.)

Third Federal then filed a discretionary appeal, which this Court accepted. 120 Ohio St.3d 1416, 2008 -Ohio- 6166, 897 N.E.2d 651. At the same time it filed its discretionary appeal, Third Federal, without notice to Greenspan, also filed an original action in mandamus against the Eighth District, which this Court dismissed.

### ARGUMENT

**Proposition of Law No. I: Under the common law a person who is charged a fee for legal services performed by a non-lawyer may recover that fee through a claim for unjust enrichment or for money had and received.**

The Eighth District properly held that Greenspan stated a common-law claim for unjust enrichment and for money had and received, where he alleged that Third Federal charged him a fee for legal services that Third Federal is not authorized to perform.

Courts in this state and others have long-recognized the common-law principle that where a professional license is required to perform a particular service, a person who is not licensed may not receive any fee for performing that service, and a person who has paid such a fee may recover it. *See McClennan v. Irvin & Co.* (Jan. 30, 1978), 8th Dist. No. 36798, 1978 WL 217728, at \*4 (holding that client of unlicensed architect stated a claim to recover fees it had paid for architectural services), citing *Diversified Property Corp. v. Winters Natl. Bank & Trust Co.* (1967), 13 Ohio App.2d 190, 234 N.E.2d 608 (unlicensed securities broker); *Elephant Lumber Co. v. Johnson* (1964), 120 Ohio App. 266, 202 N.E.2d 189 (unlicensed architect); *Fanning v. College of Steubenville* (1961), 94 Ohio Law Abs. 145, 197 N.E.2d 422 (architectural services performed by one licensed as an engineer but not as an architect); *McGill v. Carlos* (1947), 52

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In applying this general rule, the District Courts have uniformly recognized that a non-lawyer may not recover any fee for performing legal services. For example, in *Middleton & Associates v. Weiss* (June 19, 1997), 8th Dist. No. 71416, 1997 WL 337616, the Eighth District considered “whether \* \* \* representation before the Board of Revisions by an non-attorney based upon a contingency fee agreement constitutes an unauthorized practice of law” so as to prevent a non-lawyer from collecting a fee for those services. *Id.* at \*3. The Eighth District affirmed the trial court’s holding that “the representation \* \* \* before the Cuyahoga County Board of Revision constitutes the unauthorized practice of law,” and therefore “the contract [that]

provided for such service is unenforceable.” *Id.* at \*2. The court affirmed dismissal of the non-lawyer’s claim to recover fees for the legal services he performed. *Id.* at \*4; *see also Med Controls, Inc. v. Hopkins* (1989), 61 Ohio App.3d 497, 498, 573 N.E.2d 154 (affirming summary judgment for client where non-lawyer attempted to collect fee for services that constituted the unauthorized practice of law).

In *Cocon, Inc. v. Botnick Building Co.* (1989), 59 Ohio App.3d 42, 570 N.E.2d 303, syllabus, 305, the Ninth District Court of Appeals similarly determined that a specific act “constitute[d] the unauthorized practice of law” such that no fee could be collected. The plaintiff in *Cocon* sued to recover fees for tax consulting services and for services in representing the defendant before the board of revision. *Id.* at 43. The Ninth District held that the non-lawyer could not recover fees as a matter of law because the services for which it charged constituted the unauthorized practice of law. *Id.* at 44.

In *Foss v. Berlin* (1981), 3 Ohio App.3d 8, 9–10, 3 OBR 9, 443 N.E.2d 197, the Tenth District held that a real estate broker’s drafting of a real estate sales contract would constitute the unauthorized practice of law and explained that Ohio courts would not permit a broker to “profit from the unauthorized practice of law itself, by attempting to charge defendant a fee for drafting the contract.” *Id.* at 10. The court determined, however, that the fee charged in *Foss* was permissible because it was charged by the broker for procuring a buyer, not for preparing legal documents.

Thus, *Middleton* and *Hopkins* from the Eighth District, *Cocon* from the Ninth District, and *Foss* from the Tenth District have each recognized that a non-lawyer may not collect a fee for performing legal services.

In *McClennan v. Irvin & Co.* (Jan. 30, 1978), 8th Dist. No. 36798, 1978 WL 217728, the Eighth District answered the corollary question of whether a fee paid under such circumstances is recoverable by the payor. In *McClennan*, in the context of an unlicensed architect, the Eighth District held that a person who pays a fee for professional services rendered by someone lacking a license may recover those fees through a claim for restitution. The court explained that “[a]mong the factors which are influential in determining whether restitution or some other judicial remedy will be granted to a party in such a case are: \* \* \* the degree of criminality or evil, the comparative innocence or guilt of the parties, the extent of public harm involved, the moral quality of the conduct of the parties, and the severity of the penalty or forfeiture that will result from refusal of relief.” (Omission *sic.*) *Id.* at \*5, quoting 6A Corbin on Contracts §1534, at 818; *see also* Restatement of Restitution §140; *Hedla v. McCool* (C.A.9, 1973), 476 F.2d at 1228 n.2.

Considering those factors, the court in *McClennan* held that “in light of the public policy underlying the legislature’s enactment of [the architectural licensing laws], it is concluded that [payor] is entitled to restitution of the [fee] paid to [the unlicensed architect].” *Id.* at \*6. “The public is better served by a rule which fosters strict adherence and meticulous compliance with the [licensing] laws of the State of Ohio. The allowance of restitution \* \* \* will further serve to deter those who would presume to import a liberal reading to [those laws].” *Id.*; *cf. Disciplinary Counsel v. Stranke*, 110 Ohio St.3d 247, 2006-Ohio-4367, ¶7, 852 N.E.2d 1202 (noting that bankruptcy court had ordered non-lawyer to disgorge fees he collected for legal services); *Reinhard v. Columbus* (1892), 49 Ohio St. 257, 270, 31 N.E. 35 (“As money had and received, one may recover back money paid under an illegal contract, when he is not *in pari delicto* with the defendant.”).

The rationale in *McClennan* applies directly to this case. Here, the complaint alleges that Third Federal prepared a mortgage and deed for Greenspan using non-lawyers and charged Greenspan a fee for that legal service. As this Court held in *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, ¶ 7, 2003-Ohio-6453, 800 N.E.2d 29, the preparation of a deed by a non-lawyer is the unauthorized practice of law. *See also Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23 (holding that the preparation of legal instruments for another is the unauthorized practice of law).

Like *McClennan*, the public policy underlying this Court's licensing requirements to practice law weighs in favor of allowing a claim for restitution where, as here, a non-lawyer has profited from selling legal services. Preventing non-lawyers from benefitting from their unauthorized acts serves the purpose of preventing their unjust enrichment and of protecting the public by deterring unauthorized conduct.

Allowing such a claim also accords with the rationale underlying claims for restitution. "A restitution claim is designed to force the defendant to disgorge benefits that it has wrongfully or unjustly obtained." *Johnson v. Microsoft Corp.*, 155 Ohio App.3d 626, 2003-Ohio-7153, 802 N.E.2d 712, at ¶19. A person not licensed to perform a service that requires a license wrongfully and unjustly obtains a benefit by profiting from acts he is not authorized to perform. As this Court noted in *Disciplinary Counsel v. Stranke*, 110 Ohio St.3d 247, 2006-Ohio-4367, ¶7, and as the Eighth District did in *McClennan*, courts have ordered unlicensed persons to disgorge fees they have collected for performing unauthorized services. Greenspan's complaint therefore states a valid common-law claim for unjust enrichment and for money had and received, and the Eighth District properly reversed the trial court's dismissal.

Instead of squarely addressing Greenspan's common-law claims, Third Federal erects the straw-man argument that the Eighth District below "implied" a right of action based on the unauthorized practice of law statutes. (Appellant's Br. at 6–10.) But the Eighth District's opinion is quite clear that Greenspan has not sought recovery under any statute or by implication but rather through common-law claims for unjust enrichment and for money had and received:

"It should be noted that the pleadings in this case do not directly make a claim for the 'unauthorized practice of law;' the causes of action here are entitled 'monies had and received' and 'unjust enrichment.' Both of these claims for relief are equitable in nature. \* \* \* [T]he 'unauthorized practice of law' was never asserted as an independent cause of action." *Greenspan*, 177 Ohio App.3d 372, 2008-Ohio-3528, 894 N.E.2d 1250, ¶24. In fact, the Eighth District's opinion does not once use the word "imply" or any derivation of it, and the opinion does not rely on any case law regarding implied rights of action.<sup>1</sup>

Third Federal's reliance on *Sarum Management, Inc. v. Alex N. Sill Co.*, 9th Dist No. 23167, 2006-Ohio-5710, is misplaced because in *Sarum Management* the plaintiff attempted to bring a statutory claim for the unauthorized practice of law, not the well-recognized common-law claims brought by Greenspan in this case to recover the fees he had paid. Likewise, in *Miami Valley Hospital v. Combs* (1997), 119 Ohio App.3d 346, 695 N.E.2d 308, cited by Third Federal, the Second District, considered statutory claims and held only that a defendant could not "claim

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<sup>1</sup> The cases that Third Federal cites regarding implied private rights of action are therefore inapplicable because the Eighth District did not *imply* any right of action in this case; it held that the complaint stated valid common-law claims. (See Appellant's Br. at 8–9, citing *Thompson v. Thompson* (1988), 484 U.S. 174; *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245, 249, 348 N.E.2d 144, superceded by statute; *Culbreath v. Golding Ents., L.L.C.*, 114 Ohio St.3d 357, 2007-Ohio-4278, 872 N.E.2d 284, ¶20.; *Linder v. Ins. Claims Consultants, Inc.* (S.C. 2002), 560 S.E.2d 612; *Carlson v. Roetzel & Andress* (Mar. 27, 2008), D.N.J. No. 3:07-cv-33; *Oswell v. Nixon* (Ga. 2005), 620 S.E.2d 419; *Baldwin v. Kulch Assocs., Inc.* (D.N.H. 1998), 39 F.Supp.2d 111.)

as a defense the fact that a *third party, not part of the suit*, is engaging in the practice of law.” (Emphasis added.) *Id.* at 348. Thus, none of Third Federal’s cited cases address common-law claims, like those recognized in *McClennan* and the authorities cited in *McClennan*. The Eighth District properly held that Greenspan has stated valid common-law claims for unjust enrichment and for money had and received.

**Proposition of Law No. II: The version of R.C. 4705.07 applicable to Greenspan’s claims did not abrogate common-law claims for unjust enrichment and for money had and received because the language of the applicable statutes does not clearly show any legislative intent to abrogate the common law.**

As set forth above, the Eighth District in *McClennan* long ago recognized a common-law claim to recover a fee paid to a person who lacks a license to perform the services for which it collected the fee. Yet Third Federal suggests, wrongly, that the version of R.C. 4705 applicable to Greenspan’s claims somehow preempts or abrogates those claims.

“According to principles of statutory construction, the General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent.” *Carrell v. Allied Prods. Corp.* (1997), 78 Ohio St.3d 284, 287, 677 N.E.2d 795, citing *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus. “Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force.” *Id.* ““There is no repeal of the common law by mere implication.”” *Id.*, quoting *Frantz v. Maher* (1957), 106 Ohio App. 465, 472, 7 O.O.2d 209, 155 N.E.2d 471.

As set forth above, at the time that Greenspan’s claim against Third Federal accrued in July of 2002, a common-law claim existed for unjust enrichment or money had and received to disgorge Third Federal of the fee it charged. *See McClennan, supra; Middleton & Associates,*

supra. And at the time that Greenspan's claim accrued in 2002, there was no statute evidencing intent to supersede that common law.

R.C. 4705.01 (2002) merely sets out the requirement that only lawyers properly licensed by this Court may practice law in this state:

"No person shall be permitted to practice as an attorney and counselor at law \* \* \* unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules. \* \* \* " R.C. 4705.07, eff. Sept. 30, 1997.

And R.C. 4705.07, which Third Federal cites, simply prohibited any person from holding herself out as an attorney if she was not. The statute provided:

**"4705.07 FALSE REPRESENTATION AS ATTORNEY**

(A) No person who is not licensed to practice law in this state shall do either of the following:

- (1) Hold that person out in any manner as an attorney at law;
- (2) Represent that person orally or in writing, directly or indirectly, as being authorized to practice law.

(B) The use of 'lawyer,' 'attorney at law,' 'counselor at law,' 'law,' 'law office,' or other equivalent words by any person who is not licensed to practice law, in connection with that person's own name, or any sign, advertisement, card, letterhead, circular, or other writing, document, or design, the evident purpose of which is to induce others to believe that person to be an attorney, constitutes holding out within the meaning of division (A) of this section." R.C. 4705.07 (2002). R.C. 4705.99 (2002) provided that "Whoever violates section 4705.07 of the Revised Code is guilty of a misdemeanor of the first degree."

The plain language of these statutes does not show any legislative intent to displace common-law claims relating to a fee collected by a non-lawyer for legal services. That the statute provided a criminal penalty for false representation as an attorney does not alter the fact that there is no indication that the legislature intended to abrogate common-law civil remedies for those who were charged a fee by an unlicensed practitioner. *See Carrell, supra; Wyandotte Transportation Co. v. United States* (1967), 389 U.S. 191, 201–02 (“Clearly, provision of a criminal penalty does not necessarily preclude \* \* \* a private cause of action for damages.”).

In fact, it was not until R.C. 4705.07 was amended in 2004 that the legislature showed any intent to substitute a statutory right of action for existing common-law claims. In 2004, the legislature created a special statutory right of action for anyone damaged by a person who “[c]ommit[s] any act that is prohibited by the supreme court as being the unauthorized practice of law.” R.C.4705.07, eff. Sept. 15, 2004. The statute also provided for the recovery of attorney’s fees. R.C. 4705.07(C)(2)(d), eff. Sept. 15, 2004. But by its express terms, the statute as amended does not apply to Greenspan’s claims, which accrued in 2002. R.C. 4705.07(C)(3) (amendments apply “only regarding acts \* \* \* that occur on or after the effective date of this amendment”). Simply put, the statutes in effect when Greenspan’s claims accrued do not show any legislative intent to preempt the common-law claims he brought.

**Proposition of Law No. III: Conduct that would provide the basis for an affirmative defense may also in some circumstances provide the basis for a claim where, for example, the conduct has resulted in the unjust enrichment of one party.**

Recognizing the uniform appellate decisions holding that the unauthorized practice of law is a valid affirmative defense to a claim for fees, Third Federal suggests that it is legally unthinkable that the same conduct in some circumstances might provide the basis for an affirmative defense and also for an affirmative claim for relief. (Appellant’s Br. at 11.) But this

situation is not uncommon, and was, in fact, the situation in *McClennan*, supra. In *McClennan*, a client sued a corporation for, among other things, restitution of fees the corporation had charged the client for performing architectural services where the corporation was not a licensed architect. *Id.* at \*1. The corporation counterclaimed for unpaid fees still owed by the client. *Id.* The trial court found for the corporation on its counterclaim for unpaid fees and against the client on his claim for restitution of fees already paid. But on appeal, the Eighth District reversed. It held that: (1) the corporation's unlicensed practice of architecture was an affirmative defense to its counterclaim for unpaid fees against its client; and (2) that the corporation's unlicensed practice of architecture provided the basis for an affirmative claim for restitution by the client against the corporation for fees already paid. *Id.* at \*5. This is the exact same type of claim brought by Greenspan in this case.

At any rate, contrary to Third Federal's assertion, the Eighth District's decision in this case did not hold that every affirmative defense is also a basis for a claim for relief. Rather, the Eighth District held that Greenspan's complaint stated a valid common-law claim for unjust enrichment and for money had and received based upon the specific factual allegations against Third Federal in this case.<sup>2</sup> Third Federal overreaches when it asserts that "[s]hould the Eighth District panel's decision stand, any affirmative defense would also constitute a cause of action." (Appellant's Br. at 13.) The Eighth District merely recognized that the same inequity that allows a person to resist paying a non-lawyer for legal services also provides a basis, grounded in sound

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<sup>2</sup> Third Federal's reliance on *Grenga v. Bank One, N.A.*, 7th Dist. No. 04 MA 94, 2005-Ohio-4474, and *Transitron Elec. Corp. v. Hughes Aircraft Co.* (D. Mass. 1980), 487 F.Supp. 885, in which specific conduct that would constitute an affirmative defense in some circumstances was held not to provide a corresponding cause of action is therefore misplaced.

public policy for deterring unauthorized practice, for that person to recover a fee paid for legal services that were unwittingly performed by a non-lawyer.

Other states have also recognized that a person who is charged a fee for legal services performed by a non-lawyer may recover that fee through a claim for restitution. For example, in *Carpenter v. Countrywide Home Loans, Inc.* (Mo. 2008), 250 S.W.3d 697, 703, the Missouri Supreme Court held that “[a]ny person engaged in the unauthorized practice of law has no right to collect fees, and those who have been improperly charged these fees have the right to their return at common law under the theory of money had and received.” The court affirmed a judgment that disgorged a mortgage lender of the “document preparation fees” it had charged its customers for preparing mortgages and deeds.<sup>3</sup> *Id.*; see also *Lenders Title Co. v. Chandler* (2004), 358 Ark. 66, 81, 186 S.W.3d 695, 704 (affirming class certification of class of borrowers who were charged document preparation fees by lender). Texas has even provided a specific statutory treble-damages right of action against a lender who charges for legal services of document preparation that are performed by non-lawyers. Tex.Gov. Code Ann. 83.001, 83.005.<sup>4</sup>

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<sup>3</sup> Third Federal’s claim that it should be able to profit from its unauthorized acts because otherwise Greenspan would “get[] something for nothing” (Appellant’s Br. at 12) is wrong, as recognized in other states, because doing so would both encourage unauthorized practice and ignore the principle that a wrongdoer should not profit from his wrongdoing.

<sup>4</sup> Third Federal relies on other out-of-state cases applying the voluntary payment defense to certain claims. *Reliable Collection Agency, Ltd. v. Cole* (Haw. 1978), 584 P.2d 107; *King v. First Fin. Serv. Corp.* (Ill. 2005), 215 Ill.2d 1, 828 N.E.2d 1155. But the voluntary payment defense does not apply where, as here, it is alleged that Third Federal did not disclose that it was using non-lawyers. And the Missouri Supreme Court has rejected the voluntary payment doctrine outright in these types of cases: “The voluntary payment doctrine is a principle based on waiver and consent. Consequently, [a mortgage lender] 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.”

Thus, the Eighth District’s holding in this case is consistent with well-reasoned authority in other states, as well as existing Ohio precedent.

**Proposition of Law No. IV: Trial courts have jurisdiction to decide whether an agreement is one for the unlicensed practice of law under this Court’s precedent, such that a person who paid a fee under the agreement, before the enactment of R.C. 4705.07(C), may bring an equitable claim to recover that fee.**

Third Federal also wrongly claims that disgorging Third Federal of the unauthorized fees it collected in this case will impinge on this Court’s jurisdiction over the unauthorized practice of law. But the Ohio Constitution gives common pleas courts jurisdiction over all civil suits and those courts routinely apply this Court’s unauthorized practice of law decisions when necessary.

Section 4(B), Article IV of the Ohio Constitution provides that “[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters \* \* \* as may be provided by law.” Pursuant to this provision, the General Assembly has given the common pleas courts “original jurisdiction *in all civil cases.*” (Emphasis added.) R.C. 2305.01.

“[T]he usual and customary meaning accorded to a civil action is ‘[a]n action brought to enforce, redress or protect a private or civil right; a noncriminal litigation.’” *Benjamin v. Credit Gen. Ins. Co.*, 10th App. No. 04AP-642, 2005-Ohio-1450, ¶19 (quoting Black’s Law Dictionary (7th Ed. 1999)). An action for unjust enrichment is a civil case. *See, e.g., Clapp v. Mueller Elec. Co.*, 162 Ohio App.3d 810, 2005-Ohio-441, 835 N.E.2d 757, ¶41.

Greenspan brought a civil case for restitution of an unlawful fee, based on theories of unjust enrichment and money had and received. Accordingly, the court of common pleas properly possessed jurisdiction to hear this civil case under R.C. 2305.01 and section 4(B), article IV of the Ohio Constitution.

Third Federal argues, incorrectly, that this Court’s exclusive jurisdiction over the practice of law prohibits lower courts from hearing any claim involving unauthorized practice. The fact

that the conduct making the agreement unenforceable in this case is the unauthorized practice of law, however, does not transform Greenspan's civil case into one within this Court's original jurisdiction. A civil case for restitution under an illegal or unenforceable contract often involves conduct that is criminal or otherwise prohibited. *Licking County v. Maharg* (1990), 61 Ohio Misc.2d 126, 575 N.E.2d 529 (granting motion for summary judgment on claim by county for restitution of money paid by county informant to drug dealer). The fact that the underlying conduct is criminal does not transform the civil case into a criminal case that can be prosecuted only by the state. *Cf. id.* Similarly, the fact that the underlying conduct in this case is the unauthorized practice of law does not transform this civil case into one within this Court's original jurisdiction.

The mere fact that a civil case may share an *issue* in common with a disciplinary matter within this Court's original jurisdiction does not change jurisdiction over the *civil case*. For example, this Court would certainly have jurisdiction to discipline an attorney who failed to "act with reasonable diligence and promptness in representing a client" or "neglect[ed] a legal matter entrusted to him." Prof. Cond. Rule 1.3; DR 6-101(A)(3) (superceded February 1, 2007). But no one could seriously suggest that a client harmed by a lawyer's neglect could not pursue an ordinary malpractice claim in the trial courts, or that the claim must first be presented in this Court, and then only if the client can enlist the support of a local bar association. *See, e.g., Disciplinary Counsel v. McKenna* (2006), 108 Ohio St.3d 178, 2006-Ohio-547, 842 N.E.2d 46, ¶6, 13 (suspending lawyer from practice of law and noting related malpractice action had been filed).

Similarly here, the court of common pleas has jurisdiction over Greenspan's civil case. That this Court would have jurisdiction over a petition by a local bar association to *enjoin* Third Federal's use of nonlawyers to prepare legal documents does not change the result.

This Court's precedent requires lower tribunals to deal with the issue of unauthorized practice when it arises in a case otherwise properly before those tribunals. For example, in *Fravel v. Stark County Board of Revision*, 88 Ohio St.3d 574, 2000-Ohio-430, 728 N.E.2d 393, this Court affirmed a Board of Tax Appeals' holding that a non-lawyer engaged in the unauthorized practice of law. The Court did *not* suggest that the Board of Tax Appeals lacked jurisdiction to determine that the non-lawyer engaged in the unauthorized practice of law. Instead, the Court explained that the BTA correctly applied the law:

"\* \* \* Dorn engaged in the unauthorized practice of law, and, under *Sharon Village*, the BTA correctly dismissed the complaint Dorn filed on behalf of Fravel. Accordingly, we hold that the BTA's decision is reasonable and lawful, and we affirm it." *Id.* at 576. *See also Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision*, 85 Ohio St.3d 125, 1999-Ohio-257, 707 N.E.2d 472 (affirming board of tax appeals' decision that non-lawyer engaged in unauthorized practice of law); *C.I.A. Props. v. Cuyahoga County Auditor*, 89 Ohio St.3d 363, 2000-Ohio-192, 731 N.E.2d 680 (same); *Gammarino v. Hamilton County Bd. of Revision*, 80 Ohio St.3d 32, 1997-Ohio-361, 684 N.E.2d 309 (reversing board of tax appeals' decision that non-lawyer did not engage in unauthorized practice of law); *State ex rel. Cooker Rest. Corp. v. Montgomery County Bd. of Elections*, 80 Ohio St.3d 302, 306, 686 N.E.2d 238, 1997-Ohio-315 (holding that board of

elections did not abuse discretion when it held that the preparation and filing of a statutory protest with a board of elections constitutes the practice of law).<sup>5</sup>

The district courts have similarly exercised jurisdiction over claims nearly identical to those raised by Greenspan without ever suggesting the common pleas courts lacked jurisdiction over such civil cases, which involved some determination of the unauthorized practice of law. In particular, in *Middleton & Associates*, *Cocon*, and *Foss*, supra, the District Courts determined that a non-lawyer could not recover a fee for services because that would reward the non-lawyer for his unauthorized practice of law. For example, in *Middleton & Associates*, the court expressly framed the issue as whether certain conduct constituted the unauthorized practice of law:

“Th[e] sole issue presented in this case is whether the representation before the Board of Revisions by an non-attorney based upon a contingency fee agreement constitutes an unauthorized practice of law.” *Middleton & Assocs.* at \*3.

The court then examined this Court’s precedent and determined that the services constituted the unauthorized practice of law. The court affirmed the trial court’s holding that “the representation \* \* \* before the Cuyahoga County Board of Revision constitutes the unauthorized practice of law,” and therefore “the contract [that] provided for such service is unenforceable.” *Id.* at \*2; see also *Med Controls, Inc. v. Hopkins* (1989), 61 Ohio App.3d 497, 498, 573 N.E.2d 154 (holding that a contract is unenforceable when it is for the unauthorized practice of law);

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<sup>5</sup> Thus, the decisions cited by Third Federal for the general principle that this Court has exclusive jurisdiction to define and broadly regulate and control the practice of law in Ohio do not mean that trial courts are prohibited from applying those decisions when necessary to resolve issues in a civil case within their jurisdiction. (See Appellant’s Br. at 14–16, and cases and rules cited.) In addition, the “complaints” referred to by Third Federal in The Rules for the Government of the Bar are complaints by bar associations, not civil complaints by laypersons for restitution, which are within the jurisdiction of the common pleas courts. See Gov. Bar.R. VII §4.

*Cocon, Inc. v. Botnick Building Co.* (1989), 59 Ohio App.3d 42, 570 N.E.2d 303, syllabus, 305; *Foss v. Berlin* (1981), 3 Ohio App.3d 8, 9–10, 3 OBR 9, 443 N.E.2d 197.<sup>6</sup>

Recent amendments to the Revised Code also support the proposition that the common pleas courts have jurisdiction to hear civil cases, like Greenspan's, which arose from events prior to 2004. In 2004, the General Assembly amended R.C. 4705.07 to do two things: (1) provide that all determinations regarding unauthorized practice of law must be made by this Court, and (2) to provide a statutory right of action for anyone damaged by the unauthorized practice of law upon obtaining such a determination from this Court. Am.Sub.H.B. No. 38, 104 Ohio Laws. The statute only applies to acts that occur on or after September 15, 2004, the effective date of the amendment. R.C. § 4705.07(C)(3).

Because the facts alleged by Greenspan occurred before 2004, he has no statutory claim and instead brought common-law claims for unjust enrichment and for money had and received. Nonetheless, the amendments to the statute support the proposition that prior to the amendments, trial courts could hear claims like Greenspan's without a prior unauthorized practice of law adjudication by this Court.

"When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law." *Lynch v. Gallia County Bd. of Comm'rs* (1997), 79 Ohio St.3d 251, 254, 680 N.E.2d 1222, 1224. "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant \* \*

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<sup>6</sup> Third Federal relies again upon *Sarum Management, Inc. v. Alex N. Sill Co.*, 2006-Ohio-5710, but in that case the plaintiff brought a statutory claim for the unauthorized practice of law. The plaintiff failed, however, to follow the statutory procedure for bringing the statutory claim. Greenspan's claims are common law claims to which the statute in *Sarum Management* does not apply, and therefore he need not have followed the statutory procedure described in *Sarum Management*.

\* .” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶6, quoting *E. Ohio Gas Co. v. Pub. Util. Comm’n* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875.

The legislature’s amendments to R.C. 4705.07(C) provide that “Any person who is damaged by another person who commits a violation of division (A)(3) of this section may commence a civil action to recover actual damages from the person who commits the violation, *upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law in violation of that division.*” (Emphasis added.) R.C. 4705.07(C)(2). The legislature’s addition of a requirement that a prior unauthorized practice of law adjudication by this Court is a prerequisite to suit under the statute must be presumed to have been made to effect a change—that is, prior to the amendment, there was no such requirement. Thus, the amendments to R.C. 4705.07 confirm that the court of common pleas had jurisdiction to hear claims based on events occurring prior to the effective date of the statute without a prior adjudication by this Court.

Third Federal’s citation to a recent advisory opinion from the Board on the Unauthorized Practice of Law has no application to this analysis.<sup>7</sup> The Board’s decision in the advisory opinion is based on facts that are not present in this case—the only facts before the Court are those alleged in the Complaint, which must be construed in the plaintiff’s favor. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591, 592-593, 635 N.E.2d 26. Moreover, the advisory opinion assumes certain facts that Greenspan intends to dispute regarding the degree of non-lawyer

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<sup>7</sup> The Board’s decision to issue the advisory opinion while this case is pending also appears to be inconsistent with Board Rule VII, section 2(C), which states that “The Board shall not issue advisory opinions in response to requests concerning a question that is pending before a court.”

involvement in the selection and preparation of the legal documents involved in this case. And the advisory opinion specifically does not address whether a non-lawyer that may prepare documents for itself may charge another a fee for that service. *See* Nonattorney Completion of Mortgage Instruments (Dec. 12, 2008), Adv. Op. UPL 2008-02, at footnote 1. On the facts in the Complaint, Greenspan has alleged that Third Federal charged him an improper fee for legal services performed by non-lawyers. *See Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, ¶ 7, 2003-Ohio-6453, 800 N.E.2d 29 (holding that the preparation of a deed by a non-lawyer is the unauthorized practice of law). The courts of common pleas have jurisdiction over Greenspan's civil claims.

**Proposition of Law No. V: The panel below did not abuse its discretion in declining to hear this case en banc.**

Third Federal wrongly claims that the Eighth District was required to hear this case en banc on the grounds that the panel's decision conflicts with a prior decision of the Eighth District, *Crawford v. FirstMerit Mortgage Corp.*, 8th Dist. No. 89193, 2007-Ohio-6074. But the panel's opinion explained why *Crawford* did not apply. And one judge was common to both the panel that decided this case and the panel that decided *Crawford*, yet even he did not invoke the Eighth District's en banc proceedings, which *any* judge on a panel may do.

"An abuse of discretion standard applies to decisions on whether to grant en banc proceedings." *McFadden v. Cleveland State University*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672; *cf. W. Pacific R.R. Corp. v. W. Pacific R.R. Co.* (1952), 345 U.S. 247, 259 ("[E]ach Court of appeals is vested with a wide latitude of discretion to decide for itself how that power [to convene en banc proceedings] shall be exercised."); *In re Byrd* (6th Cir. 2001), 269 F.3d 585, 593 ("[T]he Supreme Court has determined that the process by which a federal appellate court decides to rehear a matter en banc is inherently internal, beyond the review of

litigants or even the Supreme Court itself.” (citing *Shenker v. B. & O. R.R.* (1963), 374 U.S. 1, 5)). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, 16 O.O.3d 169.

In this case, the Eighth District’s decision not to grant en banc rehearing was not an abuse of discretion. The opinion in this case squarely addressed *Crawford* and explained why *Crawford’s* reasoning did not apply. *Greenspan*, 177 Ohio App.3d 372, 2008-Ohio-3528, 894 N.E.2d 1250, ¶¶26–27. The Eighth District did not act in an “unreasonable, arbitrary or unconscionable” manner.

Third Federal’s contention that this case is like *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, is also incorrect. The concerns at issue in *In re J.J.*, in which two panels of the same court issued conflicting decisions on the same day, are not present in this case, where the court decided two cases six months apart, where one judge was common to both panels of the court, and where the court in this case provided a reasoned analysis of why its decision was not governed by the prior decision.

The Eighth District’s decision that en banc proceedings were not necessary in this case is also entitled to deference because one judge was common to the two panels that Third Federal claims issued conflicting decisions, and yet even that judge did not feel that this case warranted en banc review.<sup>8</sup> Under the Eighth District’s rules, any judge of a panel, even a dissenting judge,

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<sup>8</sup> Although en banc proceedings have, until recently, been the subject of judicial disagreement in this State, at least two of the judges on the panel in this case—including the dissenting judge—have previously participated in en banc proceedings and have previously voiced their opinion that the practice is constitutional, even before this Court’s decision in

may invoke en banc proceedings. Article 8(b)(i) of the Standing Resolution of the Rules for the Conduct of Court Work. Yet no member of the court chose to do so in this case, even after the procedure was suggested by Third Federal.<sup>9</sup>

### CONCLUSION

The Court should affirm the decision below and remand this action to the trial court for further proceedings.

Dated: April 1, 2009

Respectfully submitted,



Richard E. Shevitz, *admitted pro hac vice*  
Vess A. Miller, *admitted pro hac vice*  
COHEN & MALAD, LLP  
One Indiana Square, Ste. 1400  
Indianapolis, IN 46204  
Telephone: (317) 636-6481  
Facsimile: (317) 636-2593

Mark Schlachet (0009881)  
(Counsel of Record)  
3637 South Green Road—2d Floor  
Beachwood, OH 44122  
Telephone: (216) 896-0714  
Facsimile: (216) 514-6406

*Counsel for Appellee, Gary A. Greenspan*

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*McFadden. See Lett v. State*, 161 Ohio App.3d 274, 2005-Ohio-2665, 829 N.E.2d 1281, ¶52 (Gallagher, J., concurring, joined by Celebrezze, J.) (“I write in support of the majority view that the en banc process is constitutional.”), overruled on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109.

<sup>9</sup> Even if this Court were to find that the Eighth District abused its discretion—which it did not—the proper course would be to remand this action to the Eighth District for hearing en banc. But, as set forth above, the Eighth District’s decision in this case was proper and should be affirmed.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merits Brief of Appellee Gary A. Greenspan was sent by regular U.S. mail to counsel for appellant this 1st day of April, 2009:

John D. Parker  
Thomas D. Warren  
Brett A. Wall  
Karl Fanter  
BAKER & HOSTETLER LLP  
1900 East Ninth Street, Suite 3200  
Cleveland, OH 44114-3485  
Telephone: (216) 861-7528  
Facsimile: (216) 696-0740



Richard E. Shevitz, *admitted pro hac vice*  
Vess A. Miller, *admitted pro hac vice*  
COHEN & MALAD, LLP  
One Indiana Square, Ste. 1400  
Indianapolis, IN 46204  
Telephone: (317) 636-6481  
Facsimile: (317) 636-2593