

IN THE SUPREME COURT OF OHIO

GARY A. GREENSPAN, : Case No.: 2008-1568  
: :  
Plaintiff-Appellee, : :  
: : On Appeal From the  
: : Cuyahoga County Court  
v. : : of Appeals, Eighth  
: : Appellate District,  
THIRD FEDERAL SAVINGS & LOAN : Case No. 07-89850  
ASSOCIATION, : :  
: :  
Defendant-Appellant. : :

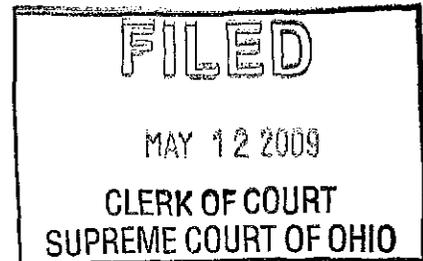
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REPLY BRIEF OF APPELLANT  
THIRD FEDERAL SAVINGS & LOAN ASSOCIATION

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## INTRODUCTION

Greenspan concedes that prior to September 15, 2004, there was no express or implied private right of action for the unauthorized practice of law. Instead, he alleges that his causes of action are grounded in the common law.

But the sole basis of Greenspan's effort to recover a "document preparation" fee is that Third Federal allegedly violated Ohio's prohibition against the unauthorized practice of law. This cannot be construed as anything but an affirmative claim of the unauthorized practice of law. Indeed, Greenspan concedes on appeal that his claims were superseded when the General Assembly created a private right of action for the unauthorized practice of law in 2004. But the only reason Greenspan's claims would be superseded by statute is if his claims, too, were for the unauthorized practice of law.

Claims alleging the unauthorized practice of law cannot be at "common law" because the unauthorized practice of law is a creature of statute and this Court's rules, not common law. And asserting such claims would run afoul of this Court's original and exclusive jurisdiction over matters relating to the unauthorized practice of law. It is thus not surprising that no common-law causes of action based upon the unauthorized practice of law have ever been approved in the history of Ohio jurisprudence. Because claims for the unauthorized practice of law could not be asserted before September 15, 2004, they must fail.

Accordingly, the Court should reverse the decision below. At a minimum, the Court should remand the matter to have the Eighth District heed its own precedent. As the panel acknowledged, *Crawford v. FirstMerit Mtge. Corp.* (Nov. 15, 2007), 8th Dist. No. 89193, 2007-Ohio-6074, appeal not accepted, 117 Ohio St.3d 1478, 2008-Ohio-1841, 884 N.E.2d 1109, directly conflicted with its opinion. Pursuant to this Court's mandates

and the Eighth District's own rules, the panel should have either affirmed the trial court's dismissal of Greenspan's action pursuant to *Crawford*, or held an en banc hearing. It did neither.

## **ARGUMENT**

### **I. There is no common-law claim for the unauthorized practice of law under Ohio law.**

Greenspan concedes that there was no express or implied private right of action to recover money damages based on this Court's and the General Assembly's prohibition on the unauthorized practice of law prior to September 15, 2004. Instead, Greenspan maintains that his claims for "unjust enrichment" and "money had and received" are simply common-law claims that were not pre-empted by prior versions of R.C. 4705.

This argument is flawed in several respects. Greenspan's claims cannot be construed as anything but affirmative claims for the unauthorized practice of law, which he concedes are barred. Indeed, Greenspan admits as much, conceding that the 2004 amendments to R.C. 4705 bar his claims. See, e.g., Greenspan Br. at 12. But, of course, if his claims were *not* for the unauthorized practice of law, then R.C. 4705.07 would *not* have pre-empted them.

Moreover, common-law claims cannot be predicated upon the unauthorized practice of law, a creature of statute and this Court's rules. And even if a common-law claim based upon the unauthorized practice of law could theoretically have been maintained, it would have violated this Court's exclusive jurisdiction over such claims, and the prior version of R.C. 4705 would have superseded any such causes of action in any event.

**A. Greenspan's claims are for the unauthorized practice of law.**

Although styled as “unjust enrichment” and “money had and received,”<sup>1</sup> Greenspan's claims cannot be reasonably construed as anything but allegations that Third Federal engaged in the unauthorized practice of law. Greenspan's claims are based upon the fact that Third Federal engaged in the unauthorized practice of law by having non-lawyers prepare legal documents in connection with his mortgage transaction. The central issue in the complaint is whether “the document preparation fee charged by Third Federal for services performed by non-attorneys in preparing such legal documents is prohibited by Ohio law.” (Cmpl. ¶14(c); see, also, id. at ¶2, 9, 14(a), (b), Supp. at 1-3.)

Greenspan's claims turn on this one fact alone. Indeed, Greenspan concedes that the “underlying conduct in this case is the unauthorized practice of law. \* \* \* ” Greenspan Br. at 16. He does not allege that Third Federal failed to disclose the document preparation fee, defrauded him, was negligent, breached any contract, or otherwise provided deficient or improper loan documents.

Greenspan's emphasis on the remedy he seeks – restitution or disgorgement of the \$300 document preparation fee – does not change the gist of his claim. To avoid elevating the form over the substance of a claim, courts examine the crux of a complaint, not merely the legal theory set forth, to determine whether a claim for relief exists. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, syl., 524 N.E.2d 166 (claim barred where “essential character” of action was intentional tort, but was pleaded as negligence

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<sup>1</sup> These two causes of action are essentially the same. See *Hummel v. Hummel* (1938), 140 Ohio St. 520, 525-28, 14 N.E.2d 923; *Drozeck v. Lawyers Title Ins. Corp.* (8th Dist. 2000), 140 Ohio App.3d 816, 823, 749 N.E.2d 775.

claim). Greenspan may not recharacterize his claim for the unauthorized practice of law as another cause of action to avoid dismissal “through clever pleading or by utilizing another theory of law. \* \* \* ” *Id.* at 100 (quotation omitted). See, also, *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, at ¶19 (“the mere fact that [plaintiff] cast its allegations in the underlying case to sound in tort is insufficient to confer jurisdiction upon the common pleas court”). Indeed, this Court has specifically rejected a party’s attempt to allege unjust enrichment or money had and received to circumvent the General Assembly’s statutory framework. See, e.g., *Stanson, Inc. v. McDonald* (1946), 147 Ohio St. 191, para. four of syl., 70 N.E.2d 359 (“Where the General Assembly has denied a right of action to recover compensation in certain cases a court may not, in disregard of such legislation, afford relief upon the theory of money had and received.”).<sup>2</sup>

Other states have rejected Greenspan’s precise argument, including in actions brought by Greenspan’s own counsel. See, e.g., *Charter One Mtge. Corp. v. Condra* (Ind. 2007), 865 N.E.2d 602, 605, 606-07 (construing plaintiff’s “money had and received” and “unjust enrichment” claims for mortgage preparation fees as under the Indiana Supreme Court’s jurisdiction for the unauthorized practice of law); *Gonczi v. Countrywide Home Loans, Inc.* (Mar. 31, 2008), C.A. 11 Nos. 07-10977, 07-10981, 2008

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<sup>2</sup> See, also, *Thomas Steel, Inc. v. Wilson Bennett, Inc.* (8th Dist. 1998), 127 Ohio App.3d 96, 106-07, 711 N.E.2d 1029 (disallowing unjust enrichment claim because if allowed, parties “could effectively ignore the notice and commencement-of-suit requirements of the bond statute, which would become meaningless”); *Leatherbury v. Reagan* (2d Dist. 1987), 34 Ohio App.3d 291, 293, 518 N.E.2d 58 (dismissing unjust enrichment claim based on statute; “If the statute prohibited recovery, the court could not reach for equitable or other forms of relief to defeat the public policy adopted by the legislature.”); *Kapel v. Carnegie Mgmt. & Dev. Corp.* (May 11, 1995), 8th Dist. No. 67939, 1995 WL 277118, at \*4 (same).

WL 835251, at \*1 (same); *Hambrick v. GMAC Mtge. Corp.* (S.C. App. 2006), 634 S.E.2d 5, 8-9 (construing unjust enrichment claim as claim for unauthorized practice of law within South Carolina Supreme Court's original jurisdiction).

Greenspan admits as much in his brief. Greenspan concedes that the 2004 amendments to R.C. 4705.07 would bar his claims. But the private right of action allowed by the statute (should it be authorized by this Court) is a claim for the unauthorized practice of law. If Greenspan's unjust enrichment and money had and received are somehow *not* for the unauthorized practice of law, but constitute independent claims, then R.C. 4705.07 would not have preempted them.

Greenspan cannot circumvent the absence of a private right of action for the unauthorized practice of law by labeling it a claim for unjust enrichment or money had and received. As there is concededly no pre-2004 claim for the unauthorized practice of law, the Eighth District erred in allowing Greenspan's claims to go forward.

**B. Greenspan cannot bring a common-law cause of action for violation of this Court's rules governing the unauthorized practice of law.**

Greenspan's claim that he can assert common-law causes of action based upon the unauthorized practice of law also fails because the unauthorized practice of law is a creation of statute and this Court's rules. See R.C. 4705.01 et seq. (governing the practice of law in Ohio); Gov.Bar.R. VII(1). The unauthorized practice of law is defined as a violation of those rules: "The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX, or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio." Gov.Bar.R. VII(2)(A); see, also, R.C. 4705.01 (defining the unauthorized practice of law as failing to be "in

compliance with [this Court's] prescribed and published rules"). When a claim derives from statute and rule, it is not based in the common law. See, e.g., *Hoops v. United Tel. Co. of Ohio* (1990) 50 Ohio St.3d 97, 102, 553 N.E.2d 252 (no common-law cause of action for age discrimination under Ohio law, which is a creature of statute). The current rule-based framework for consideration of claims for the unauthorized practice of law was set forth by this Court in 1983, well before the claims asserted here.

Moreover, those rules provide the exclusive framework for the consideration and disposition of claims of the unauthorized practice of law. "*All proceedings arising out of complaints of the unauthorized practice of law shall be brought, conducted, and disposed of in accordance with the provisions of this rule.*" Gov.Bar.R. VII(4)(A) (emphasis added). This rule derives from this Court's original and exclusive jurisdiction to resolve all matters related to the unauthorized practice of law. See Section 2(B)(1)(g), Article IV, Ohio Constitution; *Lorain Cty. Bar Assn. v. Kocak*, 2009-Ohio-1430, 904 N.E.2d 885, at ¶16; *Disciplinary Counsel v. Alexicole*, 105 Ohio St.3d 52, 2004-Ohio-6901, 822 N.E.2d 348, at ¶8; *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, at ¶39, 48; *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, 813 N.E.2d 669, at ¶15. This Court's exclusive jurisdiction is not qualified; there are no exceptions for implied private rights of action or civil remedies disguised as others causes of action.

Other state supreme courts have construed allegations identical to Greenspan's as within their exclusive jurisdiction. See, e.g., *Condra*, 865 N.E.2d at 605, 606-07; *Gonczy*, 2008 WL 835251, at \*1; *Hambrick*, 634 S.E.2d at 8-9.

Given that a claim for the unauthorized practice of law is based upon a violation of this Court's rules, and given this Court's exclusive jurisdiction over such claims, it is

not surprising that there is not a single case in Ohio history permitting an action to be maintained based on the unauthorized practice of law – whether couched as a “common law” claim for unjust enrichment or otherwise. Indeed, every case that has addressed this issue has rejected it. See, e.g., *Miami Valley Hospital v. Combs* (2d Dist. 1997), 119 Ohio App.3d 346, 352-53, 695 N.E.2d 308, appeal not allowed, 79 Ohio St.3d 1491, reconsideration denied, 80 Ohio St.3d 1427 (the rules implementing R.C. 4705.01 “reveal an explicit intent to deny a private remedy, or to restrict any remedy to the procedures contained in the [Supreme Court Rules]”; such private actions would also prevent uniform enforcement “resulting from varying conclusions reached by different judges or in different circuits”); *Crawford*, 2007-Ohio-6074, at ¶22 (same); *Sarum Mgmt., Inc. v. Alex N. Sill Co.* (Nov. 1, 2006), 9th Dist. No. 23167, 2006-Ohio-5710, at ¶2, 27, 30 (same).

**C. Any common-law cause of action would have been preempted by the prior version of R.C. 4705 as well.**

Greenspan admits that R.C. 4705.07 preempts any common-law cause of action for unjust enrichment or money had and received based upon the unauthorized practice of law. Indeed, the explicit purpose of the 2004 amendments was to create a *new* private right of action to permit recovery for the unauthorized practice of law where one did not previously exist. Sub.H.B. No. 38, 2004 Ohio Laws File 104 (2004) (R.C. 4705.07 was amended “specifically \* \* \* to provide for the recovery of damages for a violation of the prohibition [of the unauthorized practice of law]”). The natural import of the creation of a new cause of action allowing recovery for the unauthorized practice of law is that one did not previously exist.

Moreover, the plain language of the prior version of R.C. 4705 and its legislative history reveal that any such common-law cause of action for the unauthorized practice of law would have been preempted by that version of the statute as well. The plain language of the statute reveals that the General Assembly provided only for criminal, not civil, remedies for the unauthorized practice of law. See R.C. 4705.01, .07, .99 (2002). When a legislature elects to provide only a criminal remedy for a particular conduct, courts are reluctant to allow a private civil right of action. See, e.g., *Linder v. Ins. Claims Consultants, Inc.* (S.C. 2002), 560 S.E.2d 612, 623 (because South Carolina statute authorized criminal sanctions against those engaged in the unauthorized practice of law, court refused to infer private right of action); *Carlson v. Roetzel & Andress* (March 27, 2008), D.N.J. No. 3:07-cv-33, 2008 WL 873647, at \*7 (same) (interpreting North Dakota law); *Oswell v. Nixon* (Ga. 2005), 620 S.E.2d 419, 421-22 (same); *Baldwin v. Kulch Assocs., Inc.* (D.N.H. 1998), 39 F.Supp.2d 111, 118 (same).

Moreover, the legislative history of the 1997 amendments to R.C. 4705 (which were effective during the relevant time period) shows that the statute would have preempted any common-law cause of action for the unauthorized practice of law. The General Assembly, which amended R.C. 4705 to increase the penalty for the unauthorized practice of law to a first degree misdemeanor, acknowledged the Ohio Supreme Court's "exclusive authority to regulate, control, and define the practice of law" in Ohio, and stated that the Supreme Court, pursuant to that exclusive authority, has adopted rules for the government of the Bar, including "provisions regulating the unauthorized practice of law." Ohio Bill Analysis, 1997 S.B. 58 (1997). By highlighting this Court's exclusive authority to define what constitutes the unauthorized practice of

law, the General Assembly made clear that any cause of action that did not heed this Court's exclusive jurisdiction could not be maintained.

**D. The affirmative-defense cases Greenspan cites are not on point.**

Greenspan cites to a variety of cases in which a party may resist payment by asserting, as an affirmative defense, that the unlicensed practice of a regulated profession. Greenspan Br. at 4-8. But these cases are inapposite. As explained in Third Federal's opening brief, even if the unauthorized practice of law was an affirmative defense to a collection action, that does not "inexorably" give rise to a cause of action for the unauthorized practice of law. *Greenspan v. Third Fed. S. & L.* (8th Dist.), 177 Ohio App.3d 372, 2008-Ohio-3528, 894 N.E.2d 1250, at ¶20. Indeed, Greenspan does not dispute that there are numerous affirmative defenses that do not constitute causes of action. Ultimately, whether a private cause of action exists depends upon whether it is expressly or impliedly authorized. See *Thompson v. Thompson* (1988), 484 U.S. 174, 179, 108 S.Ct. 513; *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245, 249, 348 N.E.2d 144. See, generally, Third Fed. Merits Br. at 8-10. Greenspan admits that no such express or implied authorization exists here.<sup>3</sup>

Moreover, of the few cases Greenspan cites that did not involve an affirmative defense, none involved a cause of action for the unauthorized practice of law. The only one that actually allowed a claim to proceed, *McClennan v. Irvin and Co.* (Jan. 30, 1978), 8th Dist. No. 36798, 1978 WL 217728, is an unreported thirty-year-old case

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<sup>3</sup> Even if the existence of an affirmative defense of the unauthorized practice of law were relevant to the analysis, the appropriateness of asserting such an affirmative defense has never been determined by this Court. None of the Greenspan cites that permit the unauthorized practice of law to be raised as an affirmative defense to a collection action are Ohio Supreme Court decisions, nor was the issue of relief for the unauthorized practice of law ever addressed.

involving architecture – a field neither regulated by nor within the exclusive jurisdiction of this Court.<sup>4</sup> The practice of law is different, as “[a]ll proceedings arising out of complaints of the unauthorized practice of law shall be brought, conducted, and disposed of in accordance with” this Court’s rules. See Gov.Bar.R. VII(4)(A).

*McClennan* is thus of no moment.

## **II. This Court has exclusive jurisdiction over the unauthorized practice of law.**

Greenspan argues that Article IV, Section 4(B), of the Ohio Constitution gives common pleas courts original jurisdiction “over all justiciable matters \* \* \* as may be provided by law,” and that R.C. 2305.01 gives common pleas courts “original jurisdiction in all civil cases.” Greenspan Br. at 15-16. Because his claim is a civil action, Greenspan argues, the common pleas court has jurisdiction over his matter. In other words, 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.” Greenspan Br. at 16.

Greenspan’s argument is meritless. Article IV, Section 4(B) only gives the common pleas courts original jurisdiction to the extent “provided by law,” and Article IV, Section 2(B)(1)(g) of the Constitution specifically vests this Court with original *and*

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<sup>4</sup> In *Disciplinary Counsel v. Stranke*, 110 Ohio St.3d 247, 2006-Ohio-4357, 852 N.E.2d 1202, an attorney represented two debtors and was not admitted to practice in the bankruptcy court. As a sanction for the attorney’s behavior, the bankruptcy court ordered that he pay a \$200 fine and return his \$800 fee to both of his clients. *Id.* at ¶4-7. No one brought an “unauthorized practice” claim to the court; the bankruptcy court imposed the penalty sua sponte under a statute that allows for disgorgement of fees as a penalty for persons who fraudulently prepare bankruptcy petitions. *Id.* In *Reinhard v. Columbus* (1892), 49 Ohio St. 257, 31 N.E. 35, the plaintiff was coerced by police officers into paying a bribe to avoid going to prison. *Id.* at 268. The court allowed the plaintiff to recover his bribe money because of he was forced to make a payment under duress. *Id.* *Reinhard* has nothing do with the unauthorized practice of law.

*exclusive* jurisdiction over matters relating to the unauthorized practice of law. See, *supra*, at 6; Third Fed. Merits Br. at 14-17. This specific constitutional provision trumps any general statutory provision to the contrary. See R.C. 1.51; *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 490, 1999-Ohio-123, 715 N.E.2d 1062 (“What the constitution grants, no statute may take away.”).

Greenspan’s argument also proves too much. Under his reasoning, there would be no limitation on which actions may be brought in common pleas even under the current version of R.C. 4705.07, which requires that this Court first determine whether conduct constitutes the unauthorized practice of law before a party can file a civil action in common pleas court. But Greenspan does not dispute that under the current version of the statute, his claims could not proceed.

Greenspan also suggests that this Court has implicitly ceded jurisdiction over the unauthorized practice of law to lower courts, citing to cases in which boards of revision and tax appeal dismissed actions because they were prepared and filed by nonlawyers. Greenspan Br. 17-18. But those cases did not involve trial courts resolving whether causes of action for the unauthorized practice of law could proceed. Rather, the courts simply held, as was their prerogative, that they lacked jurisdiction to hear the matters before them because the complaints had not been filed by lawyers. See *State ex rel. Enyart v. O’Neill*, 71 Ohio St.3d 655, 656, 1995-Ohio-145, 646 N.E.2d 1110 (“a court having general subject-matter jurisdiction can determine its own jurisdiction”). Dismissing cases on jurisdictional grounds is not akin to permitting a private right of action to proceed for the unauthorized practice of law, which this Court has held is within its exclusive jurisdiction.

Moreover, those decisions were a direct application of this Court's decision regarding the unauthorized practice of law – *Sharon Village Ltd. v. Licking Cty. Bd. of Revision*, 78 Ohio St.3d 479, 1997-Ohio-197, 678 N.E.2d 932 – a case that reaffirmed that “the regulation of the practice of law is vested *exclusively* in the Ohio Supreme Court.” Id. at 480 (emphasis added). Thus, in dismissing the actions before them, the lower courts actually *heeded* this Court's exclusive jurisdiction.

Greenspan also argues that because the 2004 amendments to R.C. 4705.07 codify the requirement that a private right of action for the unauthorized practice of law be submitted to this Court in the first instance, prior to 2004 the common-pleas courts had original jurisdiction over these matters. Greenspan Br. at 19-20. But as noted above, what the 2004 amendments actually show is that no cause of action for the unauthorized practice of law was available *at all* prior to those amendments. In any event, this Court pronounced well before the 2004 amendments that its jurisdiction over the unauthorized practice of law was exclusive, belying Greenspan's claim. See, e.g., *Sharon Village*, 78 Ohio St.3d at 480 (issues involving the unauthorized practice of law are “vested exclusively in the Ohio Supreme Court”).

Should the Eighth District's opinion stand, this Court's comprehensive and exclusive framework for determining what constitutes the unauthorized practice of law in Ohio would be circumvented. And the consistency of this Court's determinations in this area would be threatened. Indeed, as discussed in Third Federal's opening brief, the Board on the Unauthorized Practice of Law for the Supreme Court of Ohio recently opined that the type of conduct alleged by Greenspan is not the unauthorized practice of law: “A nonattorney employee may perform the act of completing a standardized form mortgage for his/her bank or lender employer without the supervision of an attorney

admitted to practice law in Ohio.” Nonattorney Completion of Mortgage Instruments (Dec. 12, 2008), Adv. Op. UPL 2008-02, at syl.<sup>5</sup> Should the trial court hear the merits of this claim, it might rule in conflict with the advisory opinion of this Court’s own Board on the Unauthorized Practice of Law.

**III. The Eighth District was required to follow *Crawford* absent an en banc hearing.**

Greenspan does not dispute that this Court has repeatedly held that appellate districts are “duty-bound” to resolve intradistrict conflicts through en banc proceedings, nor does he dispute that the Eighth District’s rules state that previous majority opinions by the Eighth District are binding on the entire Eighth District absent an en banc hearing. See *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E. 672, para. two of syl.; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, at ¶18; *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 816, at ¶40; Article 8(b)(i) of the Standing Resolution of the Rules for the Conduct of Court Work.

Instead, Greenspan argues that the Eighth District did not abuse its discretion by failing to grant an en banc hearing because “the panel’s opinion explained why *Crawford* [*v. FirstMerit Mtge. Corp.* (8th Dist.), 2007-Ohio-6074] did not apply.” Greenspan Br. at 21.

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<sup>5</sup> The cases cited by Greenspan are distinguishable, as Greenspan did not allege that Third Federal either rendered legal advice or warranted that attorneys were preparing the documents. See *Toledo Bar Assn. v. Chelsea Title Agency of Dayton, Inc.*, 100 Ohio St.3d 356, 2003-Ohio-6453, 800 N.E.2d 29 (preparation of general warranty deeds containing language specifying that they were prepared by an attorney was the practice of law) and *Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 193 N.E. 650 (rendering opinion as to validity of title to real estate was practice of law).

But the only reason that the Eighth District panel did not apply *Crawford* was because it believed the holding was “simply in error.” See *Greenspan*, 2008-Ohio-3528, at ¶26. The panel conceded that the cases were identical. *Id.* Thus, *Crawford* was binding on the panel under the Eighth District’s own rules and this Court’s mandate. The panel had no authority not to follow *Crawford*.

Moreover, the “abuse of discretion” standard to which *Greenspan* cites applies only to the determination that two decisions conflict. Once a court determines that its decision conflicts with a prior opinion, as here, that court *must* either follow binding precedent or convene en banc. *McFadden*, 2008-Ohio-4914, at ¶19. Faced with the binding precedent of *Crawford*, the panel below had two options: apply *Crawford* and affirm the trial court’s dismissal of *Greenspan*’s action, or hold an en banc hearing. The panel did neither. Because *Crawford* is binding, at a minimum the panel’s decision should be reversed on this ground.<sup>6</sup>

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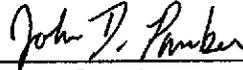
<sup>6</sup> *Greenspan* maintains that no members of the panel requested an en banc hearing. *Greenspan Br.* at 22-23. This is no way for the parties to know whether this is true; the Eighth District’s rules provide that a panel judge may request an en banc proceeding, but such a request must be approved by the Administrative Judge. In any event, whether such a request was made or not made, the panel was bound to follow *Crawford*.

## CONCLUSION

For the above reasons and for those set forth in Third Federal's opening brief, the Court should reverse the decision below and affirm the trial court's dismissal of Greenspan's action.

Date: May 12, 2009

Respectfully submitted,



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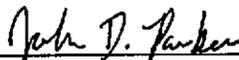
**PROOF OF SERVICE**

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