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## Illinois Supreme Court Settles Legality Of Document Preparation Fees For Mortgage Lenders

Mortgage lenders who prepare their own loan documents and charge document preparation fees do not engage in the unauthorized practice of law according to the Illinois Supreme Court in a decision rendered last week. In a consolidated opinion affirming two separate appellate court decisions, *King v. First Capital Financial Services Corporation* (Ill. Sup. Ct. Docket No. 97263) and *Jenkins v. Concorde Acceptance Corporation* (Ill. Sup. Ct. Docket No. 97761), the court ruled that (1) where the defendant lenders prepared loan documents themselves, they did not engage in the unauthorized practice of law; (2) no private cause of action for damages exists under the Illinois Attorney Act for the unauthorized practice of law; and (3) plaintiffs' claims for return of document preparation fees they had paid were barred because the fees were disclosed and paid voluntarily. Lord, Bissell & Brook LLP represented a number of mortgage industry clients in related cases.

In both class action cases, the plaintiff borrowers sued the defendant lenders, alleging that the lenders had engaged in the unauthorized practice of law by preparing promissory notes, mortgages, and related loan documents in connection with the borrowers' mortgage loan transactions, and by charging document preparation fees for that service. Based on these core allegations, the borrowers asserted a variety of claims against the lenders, including claims for damages based upon the Illinois Attorney Act, which forbids the unauthorized practice of law, claims for violations of the Illinois Consumer Fraud Act, and various equitable causes of action to recoup the document preparation fees they paid.

The *King* case was a class action filed in state court in Rock Island County, Illinois. The *Jenkins* cases involved 37 separate class actions filed in state court in Cook County, Illinois. The allegations in 35 of the 37 *Jenkins* complaints were similar to those in the *King* case in that the lenders' employees were alleged to have prepared the subject loan documents. Both *King* and *Jenkins* involved the same essential fact pattern and legal claims as an earlier case filed in federal court in Chicago. In that case, *Michalowski v. Flagstar Bank, FSB*, the United States District Court for the Northern District of Illinois agreed with Lord, Bissell & Brook attorneys that no cause of action for damages exists for the unauthorized practice of law absent allegations that the defendant held itself out as an attorney and negligently handled the plaintiff's matter. The Appellate Courts in *Jenkins* and *King*, along with the trial court

in *Jenkins*, followed the reasoning of the *Michalowski* court. In two of the *Jenkins* cases, the lenders were alleged to have used a third-party document preparation service for the preparation of the plaintiffs' mortgage loan documents. In its opinion last week, the Illinois Supreme Court divided the cases into two groups: cases where the lenders prepared their own loan documents and charged a document preparation fee, and cases where the lenders used a third-party document preparation service to prepare the plaintiffs' loan documents.

### THE "PRO SE EXCEPTION"

The court held that lenders who use their non-attorney employees to prepare mortgage loan documents and who charge a fee for that service do not engage in the unauthorized practice of law. The court analyzed case law going back nearly seventy years, discussed the public interest in prohibiting the practice of law by unlicensed individuals, and delineated the types of activities that constitute the unauthorized practice of law. The court noted that the practice of law has been defined as "the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

The court re-affirmed that anyone who chooses to practice law must be appropriately licensed, and acknowledged that the preparation of loan documents is generally the type of activity that is included in the practice of law. However, the court also recognized that non-lawyers may lawfully engage in activity considered the practice of law when it is for their own benefit, rather than the benefit of others. The court held that this "pro se exception" applied in *Jenkins* and *King* because the loan documents prepared by the defendants were primarily for the defendants' own benefit—the notes evidence the borrowers' debt to the lenders and the mortgages secure such debt. Any benefit that may accrue to the borrowers from the loan documents is secondary to the lenders' benefit.

The borrowers argued that by charging the borrowers a fee for preparing legal instruments, the lenders could not prevail on the theory that they prepared the documents for their own benefit. The court rejected this argument, finding that the charging of a fee, by itself, cannot change an act that fits into the "pro se exception" to an act that constitutes the unauthorized practice of law. The court held

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that “it is the character of the acts involved that determine whether one engages in the unauthorized practice of law.”

### NO CAUSE OF ACTION FOR DAMAGES

While in the first group of cases the lenders prepared loan documents for their own benefit, in the second group of cases the borrowers complained that an independent document preparation service prepared the documents using non-lawyers. The borrowers argued that the “pro se exception” did not apply to this group because the preparer of the documents did not do so for its own benefit nor was it a party to the subject loan transactions. The court agreed that the “pro se exception” is not available for the document preparation companies or lenders in the second group because they did not prepare their own documents for their own benefit. However, the lenders and document preparation fee companies in the second group still prevailed because the court held that no cause of action for damages exists under the Illinois Attorney Act for the unauthorized practice of law.

The Attorney Act provides that any person engaged in the unauthorized practice of law “is guilty of contempt of court and shall be punished accordingly upon a complaint being filed against that person.” Based on this language the court found that while the statute permits an injunction prohibiting a person from continuing to engage in the unauthorized practice of law, nothing in the statute provides that a person engaged in the unauthorized practice of law can be sued for damages. The court noted that the statute expressly provides that “other remedies permitted by law,” such as negligence, may be available against a person who engages in the unauthorized practice of law and then causes damages by mishandling the matter. However, no such allegations were asserted in any of the cases here.

### THE VOLUNTARY PAYMENT DOCTRINE

Latching onto the “other remedies permitted by law” provision of the Attorney Act, the plaintiffs asserted claims for restitution against all of the defendants, seeking to disgorge from the lenders all of the document preparation fees that they had collected. The court held that such claims were barred because the plaintiffs had knowingly and voluntarily paid the document preparation fees without complaint.

The “voluntary payment doctrine” provides that money paid under a claim of right is not recoverable, provided that the money was paid voluntarily and with full knowledge of the facts, and provided that the money was not paid under coercion, fraud, a superior bargaining position by the trans-

ferree, or a mistake of law. The voluntary payment doctrine does not apply to situations where non-payment would result in adverse economic consequences to the party making payment.

The plaintiffs argued that they were not informed in advance of the closing of their transactions that non-lawyers prepared their loan documents, and that refusing to pay the document preparation fee at the closing would have resulted in the type of adverse economic consequences that render the voluntary payment doctrine inapplicable. The court rejected this argument, holding that the disclosures provided to the borrowers before their closings adequately disclosed that document preparation fees and attorneys’ fees were separate charges. The court noted that none of the borrowers alleged that any of the lenders led them to believe that their loan transaction would be canceled if they refused to pay the document preparation fee. The court further noted that none of the borrowers alleged that any of the lenders led them to believe that a lawyer had prepared their loan documents. Therefore, the court held that the voluntary payment doctrine applied to bar the plaintiffs’ restitution claims.

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The *King* and *Jenkins* decision marks a significant victory for mortgage lenders on a heavily litigated topic. Lord, Bissell & Brook has been a champion for lenders in this dispute for years, and many of its clients will benefit from this decision. Last week’s decision in *King* and *Jenkins* makes clear that lenders may not be sued in Illinois for the unauthorized practice of law for merely preparing their own loan documents for use in their own loan transactions. Other states have drawn the same conclusion as the Illinois Supreme Court, while still others have reached the opposite conclusion. In many states the issues remains unresolved. Lord, Bissell & Brook will continue to protect the interests of its mortgage industry clients in these states and will continue to provide updates as this issue is resolved across the country.

#### ABOUT THE AUTHORS

Partner and Class Actions practice group leader Tom Cunningham and associate Simon Fleischmann are both members of the firm’s Banking and Financial Institutions practice group. In 2002, Cunningham and Fleischmann obtained the above-discussed dismissal of the *Michalowski* case. Cunningham and Fleischmann represent other lenders in state court cases related to the *Jenkins* case.