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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2021-001292

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,……...Respondent,

v.

The Estate of Patricia Ann Owens Houck; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the.....Petitioners.

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER SOURCES

STATEMENT OF ISSUES/QUESTIONS PRESENTED

I. Did the Court of Appeals err in reversing the grant of summary judgment to Petitioners on Respondent's foreclosure claim?

STATEMENT OF THE CASE

This Court has granted certiorari to review the Court of Appeals' decision in Deutsche Bank v. Estate of Houck, 434 S.C. 500, 863 S.E.2d 829 (Ct. App. 2021), to reverse the master-in-equity's grant of summary judgment against the Respondent (hereinafter "Deutsche Bank") on its mortgage foreclosure claim.

This case was brought before Court of Appeals as a cross-appeal from an order by the Honorable James O. Spence that:

1) Granted the Petitioners (hereinafter "Bailey and Owens") summary judgment against Deutsche Bank; and,
2) While deciding that the elements were all met of mandatory liability on Bailey and Owens' counterclaim under S.C. Code Ann. § 29-3-310 and -320 for failure to record a mortgage satisfaction document, allowed Deutsche Bank to escape financial consequences for that liability if it recorded a satisfaction within a certain time frame.

(App'x pp. 40-41.)

Deutsche Bank filed this lawsuit on October 19, 2016, against Bailey and Owens, seeking foreclosure of a mortgage and seeking reformation of that mortgage. (App'x pp. 80-102.) Bailey and Owens answered and counterclaimed. (App'x pp. 103-19.) Bailey and Owens asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (App'x pp. 111-13.) Bailey and Owens also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102

(usually referred to as the attorney preference statute.) (App'x pp. 113-14.) The case was referred to the Honorable James O. Spence, as Master-in-Equity for Lexington County. (App'x pp. 55-56.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (App'x pp. 169-73.) Bailey and Owens moved for 1) summary judgment in their favor as to Deutsche Bank's claims for foreclosure and reformation, 2) summary judgment in their favor as to their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor as to their counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage. (App'x pp. 128-29.)

The master denied Deutsche Bank's motion for summary judgment and granted Bailey and Owens' motion, ruling that, under the undisputed facts, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the previously concluded case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210 (hereinafter "Bailey v. Novastar" or "the 2013 action"), in which Deutsche Bank was a defendant, because, if Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable under S.C. Code Ann. § 37-10-105(C). (App'x pp. 27, 31.) The master ruled that the res judicata effect of the end of the Bailey v. Novastar case precluded the foreclosure claim and satisfied the mortgage by operation of law. (App'x pp. 27, 31, 37-38, 40-41.) The master also granted summary judgment in Bailey and Owens' favor as to liability under S.C. Code Ann. § 29-3-320 for Deutsche Bank's failure to record a satisfaction document within three months of a duly made request for the same under S.C. Code Ann. § 29-3-310. (App'x pp. 40-41.) The master, however, provided Deutsche Bank a mechanism under which it could escape monetary liability under S.C. Code Ann. § 29-3-320 by recording a mortgage satisfaction document within a time frame set by the master.

(App'x pp. 40-41.) The allowance of that escape from liability was the subject of Bailey and Owens' appeal to the Court of Appeals. (App'x pp. 646-68.) Deutsche Bank appealed the denial of its summary judgment motion and also the grant of summary judgment against it. (App'x pp. 535-74.)

The note and mortgage involved in this case were dated June 15, 1998, and were given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc. (App'x pp. 84-85, 250-57.) The note document contained a balloon provision under which, even if all the monthly payments under the note were made timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (App'x p. 250.) The mortgage was recorded on July 2, 1998, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank. (App'x p. 85.)

Bailey is Owens' daughter and the grantee of a deed of the subject property from her mother through a deed executed and recorded after the subject mortgage. (App'x p. 7.)

The note matured on July 1, 2013, and, as Deutsche Bank alleged and Bailey and Owens admitted, "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." (App'x pp. 8, 86.)

The parties agreed, and public records show, that the Bailey v. Novastar action occurred, that Deutsche Bank was a defendant in that case, and that the case was tried to a final judgment in

favor of Deutsche Bank and the other defendants in that case. (App'x p. 10, p. 189 ln. 9-23, pp. 378-533.)

The Bailey v. Novastar case was filed on June 27, 2013. (App'x pp. 385-404.) In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the subject note and mortgage and the circumstances surrounding that. (App'x pp. 11, 388-404.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102 (commonly referred to as the attorney preference statute, under which a mortgage lender is required to ascertain a borrower's preference as to the legal counsel she desires to represent her in the mortgage loan closing) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (App'x pp. 388-92.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document. (App'x pp. 389-92.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made." S.C. Code Ann. § 37-10-105(C)(1). Under this remedies statute, a court may also "enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result" or "rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement[.]" S.C. Code Ann. § 37-10-105(C)(2)&(3).

The prayer in the Bailey v. Novastar complaint stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (App'x p. 395.)

Deutsche Bank served its answer in the Bailey v. Novastar case on September 26, 2013. (App'x pp. 10, 405-14.) In a filing made in Bailey v. Novastar, Deutsche Bank stated that Bailey and Owens' claims in that case "ar[ose] out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]" (App'x pp. 417, 419, 426.) At no time did Deutsche Bank assert a counterclaim for foreclosure in the Bailey v. Novastar action, despite the fact that the subject note had matured at the time Deutsche Bank served its answer. (App'x pp. 12, 250, 405-14.)

Bailey v. Novastar was tried to a jury and resulted in a verdict for Deutsche Bank and the other defendants on September 15, 2015. (App'x pp. 378-79.) Bailey and Owens' motion for a new trial in that case was denied by order filed June 24, 2016. (App'x p. 382.) No appeal was taken in that case.

In the instant case that is subject of this appeal, the master analyzed the history and meaning of the law of res judicata in South Carolina in some depth, concluding that the failure of Deutsche Bank to raise its foreclosure claim in Bailey v. Novastar resulted in the final judgment in that case having res judicata effect on that claim. (App'x pp. 31, 37-38.)

The Court of Appeals reversed the grant of summary judgment, ruling in Deutsche Bank's favor, and remanded the case. Deutsche Bank, 434 S.C. at 510. The Court of Appeals analyzed the case as follows:

> Deutsche Bank argues the master erred by finding its foreclosure claim was a compulsory counterclaim in the 2013 Action and that res judicata precluded it from bringing this action. It asserts the foreclosure claim did not arise from the same transaction or

occurrence that gave rise to Mortgagors' claims for violation of the Attorney Preference Statute and the SCUTPA and thus did not logically relate to their claims in the 2013 Action. Deutsche Bank contends that because section 37-10-105 provided several forms of relief, Mortgagors' general request for "all available relief" under section 37-10-105 instead of a specific request for nonenforcement of the agreement was insufficient to satisfy the logical relationship test. We agree.

. . .

Applying the logical relationship test, we find the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action.

The occurrence that gave rise to Deutsche Bank's inclusion in Mortgagors' complaint in the 2013 Action was the execution of the loan documents and the closing of the Mortgage. The occurrence that gave rise to Deutsche Bank's foreclosure action was Mortgagors' default on the Note. We acknowledge DAV Corp.; BADD, L.L.C.; and Salon Proz, LLC all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, this case differs from the foregoing cases because here the prior action was not a foreclosure action. Rather, Mortgagors' claims against Deutsche Bank in the 2013 Action were for violation of the Attorney Preference Statute and the SCUTPA. Thus, the question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA. Deutsche Bank's foreclosure claim was not a defense to Mortgagors' allegations in the 2013 Action, and had Deutsche Bank raised the foreclosure claim in the 2013 Action, it would not have affected Mortgagors' allegations pertaining to the violation of the Attorney Preference Statute. See U.S. Bank Tr. Nat. Ass'n v. Bell, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) ("Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." (footnote omitted)). We therefore conclude that although Deutsche Bank could have asserted a counterclaim for foreclosure in the 2013 Action, such claim was permissive—not compulsory.

> Further, although Mortgagors claimed they were not aware of the Note's balloon provision, they did not specifically request a determination that the Mortgage or the underlying obligation to repay the loan was unenforceable. Rather, they sought damages, attorney's fees, and in general terms, "penalties as provided in the South Carolina Consumer Protection Code, including all available relief" under section 37-10-105. Had the court in the 2013 Action determined that the balloon provision was unconscionable or induced by unconscionable conduct, it could have declared the entire agreement unenforceable, but such remedy was neither required nor specifically requested. See § 37-10-105(A), (C). The court could have instead refused to enforce only that particular term of the agreement or simply chosen to award monetary relief. See id.

Deutsche Bank, 434 S.C. at 505, 507-09.

Bailey and Owens petitioned for rehearing or rehearing *en banc*, and that petition was denied. (App'x pp. 719-29.)

Bailey and Owens petitioned this Court of a writ of certiorari on two questions, and this Court granted certiorari to review whether the Court of Appeals erred in reversing the master-in-equity's grant of summary judgment.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The standard on a motion for summary judgment is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be

viewed in the light most favorable to the non-moving party." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

Nonetheless, "cross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." Mead v. Beaufort Cnty. Assessor, 419 S.C. 125, 131, 796 S.E.2d 165, 168 (Ct. App. 2016). "Where cross motions for summary judgment are filed, the parties concede the issue . . . should be decided as a matter of law." Id.

Where summary judgment is granted as the result of the determination of questions of law, this Court's review of those determinations is *de novo*, as it always is for questions of law. Bennett v. Carter, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017); Wachovia Bank, Natl. Assn. v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014); Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010). To the extent the review of a grant of summary judgment depends upon questions of law, rather than questions of fact, the standard under which "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party" does not apply, since the review is of a matter of law, not fact. Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004).

ARGUMENT

The Court of Appeals' opinion contravenes this Court's precedent – and the logical, common-sense principles that underlie it – concerning res judicata and compulsory counterclaims. In its opinion, the Court of Appeals has carved out, for a class of mostly moneyed litigants, a special, unwarranted exception to generally applicable law – an exception that contravenes both the Rules of Civil Procedure and settled principles already established by this Court.

The Court of Appeals' opinion departs from existing law and enshrines in South Carolina jurisprudence an anti-consumer, pro-financial institution double standard in the law of compulsory counterclaims and res judicata. The crux of the Court of Appeals' opinion is contained in the following excerpt:

> We acknowledge DAV Corp.; BADD, L.L.C.; and Salon Proz, LLC all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, *this case differs from the foregoing cases because here the prior action was not a foreclosure action*.

Deutsche Bank, 434 S.C. at 508 (emphasis added).

The Court of Appeals has created a "foreclosure rule" for compulsory and permissive counterclaims (and, thus, a rule of res judicata) that is dependent on which claim was brought first, not upon the relationship between the claims. Id. Under this rule, a bank customer's counterclaim that "could affect the enforceability of the loan" is compulsory in a mortgage foreclosure action, but, if the roles are reversed and suit is brought on the customer's claim first, the bank's counterclaim for foreclosure is somehow not compulsory – despite the claims' ability to affect one another being exactly the same. Id.

This is tantamount to a special rule for banks and other financial institutions, a rule that is based on no previous precedent and which contradicts precedent in this area of the law. See id. Under this rule, foreclosing banks are not bound by the same rules that bind other litigants, the same rules that bind their opponents. See id. The Court of Appeals' decision has run afoul of this Court's holding that "[r]ich, poor, and humble are equal in law." State v. Du Pre, 134 S.C. 268, 271, 131 S.E. 419 (1926). Furthermore, the opinion introduces an illogical element – which claim

was pled first – into areas of analysis in which trial courts routinely struggle: res judicata and whether a counterclaim is permissive or compulsory. Deutsche Bank, 434 S.C. at 508

Reversal by this Court would not only restore to Bailey and Owens the outcome that precedent requires, it would also put this state's jurisprudence about res judicata and compulsory counterclaims back on a sensible track.

I. The opinion finds the foreclosure claim was permissive in the 2013 action for reasons that contradict existing precedent.

At the heart of this case is the meaning of Rule 13(a), SCRCP. "Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). The language of Rule 13(a) requires that "[a] pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added). Such claims are usually referred to as compulsory counterclaims. "A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP (emphasis added). Such claims are usually referred to as permissive counterclaims.

In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., a foreclosure action with counterclaims, this Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory, i.e., a counterclaim is compulsory if it has a logical relationship with the plaintiff's claim. 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, this Court

settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." Id.

Whether a claim was a compulsory counterclaim in an earlier action can be of great importance to whether res judicata now bars the claim.

> Failure to assert a compulsory counterclaim precludes a later assertion of that claim in a subsequent or independent action, but failure to assert a permissive counterclaim does not preclude its assertion in a subsequent action. . . . The Restatement [Second, Judgments § 22(2)(a)] similarly provides that a party may be precluded from subsequently maintaining an action on a counterclaim that was not interposed in a previous suit where the counterclaim must be interposed by a compulsory counterclaim statute or rule of court.

47 Am.Jur.2d Judgments § 504 (2006).

The rule that unasserted compulsory counterclaims are barred by judgment in the action in which they could have been asserted flows logically from Rule 13(a)'s purpose, which is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62.

> The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Beach Co., 351 S.C. at 62.

This Court has adhered to this eminently logical rule. In Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997), this Court held that, "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." In Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 190-91, 417

S.E.2d 569, 571 (1992), this Court held the same, observing that "[t]he claims are now barred as arising out of the same transaction as the prior suit."

The rule is consistent with principles of res judicata generally. Res judicata "bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). Res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*." Id. at 175 (emphasis added, quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

The principle of res judicata has roots in the doctrine of bar and merger, from which it is no longer distinct in South Carolina. 7 S.C. Jur. Estoppel and Waiver § 29 (1991). It appears to have arisen from

> the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation.)

Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317, 319 (1944).

"The primary purposes of the doctrine . . . are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48 (1998); accord Nelson v. QHG of S.C., Inc., 362 S.C. 421, 427, 608 S.E.2d 855 (2005).

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.

Judy, 712 S.E.2d at 414 (quoting Plum Creek, 334 S.C. at 34).

A litigant's claim is barred even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original, quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

Res judicata applies to all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24).

The Court of Appeals' decision turns on the conclusion that Deutsche Bank's foreclosure claim was not barred by res judicata because it was not a compulsory counterclaim required by Rule 13(a), SCRCP, to be raised in Bailey v. Novastar, an action that sought "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (App'x p. 395.)

The remedies associated with violation of the attorney preference statute (as well as other violations of Chapter 10 of the Consumer Protection Code) are set out in S.C. Code Ann. § 37-10-105, which states as follows:

> A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending

actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) *If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may,* in an action other than a class action:

(1) *refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made*;

(2) *enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result*;

(3) *rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement*; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

(b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and

(c) attorney's fees and costs.

An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

> (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

S.C. Code Ann. § 37-10-105 (emphasis added).

The relief sought by Bailey and Owens in the first action – "all relief available under S.C. Code Ann. § 37-10-105(C)" – included the relief available in S.C. Code Ann. § 37-10-105(C)(1), (2), and (3), which expressly provided for the non-enforcement or modified enforcement of the note and mortgage – which neither Deutsche Bank nor the Court of Appeals disputed. (App'x p. 395.) The Court of Appeals stated "the question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagor's claims under the Attorney Preference Statute and the SCUTPA."[1]

The Court of Appeals got the answer to that question wrong.

If Deutsche Bank had counterclaimed for foreclosure in the 2013 action and won on the counterclaim, that would have most certainly affected the enforceability of Bailey and Owens' claim in that action for attorney preference violation coupled with unconscionability. Deutsche Bank's success on the foreclosure counterclaim, which by its nature would have sought enforcement of the note and mortgage per their written terms, would have taken some available relief under the attorney preference claim off the table entirely. See S.C. Code Ann. § 37-10-105(C)(1-3); U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009)

[1] Whether the claim in Bailey v. Novastar for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, would have been affected by Deutsche Bank raising and prevailing on its foreclosure claim is not the issue before this Court, nor was it before the Court of Appeals.

(elements of foreclosure action). It would have been impossible in the 2013 action for a court both to enforce the note and mortgage as written (Deutsche Bank winning on the foreclosure counterclaim) and award relief to Bailey and Owens under S.C. Code Ann. § 37-10-105(C)(1), (2), or (3), all of which provided for the non-enforcement or modified enforcement of the note and mortgage if Bailey and Owens had won on their claim. The court in Bailey v. Novastar could not have both adjudged the note and mortgage unenforceable – a total victory for Bailey and Owens on their claim – and adjudged it enforceable – a total victory for Deutsche Bank on its foreclosure claim.

The Court of Appeals' opinion does not square with an examination of the relief available under these two claims. The Court of Appeals seemed to premise its decision on the idea that it would not have been *impossible* for the court in Bailey v. Novastar to have both awarded relief to Bailey and Owens and to Deutsche Bank on its counterclaim for foreclosure, had the counterclaim been brought, with the Court of Appeals reasoning as follows:

> Had the court in the 2013 Action determined that the balloon provision was unconscionable or induced by unconscionable conduct, it could have declared the entire agreement unenforceable, but such remedy was neither required nor specifically requested. See § 37-10-105(A), (C). The court could have instead refused to enforce only that particular term of the agreement or simply chosen to award monetary relief. See id.

Deutsche Bank, 434 S.C. at 508-09.

But neither this Court nor, until this case, the Court of Appeals has ever held that impossibility or total incompatibility of success on opposing claims is required for a counterclaim to be compulsory. After all, the test is not total mutual repugnancy of the claims, but whether the claims have a logical relationship to one another. DAV Corp., 298 S.C. at 518. Where success on

one claim can mean that a court can refuse to enforce loan documents, in whole or in part, or rewrite them, S.C. Code Ann. § 37-10-105(C)(1-3), and success on another claim is the enforcement of those same loan documents according to their terms, see U.S. Bank, 684 S.E.2d at 205, Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984), each of the claims has the capacity to affect the relief available on the other claim. These claims have a logical relationship to each other. DAV Corp., 298 S.C. at 518. A claim that has the ability to affect what relief can be awarded on an opposing claim will always have a logical relationship to the opposing claim and always be a compulsory counterclaim to it. See id.

The Court of Appeals' opinion found that "the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action." Deutsche Bank, 434 S.C. at 507. Accordingly, the Court of Appeals found that the foreclosure counterclaim Deutsche Bank had and could have brought at the time it answered in the 2013 action was permissive, rather than compulsory. Id. at 507-09.

The opinion decides that the 2013 action and the instant foreclosure action arose out of different occurrences, respectively, the execution of the loan documents and mortgage closing and default under the note. Id. at 508. That decision, however, runs contrary to precedent.

The Court of Appeals' opinion contravenes this Court's decision in Carolina First Bank v. BADD, L.L.C., also a mortgage foreclosure action, in which this Court, citing the rule that a counterclaim is compulsory if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in such a debt collection action if it arises out of the execution of the documents that form the basis of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). This Court in BADD emphasized that

"the 'transaction or occurrence' for the purpose of determining the compulsory character of [the] counterclaim is the execution" of those documents. Id. at 296. Under that precedent, the transaction or occurrence giving rise to Deutsche Bank's foreclosure claim was (or at the very least included) the execution of the loan documents and mortgage closing. See id. Indeed, a mortgage foreclosure plaintiff is required to prove the execution of the subject note and mortgage. Paramount Fund, 282 S.C. at 499 ("[i]n an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence"). The execution of the note and mortgage was the very same transaction or occurrence the Court of Appeals determined gave rise to Bailey and Owens' claims in the 2013 action. Deutsche Bank, 434 S.C. at 508 ("The occurrence that gave rise to the Deutsche Bank's inclusion in Mortgagors' complaint in the 2013 Action was the execution of the loan documents and the closing of the Mortgage."). When BADD is applied to this case, Deutsche Bank's foreclosure claim can only be reckoned as having been a compulsory counterclaim in the 2013 action because, like Bailey and Owens' claim, it arose out of the execution of the note and mortgage. BADD, 414 S.C. at 296.

The Court of Appeals' opinion also does not square with the analysis used in DAV Corp., the case in which this Court established the logical relationship test. 298 S.C. at 518. This Court there held that most of DAV's counterclaims were compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note[.]" Id.

In the DAV Corp. case, the plaintiff's claim was for foreclosure of a mortgage, and the Court described of DAV's counterclaims as follows:

1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;

2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;

3) breach of fiduciary duty to co-joint venturers;

4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;

5) violation of the Unfair Trade Practices Act by breaching the oral agreement;

6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

All but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

When the precedent of DAV Corp. is applied, it also gives a positive result for whether Deutsche Bank's foreclosure claim was compulsory in the 2013 action under the logical relationship test. The unconscionable attorney preference violation claim in the 2013 action had *more* to do with Deutsche Bank's foreclosure claim than the claim in DAV Corp. had to do with the compulsory counterclaims there. Id. at 517-19. They arose out of the same relationship and more closely so than the DAV Corp. claims, and, as discussed above, they affect each other's enforceability at least as much, if not more than, the opposing claims in DAV Corp. did. Id. at 517-19.

Not only is the instant decision inconsistent with this Court's precedent, the Court of Appeals is also inconsistent with itself. It determined in S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), that a claim for violation of the South Carolina Unfair Trade Practices Act was compulsory in a mortgage foreclosure action because it *could* affect the enforceability of the loan – not that it necessarily *would* affect the enforceability of the loan. There is *much* more mutual incompatibility of claims and remedies involved in this case between the 2013 action and Deutsche Bank's foreclosure claim than there was in Salon Proz, 420 S.C. at 97.

More recently, the Court of Appeals issued another decision, Encore Technology Group, LLC v. Trask, 436 S.C. 289, 871 S.E.2d 608 (Ct. App. 2021), that is also difficult to square with its opinion in this case. There, the Court of Appeals decided that res judicata barred claims that were not asserted as counterclaims in a previous suit, where both suits arose out of whether the business entity litigants were in unfair competition with one another. Id. at 296, 309-10. The Court of Appeals wrote that "[p]recedent explains a litigant is barred from raising issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. at 309 (internal quotation marks omitted). The court stated that "the question of whether a claim in a later case should have been a compulsory counterclaim in a prior case is the same question as whether res judicata applies." Id. at 310. There was no discussion of impossibility or incompatibility of success on the opposing claims, and there was no attempt to draw narrowly the bounds of the transaction or occurrence from which the claims arose; it was enough that where both suits arose out of whether the parties were in unfairly competing against one another. Id. at 296, 309-10. The Court of Appeals reasoned that "res judicata applies to claims that arise out of

the same transaction or occurrence covered by a prior suit. Once Clear Touch raised unfair competition, it was obligated to raise all claims related to that unfair competition." Id. at 310. Under the analysis the Court of Appeals used in the instant Deutsche Bank v. Estate of Houck case, the claims in Encore Technology would never have been found compulsory. Encore Technology, 436 S.C. at 296, 309-10; Deutsche Bank, 434 S.C. at 505, 507-09.

Older jurisprudence of the Court of Appeals also hews to an interpretation truer to DAV Corp.'s flexible recognition that a counterclaim is compulsory whenever it has a logical relationship to the plaintiff's claim. 298 S.C. at 518-19. In Jaynes v. County of Fairfield, 303 S.C. 434, 401 S.E.2d 183 (Ct. App. 1991), the Jaynes were defendants in an earlier road-closing action brought by Fairfield County that concerned, among other things, whether a road was public property – a case that Fairfield County lost. Id. at 435-36, 438 & n. 1. The Court of Appeals correctly held that the Jaynes' later inverse condemnation action against the county about that road was barred by res judicata, since the claims were about the same road and, thus, bore a logical relationship to one another. Id. The claims did not have elements that mirrored one another, nor was there discussion of impossibility or incompatibility of success on the opposing claims; rather, the claims arose out of a common matter: the road and who owned it. Id. Further, the Court of Appeals did not undertake to define that matter in an artificially narrow way. Id. Just as Bailey v. Novastar and the instant case were both a case about a certain mortgage, Deutsche Bank, 434 S.C. at 507-09, so the cases in Jaynes were both about a certain road. 303 S.C. at 435-36, 438 & n. 1.

This Court has also avoided the Court of Appeals' narrow view of when a logical relationship exists between claims. In First-Citizens Bank & Trust Co. v. Hucks, this Court did not examine whether the plaintiff's and the defendants' claims had any mirroring elements or of

necessity precluded any success by the other party on his claims; rather, the Court's analysis was as follows:

> In the instant case, the trustee's equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The logical relationship existed because both claims arose out of the administration of a certain trust. Id.

The test is whether the claims in question have a logical relationship to one another. DAV Corp., 298 S.C. at 518. It is readily apparent that courts and litigants are often tempted to whittle that test down to something that is easier to assess. The body of case law applying this test, though, does not provide such a narrowed, shortcut definition of "logical relationship"; rather, the cases form a non-exhaustive list of situations in which claims bore a logical relationship to one another, whether because they concerned a common object, arose out of a common relationship, came out of shared facts, had to do with the signing of the same contracts, or could affect each other's enforcement or remedies. E.g., BADD, 414 S.C. at 295, 296; Crestwood Golf Club, 328 S.C. at 217; Sub-Zero Freezer, 308 S.C. at 190-91; First Citizens, 305 S.C. at 298; DAV Corp., 298 S.C. at 518-19; Encore Technology, 436 S.C. at 296, 309-10; Salon Proz, 420 S.C. at 97; Jaynes, 303 S.C. at 435-36, 438 & n. 1. If two opposing claims have any one of those relationships to one another, they have a logical relationship and are compulsory. See DAV Corp., 298 S.C. at 518.

DAV Corp., BADD, and Salon Proz, which were all foreclosure actions, recognized at least two of the kinds of logical relationship that make a counterclaim compulsory. If a counterclaim

arises out of the same set of facts as the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97.

Here, the relationship between the attorney preference with unconscionability claim in the 2013 action and Deutsche Bank's foreclosure claim had both. The foreclosure counterclaim Deutsche Bank did not plead in the 2013 action was compulsory in at least *two* ways: 1) it arose from and required proof of the execution of the note and mortgage, the circumstances surrounding which were at the heart of Bailey and Owens' claims, see BADD, 414 S.C. at 295, 296, Paramount Fund, 282 S.C. at 499, and 2) it could have affected the enforceability of Bailey and Owens' claim under S.C. Code Ann. § 37-10-150(C). See DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Either one of these things, alone, would have made it a compulsory counterclaim. See BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97.

Deutsche Bank's foreclosure claim had a logical relationship to Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C) in the Bailey v. Novastar action. DAV Corp., 298 S.C. at 518-19. That made it a compulsory counterclaim. Id. at 518. Deutsche Bank is barred from asserting it in this later action, because, "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." Crestwood Golf Club, 328 S.C. at 217. Res judicata bars the foreclosure claim. Id.

No one disputes that there is party identity here; there is. Deutsche Bank disputes that there is identity of subject matter and adjudication in a prior suit; however, under this Court's jurisprudence and the Court of Appeals', the instant case excepted, there is. BADD, 414 S.C. at

295, 296; Crestwood Golf Club, 328 S.C. at 217; Sub-Zero Freezer, 308 S.C. at 190-91; First Citizens, 305 S.C. at 298; DAV Corp., 298 S.C. at 518-19; Encore Technology, 436 S.C. at 296, 309-10; Salon Proz, 420 S.C. at 97; Jaynes, 303 S.C. at 435-36, 438 & n. 1. Res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*." Judy, 393 S.C. at 175 (emphasis added, quoting Plum Creek, 334 S.C. at 34). That includes Deutsche Bank's foreclosure claim.

Consistency and sound future application of the law call for this Court to reverse the Court of Appeals. The master-in-equity was right to grant summary judgment on the mortgage foreclosure claim. A case about this mortgage has already been had, and Deutsche Bank could have, but chose not to, raise its foreclosure claim then.

II. The Court of Appeals' opinion adds an element to the compulsory/permissive res judicata analysis that should not be a part of it.

Further, the Court of Appeals' opinion adds a new wrinkle to the law in this area that just does not belong. It contradicts the Rules of Civil Procedure and precedent about the role prayers for relief do – or do not – play in the res judicata analysis.

The Court of Appeals' opinion is unduly focused on whether declaring the note and mortgage unenforceable was specifically prayed for in the complaint in the 2013 action. Deutsche Bank, 434 S.C. at 508-09. Never once has any case analyzing whether a counterclaim was compulsory or permissive taken that into account. There is not any reason to take it into account. The content of the prayer in a contested case is usually unimportant to the relief available on a claim. "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), SCRCP. The cases agree. Battery

Homeowners Assn. v. Lincoln Financial Resources, 309 S.C. 247, 422 S.E.2d 93 (1992); Perry v. Smalls, 308 S.C. 259, 417 S.E.2d 611 (Ct. App. 1992); Sossamon v. Peeler, 291 S.C. 256, 353 S.E.2d 152 (Ct. App. 1987); Jones v Bennett, 348 S.C. 96, 348 S.E.2d 365 (Ct. App. 1986).

There is also no way to square the Court of Appeals' prayer-specific reasoning in this case with the principle that res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*" – even if they were not pled at all, much less specifically prayed for, in the first suit. Judy, 393 S.C. at 175 (emphasis added, quoting Plum Creek, 334 S.C. at 34). Encompassed within the circle of res judicata are what was sought and what could have been sought. Id.

But, even if the specific content of the prayer in the 2013 action complaint were to matter to the analysis, Bailey and Owens specifically prayed for "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (App'x p. 395.) That included the relief available under S.C. Code Ann. § 37-10-105(C)(1), (2), and (3), which provides for the non-enforcement or modified enforcement of the note and mortgage. Those things could affect Deutsche Bank's ability to succeed on the foreclosure claim. See U.S. Bank, 684 S.E.2d at 205, Paramount Fund, 282 S.C. at 499.

Not only has the opinion in this case contradicted precedent and the Rules of Civil Procedure, it has turned a blind eye to what relief was actually sought in the 2013 action.

The Court of Appeals erred in reversing the master's grant of summary judgment.

III. The Court of Appeals has effectively created a different compulsory/permissive analysis for foreclosure actions and other cases – essentially, a different law for banks.

The Court of Appeals' opinion states as follows:

> We acknowledge DAV Corp.; BADD, L.L.C.; and Salon Proz, LLC all held that a claim is compulsory in a foreclosure action when, if

> the allegation were true, it could affect the enforceability of the loan. However, *this case differs from the foregoing cases because here the prior action was not a foreclosure action*.

Deutsche Bank, 434 S.C. at 508 (emphasis added).

The 2013 action was, indeed, not a foreclosure action. But Deutsche Bank's claim at issue is a foreclosure claim. There is no special law of res judicata and compulsory/permissive distinction that applies to foreclosure claims and not other claims.

"General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures, 59A C.J.S. Mortgages § 1051 (2009). There is no case law in South Carolina indicating an exception for mortgage foreclosure claims in the res judicata context. As discussed in the master's order (App'x pp. 25-26), this Court has applied res judicata to affect a mortgagee's foreclosure claim at least as far back as 1930. Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). There is not, and never has been, a res judicata exception for mortgage foreclosure claims. See id.; 59A C.J.S. Mortgages § 1051.

The compulsory counterclaim principle runs (as it must) with equal force in both directions, such that it applies equally to claims whether they are or could asserted by a plaintiff or a defendant. It is the *relationship* between the claims that informs whether they are compulsory or permissive with regard to one another. DAV Corp., 298 S.C. at 518-19. The compulsory/permissive analysis is, as it has to be, the same when a plaintiff asserts Claim A and a defendant has Claim B as a counterclaim as it when a plaintiff asserts Claim B and a defendant has Claim A as a counterclaim. The conclusion of whether the counterclaim is compulsory or permissive has to be the same, because the *relationship* between the claims is the same – either they have a logical relationship to one another or they do not. Id. The claimants' roles as plaintiff and defendant do not change

the analysis if those roles are switched. See id. The Court of Appeals' opinion errs in treating the analysis otherwise. Deutsche Bank, 434 S.C. at 508. To see this error illustrated, this Court need look no further than the opinion, which never explains why it matters which claim was brought first. Id. at 507-09.

Rule 13(a) serves a bedrock principle of res judicata: that "it is in the interest of the state that there should be an end to litigation." Watson, 31 S.E.2d at 319. Parties cannot avoid that simply by "changing their relative positions of plaintiff and defendant" in a second case. Herbert Broom, Legal Maxims 259 (6th Am. ed., Philadelphia 1868) (originally published 1845). The question is not from which side of the "v." claims are asserted; it is, rather, whether the claims have a logical relationship to one another. DAV Corp., 298 S.C. at 518.

The Court of Appeals' opinion here sets the stage for inconsistency. To demonstrate it, all one must do is to take the opinion's reasoning to its logical conclusion. If Deutsche Bank's foreclosure claim was not a compulsory counterclaim to Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C), as the Court of Appeals determined it was not, then it would have been possible for Bailey and Owens to prevail in Bailey v. Novastar, obtain a judgment declaring the note and mortgage to be unenforceable, and yet still be exposed to Deutsche Bank possibly prevailing on a claim to enforce and foreclose that same note and mortgage in a later action. See 47 Am.Jur.2d Judgments § 504 ("failure to assert a permissive counterclaim does not preclude its assertion in a subsequent action"). That is absurd. Rule 13(a) was designed to prevent "'the scandal and absurdity' of a circuity of action[.]" Broom, supra at 259.

And, as discussed above, the opinion in this case sets this inconsistent distinction up for exploitation by already powerful, moneyed litigants – typical foreclosure plaintiffs – without so

much as a word about why a departure from general principles and existing precedent is warranted for foreclosure claims. Deutsche Bank, 434 S.C. at 507-09. The opinion seems to contemplate that Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C) would have been compulsory to Deutsche Bank's foreclosure claim if the latter had been brought first. Deutsche Bank, 434 S.C. at 507-09. This, too, is absurd. Foreclosure claims do not have an inherently broader reach than others when it comes to what counterclaims are compulsory to them. No case has ever said that, before the Court of Appeals' opinion here did, and our jurisprudence should not start saying that.

The opinion under review has created a most inappropriate, illogical, and ill-conceived distinction, a compulsory/permissive analysis that is different for foreclosure actions than it is for other claims. Id. Effectively, this creates the unsavory, unjust, and unfair result of a different law for banks. Our system depends upon the law being the same for everyone, Du Pre, 134 S.C. at 271, and the opinion in this case chips away at this bedrock principle. This is wrong and should be undone. Our system allows even banks to screw up in their strategic decisions, bear the consequences of their own actions, and, when the law dictates, have their claims barred. The law, even for foreclosure plaintiffs, is and ought to be as this Court has said: "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." Crestwood Golf Club, 328 S.C. at 217. There is not, has never been, and should not be an exception for mortgage foreclosure claims to the general law of res judicata. See Columbia Natl. Bank, 151 S.E. at 275, 276; 59A C.J.S. Mortgages § 1051.

CONCLUSION

Reversal is more than just proper in this case. Reversal in a published opinion is needed here. As it stands under the Court of Appeals' opinion, the law of this state about res judicata and

compulsory counterclaims is inconsistent with itself – which is bad enough – but also now contains a pro-bank, anti-consumer special rule. Deutsche Bank, 434 S.C. at 507-09. That rule is this: If a consumer is sued for foreclosure and has a counterclaim that could render the note and mortgage unenforceable, that is a counterclaim Rule 13(a) requires him to raise or lose forever. See id. If the roles are simply reversed, however, and the consumer sues the bank on his claim first, the bank has the option at its pleasure to bring foreclosure as a counterclaim or not, without consequences if it does not – even though the relationship between the claims is exactly the same. Id.

This cannot stand.

Respectfully submitted,

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