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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Master-in-Equity

Appellate Case No. 2022-001147

U.S. Bank National Association, as Trustee, as successor to U.S. Bank Trust National Association, as Trustee, for Conseco Finance Home Equity Loan Trust 2001-C,..……..……..……..…...Respondent,

v.

Frances L. Mack nka Frances L. Mack-Marion,……..……Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the master-in-equity err reversibly here in granting judgment on the pleadings on Appellant's declaratory judgment claim on the basis of Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006)?

II. Did the master-in-equity err reversibly in determining that Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), bars Appellant's claim seeking a declaratory judgment that the 2001 mortgage in this case is unenforceable?

III. Should this Court modify the prospective-only application of Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), and, if so, how?

STATEMENT OF THE CASE

This is an appeal of a judgment on the pleadings against the Appellant, Frances L. Mack-Marion (hereinafter "Mack-Marion"), on her counterclaim seeking a declaratory judgment that the mortgage sought to be foreclosed in this action is rendered unenforceable because it was closed through the unauthorized practice of law. (R. pp. ___; order granting in part judgment on the pleadings pp. 1, 3-4; amended answer and counterclaim pp. 7.) The master-in-equity determined that the counterclaim fails as a matter of law for lack of subject matter jurisdiction under the Court of Appeals' decision in Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), and, in the alternative, is barred under this Court's decision in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), because the mortgage was closed before August 8, 2011. (R. pp. ___; order granting in part judgment on the pleadings pp. 3-4; order denying motion to reconsider.)

The Respondent, U.S. Bank National Association, as Trustee, as successor to U.S. Bank Trust National Association, as Trustee, for Conseco Finance Home Equity Loan Trust 2001-C (hereinafter "U.S. Bank"), brought this action seeking reformation of and foreclosure of a mortgage made in 2001. (R. pp. ___; complaint.) The case was referred to the Orangeburg County Master-in-Equity. (R. pp. ___; order of reference.) After initially answering *pro se*, Mack-Marion engaged counsel and amended her answer to include defenses of failure of consideration or breach of contract (because not all the loan amount was disbursed to pay off debts of hers as agreed); illegality, because the mortgage was formed through the unauthorized practice of law by the lending institution; and unclean hands as a result of the unauthorized law practice and failure to disburse the loan proceeds. (R. pp. ___; *pro se* answer; amended answer and counterclaim.) Her amended pleading also asserted counterclaims for violation of

the attorney preference statute, S.C. Code Ann. § 37-10-102, coupled with unconscionability or inducement of the mortgage loan by unconscionable conduct; for violation of the South Carolina High Cost and Consumer Home Loans Act, S.C. Code Ann. §§ 37-23-10, *et seq.*; and for a declaratory judgment that the mortgage is wholly or partially unenforceable. (R. pp. ___; amended answer and counterclaim.) U.S. Bank replied, asserting various defenses to the counterclaims, including one that Mack-Marion "failed to allege facts sufficient to constitute a cause of action against Plaintiff and, therefore, the Counterclaims should be dismissed." (R. pp. ___; reply.)

U.S. Bank moved for judgment on the pleadings as to Mack-Marion's counterclaims. (R. pp. ___; motion for judgment on pleadings.) Because the notice of hearing stated that what would be held was to be a "foreclosure hearing[,]" Mack-Marion believed that the case was to be tried; though it was later clarified that only the motion for judgment on the pleadings was to be heard. (R. pp. ___; notice of hearing; transcript p. 3 ln. 11-13, p. 9 ln. 18-23.) At the hearing, U.S. Bank's counsel conceded that Mack-Marion pled a sufficient attorney preference violation claim for an offset defense under S.C. Code Ann. § 37-10-105(A) and a counterclaim under S.C. Code Ann. § 37-10-105(C), and Mack-Marion's counsel conceded that the High Cost Home Loans Act claim failed because that act was not in effect in 2001, when the operative events occurred. (R. pp. ___; transcript p. 3 ln. 21 through p. 6 ln. 22.)

The parties argued the motion as to the counterclaim for declaratory judgment concerning the enforceability of the mortgage. (R. pp. ___; transcript p. 6 ln. 23 through p. 16 ln. 11.) Mack-Marion's counsel conceded that both Hambrick and Matrix were precedent against the viability of the claim, but he argued that this Court's precedent showed Hambrick was wrongly decided and that Matrix should be overruled to the extent it limits its applicability

to mortgages recorded after August 8, 2011. (R. pp. ___; transcript p. 10 ln. 2 through p. 12 ln. 4.)

The master, noting that he was bound by the precedent of both Hambrick and Matrix and thus had no other choice, announced that he would grant the motion for judgment on the pleadings on Mack-Marion's declaratory judgment claim. (R. pp. ___; transcript p. 12 ln. 6-8, p. 16 ln. 12-15.) The master issued an order on the motion for judgment on the pleadings that granted the motion as to the declaratory judgment claim, stating he lacked subject matter jurisdiction under Hambrick and that the date of recording barred the claim under Matrix. (R. pp. ___; order granting in part judgment on the pleadings pp. 3-4.) Mack-Marion moved to reconsider, and the master denied that motion and "clarifie[d] that these rulings are made in the alternative to one another, i.e., if the court does have jurisdiction, the claim fails on its merits due to the time limit in Matrix." (R. pp. ___; order denying motion to reconsider; motion to reconsider; memorandum in support of motion to reconsider.) The master observed that "[t]he court is bound by precedent and is not at liberty to change its ruling, regardless of whether it might have agreed or disagreed with the Defendant's arguments if they had been made on a novel issue." (R. pp. ___; order denying motion to reconsider.)

This appeal followed.

STATEMENT OF FACTS

When Mack-Marion was in the process of getting a refinance of her mortgage, the refinance that created the facts of this case, she was never given any opportunity to say what lawyer she wanted to represent her in the closing, and no lawyer supervised the closing. Indeed, she was simply mailed the closing documents to sign (supervised by no one) and return. Someone, probably the lender, absconded with some of her loan proceeds, as she never

received the agreed cash payout from the loan, and non-mortgage debt that was agreed to be paid off through the refinance was not paid. People falsely signed as notary and witness to her signature on the mortgage, and the lender recorded it.

The lawyer supervision that had at that time been required for fourteen years by this Court to protect Mack-Marion and people in her position from these lender abuses was entirely absent. She is now being sued to collect on a mortgage loan from which she never even got the full proceeds.

STANDARD OF REVIEW

The standard of whether a motion for judgment on the pleadings should be granted is the same as for a motion under Rule 12(b)(6), SCRCP, and the appellate court applies the same standard to the review of an order granting such a motion. See Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47, 49 (2009); Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 422, 297 S.E.2d 639 (1982); Wooten v. Standard Life & Cas. Ins. Co., 239 S.C. 243, 247-49, 122 S.E.2d 637 (1961); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). A judgment on the pleadings is proper only where there is no issue of fact raised by the non-moving party's pleadings that would entitle the non-moving party to judgment if those issues were resolved in his favor. Sapp, 687 S.E.2d at 49; Wooten, 239 S.C. at 249 (quoting 41 Am.Jur. Pleading § 336). The court must deny a motion for judgment on the pleadings if, when viewed in the light most favorable to the non-moving party, and with every doubt resolved in his favor, "the facts alleged [in the non-moving party's pleadings] and inferences reasonably deducible therefrom would entitle the [non-moving party] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d

601 (1995); accord Sapp, 687 S.E.2d at 49; Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987); Wooten, 239 S.C. at 249 (quoting 41 Am.Jur. Pleading § 336).

"An appellate court may decide questions of law with no particular deference to the [lower] court." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010).

ARGUMENT

I. South Carolina law requiring attorney supervision of real estate closings.

Since 1987, it has been settled law in South Carolina that closing a mortgage loan is the practice of law and that closings must be supervised by licensed South Carolina lawyers. Boone v. Quicken Loans, 420 S.C. 452, 463, 803 S.E.2d 707, 713 (2017); In re Pincelli, 375 S.C. 495, 654 S.E.2d 522 (2007) (recordation of documents not supervised by attorney constituted unauthorized practice of law); Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006) (noting the steps in a real estate closing that involve practice of law); In re Hall, 307 S.C. 496, 636 S.E.2d 621 (2006) (closing of loans by non-lawyer notary employed by corporation constituted unauthorized practice of law); Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003) (per existing precedent, lawyer required to supervise steps in a mortgage refinance closing that involve practice of law); In re Lester, 353 S.C. 246, 578 S.E.2d 7 (2003) (paralegal-conducted real estate closings were unauthorized practice of law); State v. Buyers Service Co. Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) (requiring attorneys to supervise real estate closings).

a. Buyers Service and what it established.

This Court's 1987 decision in State v. Buyers Service made plain to mortgage lenders that South Carolina law mandates that "real estate and mortgage loan closings should be

conducted only under the supervision of attorneys[.]" 292 S.C. at 433-34. In 2017 this Court summarized Buyers Service as follows:

> Almost thirty years ago, in the seminal case of Buyers Service, we first identified four steps in a residential real estate purchase transaction that constitute the practice of law and, therefore, must be performed or supervised by a South Carolina-licensed attorney: (1) the preparation of "deeds, notes[,] and other instruments related to mortgage loans and transfers of real property"; (2) title examination and the "preparation of title abstracts for persons other than attorneys"; (3) overseeing "real estate and mortgage loan closings" and "instructing clients in the manner in which to execute legal documents"; (4) and giving "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording" documents. Buyers Serv., 292 S.C. at 430–34, 357 S.E.2d at 17–19 (citations omitted).

Boone, 420 S.C. at 461-62 (internal footnotes omitted).

In Doe v. McMaster, this Court rejected an argument that Buyers Service did not apply to mortgage loan closings for refinance, rather than purchase, transactions. Doe v. McMaster, 355 S.C. at 312. The Court observed that the four parts of a closing that entail the practice of law are just as present in refinance closings as in purchase closings and noted that Buyers Service drew no purchase/refinance distinction. Id. There was never any reason to think Buyers Service did not apply to refinance mortgage closings.

In 1987, this Court put mortgage lenders on notice, in no uncertain terms, that closing a mortgage loan (whether in a purchase or a refinance transaction) without attorney supervision is the unauthorized practice of law. Buyers Service, 292 S.C. at 430-34.

b. Pre-Matrix cases on the effect of unauthorized law practice and similar conduct.

In light of the questions that were and were not before this Court in Buyers Service, Buyers Service did not discuss what effect closing a mortgage loan through unauthorized law

practice has on the rights of the parties to the mortgage. Id. This Court did not answer that specific question until the Matrix case came before the Court, and it does not appear that this exact question was ever put to this Court before Matrix. See Matrix, 394 S.C. 134-40.

That does not mean, however, that lenders could not be expected to know that there was some remedy for their unauthorized law practice, some effect on the rights of the parties that would flow from it. A body of case law was developing that made it known that closing a mortgage loan without supervision would not be regarded as a "wrong without a remedy" – something it was already well established that both law and equity abhor. Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753, 754 (1909); Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004).

South Carolina law already contained the principle that our courts will not enforce unlawful contracts and contracts that violate public policy. See White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342 (2004) ("general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions"); Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168 (Ct. App. 1993) ("a contract which contravenes public policy is void").

In 2002, this Court applied these existing principles in Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002), deciding their effect on a party's right to be paid for doing things that included the unauthorized practice of law. Id. at 496. Insurance Claims Consultants, Inc. ("ICC") was a company that engaged in public insurance adjusting. Id. at 481. In a declaratory judgment action brought in this Court's original jurisdiction, the Court determined that some of ICC's actions in working for the Linders constituted the

unauthorized practice of law, though public insurance adjusting does not inherently, necessarily constitute the practice of law and most of ICC's work appeared not to entail unauthorized law practice. Id. at 494-95. This Court thus held as follows:

> We therefore hold that the most appropriate manner in which to sanction respondents for their transgressions is for the trial court, in the underlying action, to determine the value of respondents' work which did not constitute the unauthorized practice of law. Respondents are entitled to that amount, but are not to be compensated for any amount attributable to their unauthorized activities.

Id. at 496. The Court rejected the Linders' contention that ICC's unauthorized practice of law gave them a tort action against ICC for damages. Id. at 496-97. The Court held that "there is no private right of action in South Carolina for the unauthorized practice of law." Id. at 497.

In short, the Linders were not entitled to damages (and had no tort claim) simply because ICC engaged in the unauthorized practice of law, but ICC's contract with the Linders was also not enforceable to the extent it called for ICC to be compensated for activities in which it had engaged in the unauthorized practice of law. Id. at 496-97.

In Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007), another original jurisdiction action, this Court was called upon to determine the effect of Chavis, a non-lawyer, having engaged in unauthorized law practice by drafting a will and a power of attorney document for someone else, Ms. Weiss, who had since died. Id. at 875-76, 877. Though the will made no bequests to Chavis, Chavis drafted the will to name himself as personal representative of the estate. Id. at 875. As personal representative, Chavis would normally be entitled by statute to compensation in the amount of five percent of the value of the estate assets. Id. at 877. This Court dealt as follows with the effect of Chavis' unauthorized practice of law:

> Respondent's entitlement to a fee as personal representative flows directly from his unauthorized practice of law in drafting a will naming himself as personal representative. Accordingly, respondent shall not receive any fee as personal representative of the Weiss estate and shall disgorge any fee received thus far.

Id.

In Wachovia Bank, N.A. v. Coffey, the Court of Appeals applied this Court's existing precedent to determine that a mortgagee that created a mortgage through the unauthorized practice of law was barred from foreclosure and from collecting the mortgage debt on other theories. 389 S.C. 68, 698 S.E.2d 244, 247-48 (Ct. App. 2010) (emphasis added), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). Citing the longstanding doctrine of unclean hands, the court held that Wachovia's unauthorized practice of law in closing the mortgage barred it from equitable relief. Id. The court grounded its unclean hands analysis in the principle, derived from this Court's decision in Buyers Service, that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" Wachovia v. Coffey, 698 S.E.2d at 247-48. The court reasoned as follows:

> The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in Buyers[Service]*:*
>
> > The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.
>
> Buyers[Service], 292 S.C. at 431, 357 S.E.2d at 18. We therefore reach the inescapable conclusion that Wachovia has

> come to court with unclean hands and is barred from seeking equitable relief.

Wachovia v. Coffey, 698 S.E.2d at 248.

Relying on existing precedent and principles, the Court of Appeals determined that "Wachovia's legal causes of action are barred as well." Id.

> In Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002), our supreme court refused to allow a public insurance-adjusting business to be compensated for the value of its performance attributable to the unauthorized practice of law. Linder, 348 S.C. at 496, 560 S.E.2d at 622. This is consistent with South Carolina precedent asserting that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (Ct.App.1993) (applying this policy to a contract secured and maintained by bribery). "This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson, 313 S.C. at 276, 437 S.E.2d at 170.

Wachovia v. Coffey, 698 S.E.2d at 248.[1]

It was into this legal landscape that this Court's decision in Matrix came.

c. Matrix and its interpretation.

Before there was Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), there was Matrix Financial Services Corp. v. Frazer, Op. No. 26859 (S.C. Sup. Ct. filed Aug. 16, 2010) (Shearouse Adv. Sh. No. 32 at 39). Matrix Financial held a mortgage that had been closed without attorney supervision through the unauthorized practice

[1] This Court granted certiorari and affirmed the Court of Appeals' decision as modified. Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 746 S.E.2d 35, 76 (2013). This Court found that since Wachovia, which never possessed an actual mortgage but only a purported one, had failed to prove entitlement to relief on its foreclosure theories to begin with, whether Wachovia's "unauthorized practice of law bars equitable and legal relief" was "not the dispositive question in this case." Id. at 426.

of law. Id. at 43. Matrix Financial brought a foreclosure action in which it sought equitable subrogation over a judgment lien. Id. at 40. The master-in-equity granted equitable subrogation to Matrix Financial, and the judgment creditor appealed. Id. This Court certified the appeal and transferred it from the Court of Appeals. Id.

This Court, citing on the Court of Appeals' opinion of a few months before in Wachovia v. Coffey, 698 S.E.2d at 248, held in its initial Matrix opinion that Matrix Financial was not entitled to equitable subrogation in its foreclosure action because, like Wachovia in the Coffey case, "Matrix comes to the court with unclean hands, and is thus barred from seeking equitable relief." Matrix, (Shearouse Adv. Sh. No. 32 at 42-43).

> Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan – all admittedly without the supervision of a licensed attorney. Thus, Matrix has committed the unauthorized practice of law in closing the refinance mortgage, clearly violating South Carolina law. The dissent's protestations aside, a party cannot violate the law and expect not to bear the consequences of its actions. This Court will not grant a discretionary equitable remedy to a party who refused to follow the laws of this state. Therefore, even if Matrix were able to satisfy the requirements for equitable subrogation, Matrix would not be entitled to the equitable remedy because it has unclean hands.

Id. at 43.[2]

On petition for rehearing, the Court issued an opinion that reached the same result – that "Matrix is not entitled to equitable subrogation" – but that differs from the first opinion in its analysis of the unauthorized practice of law's effect on Matrix Financial's remedy. Matrix, 394 S.C. at 138-40. The opinion nonetheless reached a similar conclusion concerning the effect of the unauthorized practice of law. Id. at 140.

[2] The Court also determined that Matrix Financial had failed to satisfy the elements of equitable subrogation. Id. at 41-42.

In the second Matrix opinion, this court wrote as follows concerning the effect of the unauthorized practice of law:

> Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case. However, we do agree that even if Matrix met the requirements for equitable subrogation, Matrix would be precluded from receiving that remedy because of its unauthorized practice of law.
>
> All real estate and mortgage loan closings must be supervised by an attorney. Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987). Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. Buyers Serv., 292 S.C. at 430–34, 357 S.E.2d at 17–19.
>
> In Wachovia Bank v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Our court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:
>
> > The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in Buyers:
> >
> > > The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.
>
> Coffey, 389 S.C. at 76, 698 S.E.2d at 248 (citing State v. Buyers Serv. Co., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

> Similarly, in this case Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan—all admittedly without the supervision of a licensed attorney. Thus, Matrix committed the unauthorized practice of law in closing the refinance mortgage, clearly violating South Carolina law. Matrix now comes to this Court, seeking equitable relief, based upon a mortgage contract it entered into in violation of the laws of this state.
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> This Court has previously held the presence of attorneys in real estate loan closings is for the protection of the public and that "protection of the public is of paramount concern" in loan closings. Buyers Serv., 292 S.C. at 433, 357 S.E.2d at 19. Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.

Matrix, 394 S.C. at 138-40.

For a just under a year afterward, there was uncertainty among the trial bench and bar about the meaning of this Court's statement that it "appl[ies] this ruling to all filing dates after the issuance of this opinion." Id. at 140. Did "filing dates" mean actions filed after August 8, 2011? Id. Did it mean the decision applied only to mortgages recorded after August 8, 2011? Id.

In 2012, this Court clarified that "filing dates" refers to the date of the recording of the mortgage at issue. In BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012), the Court stated that the language referred to "the date the document a party seeks to enforce was filed."[3] The Court discussed Matrix as follows:

[3] Part of the confusion arose from the use of the word *filing*, the word usually used to describe lodging documents in a lawsuit with the clerk of court, rather than *recording*, the term typically

> In Matrix we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. Id. at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. Id. To the extent some confusion apparently exists as to what filing date Matrix referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of Matrix. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

BAC v. Kinder, 398 S.C. at 624.

BAC v. Kinder has been the last word from this Court (and from the Court of Appeals) on the subject of the effect of the unauthorized practice of law in a mortgage closing. Id.

II. Why Hambrick is wrong.

While this line of cases about the effect of unauthorized law practice was developing, the Court of Appeals issued a 2006 opinion that this Court has not yet addressed (and which, as discussed below, is inconsistent with the Court of Appeals' later treatment of this subject). In Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), the Court of Appeals came to a conclusion very much at odds with the cases discussed above.

In Hambrick, Kristy and Scott Hambrick sued GMAC Mortgage Corporation, doing business as Ditech.com, where GMAC conducted the closing of a mortgage loan for the Hambricks and charged them for ostensible attorney's fees in connection with the closing, even though the closing was not conducted or supervised by an attorney. 634 S.E.2d at 6. "Each

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used to describe providing documents to a register of deeds or similar official for placement in the land records. Id.

allegation stemmed from the Hambricks' claim that Ditech charged them for legal fees that were not provided nor could be provided due to Ditech's failure to utilize an attorney." Id. GMAC moved to dismiss the complaint, and the circuit court granted the motion, concluding that it lacked jurisdiction to hear the claim because "the only claim that could be brought based on an allegation of the unauthorized practice of law is a request for declaratory relief brought in the original jurisdiction of the Supreme Court." Id. at 7. The Court of Appeals, relying on an interpretation of this Court's opinion in In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992), affirmed, ruling that the circuit court lacked subject matter jurisdiction to hear the Hambricks' claim because it involved the unauthorized practice of law. Id. at 6, 9. The Court of Appeals also found that this Court's opinion in Linder barred the Hambricks' claim on the ground that "Linder explicitly precludes a private right of action" for the unauthorized practice of law." Id. at 8 (citing Linder 348 S.C. at 496-97).

Respectfully, Mack-Marion must note that what the Court of Appeals did in Hambrick was to allow a tortfeasor to have immunity for its actions – actions that would be tortious regardless of whether unauthorized practice of law was involved – as long as the unauthorized practice of law formed some part of the facts giving rise to the cause of action. The Hambricks sued GMAC for making them "reimburse" GMAC for charges that GMAC had never incurred, for ostensible "attorney's fees" for a closing that no lawyer supervised. Id. at 6. The Hambricks sued GMAC for stealing some of their loan proceeds – not for unauthorizedly practicing law. Id. In Hambrick, the Court of Appeals essentially gave GMAC a pass *because* it engaged in the unlawful activity of the unauthorized practice of law. Id. at 8-9. Imagine how this would play out in a case against someone who, despite not being a lawyer, undertook to represent someone as an attorney and was then sued after his or her negligence in that regard

caused damages to the client. Hambrick seems to hand that unlicensed person a complete defense. Id.

Hambrick does not just produce unjust and absurd results. It is also inconsistent with this Court's decisions in this area and with the Court of Appeals' own decision in Wachovia v. Coffey, 698 S.E.2d at 247-48. This Court's decision in Matrix, has effectively overruled or abrogated Hambrick. Hambrick has at least been overruled to the extent that Hambrick held that if the factual background giving rise to a cause of action includes a party's having engaged in the unauthorized practice of law, the circuit court lacks any power to entertain the action.

A look at how this Court decided Matrix shows that the Court has rejected the Hambrick rationale, as the reasoning of the Matrix holding is fundamentally at odds with that of Hambrick. In Matrix, this Court held that the master-in-equity not only should have taken into account whether the activity of closing a mortgage loan without an attorney was the unauthorized practice of law but also should have used it as a basis to decide the case. 394 S.C. at 138-40. This Court's decisions bind the Court of Appeals as precedents, S.C. Const. Art. V, § 9, and Hambrick's reasoning that a circuit court cannot hear such matters has been abrogated and Hambrick overruled – but no reported decision yet states that.

The master erred here in deciding that he lacked jurisdiction to hear Mack-Marion's declaratory judgment claim because of Hambrick. (R. pp. ___; order granting in part judgment on the pleadings pp. 3-4; order denying motion to reconsider.) This Court has already determined that mortgage loan closings are required to be supervised by attorneys licensed to practice law in this state. Buyers Service, 292 S.C. at 430-34; accord Doe v. McMaster, 585 S.E.2d at 777-78 (noting that Buyers Service decided this question). The master was not being called upon to make the Supreme Court's determination, i.e., to determine whether X activity

constitutes the practice of law. *That* sort of determination is an appropriate question for a declaratory judgment action in this Court's original jurisdiction. See Unauthorized Practice of Law Rules, 309 S.C. at 307. Like the master-in-equity in Matrix, the master in this instant case is being called upon to determine what the effect is of activity that, under pre-existing, established law, we already know constitutes the unauthorized practice of law. Matrix, 394 S.C. at 138-40; Buyers Service, 292 S.C. at 430-34.

Not only is Hambrick inconsistent with this Court's decision in Matrix, it is also inconsistent with this Court's earlier precedent in Linder. 348 S.C. at 496. Contrary to Hambrick, 634 S.E.2d at 7-9, Linder expressly provided for the circuit court to remedy ICC's unauthorized practice of law by assessing how much of ICC's bill was for unauthorized law practice and refusing to allow ICC to be compensated for that unlawful conduct. Linder, 348 S.C. at 496.

Further, in Linder (unlike in Hambrick) this Court did *not* throw out the Linders' causes of action because unauthorized law practice was a part of the factual milieu from which they arose; rather, the Court held that "there is no private right of action *for* the unauthorized practice of law." Linder, 348 S.C. at 496 (emphasis added). In other words, a person cannot sue another person *simply* because the second person practiced law without a license. Id. That is a far cry from allowing a person to use the very unlawful nature of unauthorized law practice as a shield from liability, preventing a circuit court from ever reaching the merits of any claim in which there is some unauthorized law practice in the background. The latter, however, is exactly what Hambrick appears to permit. 634 S.E.2d at 7-9.

Hambrick is a deeply flawed decision. This Court should announce what it has already done without saying so – that Hambrick has been abrogated or overruled. See Matrix, 394

S.C. at 138-40. Alternatively, even if Hambrick has not been overruled or abrogated, it should be. As discussed above, the result in in Hambrick is baffling and most unfair. See 634 S.E.2d at 6, 9. The Hambrick decision essentially provided a party a defense to a claim *because of* that party's illegal conduct. Id. If Matrix has not overruled or abrogated Hambrick, then this Court needs to do so now. The Hambrick rationale is unjust and unfair, and its application rewards wrongdoers in circumstances where, but for the presence of the unauthorized practice of law in the fact pattern, they would be held accountable for their actions.

This court should reverse the master's ruling that he lacks subject matter jurisdiction to hear the declaratory judgment claim. (R. pp. ___; order granting in part judgment on the pleadings pp. 3-4; order denying motion to reconsider.)

III. Why it is important for courts to enforce consequences for unauthorized law practice.

The unauthorized practice of law is dangerous and harmful. In Wachovia v. Coffey, the Court of Appeals observed that "[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]" 698 S.E.2d at 248. The Court of Appeals noted that the purpose served by the requirement that lawyers supervise mortgage closings is "the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. (quoting Buyers Service, 292 S.C. at 431). This Court favorably cited Coffey's "inherently prejudicial" description in Matrix. 394 S.C. at 139. Prejudice inheres in the unauthorized practice of law. Id.

Among the chief reasons this Court requires an attorney licensed to practice law in this state to supervise a mortgage loan closing is so that the mortgage loan customer is in a position to receive accurate information from the lawyer, who represents the customer, about the terms

of credit transactions, and so that the lawyer may protect the customer from unfair practices by suppliers of mortgage credit. Doe v. McMaster, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing lawyer represents the mortgage loan customer[4], Doe v. McMaster, 355 S.C. at 315, and must supervise the closing because, among other things, "attorneys . . . have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of" this Court. Buyers Service, 292 S.C. at 434. Underpinning the attorney supervision requirement is the principle that "protection of the public is of paramount concern." Id. Among the principal things this Court has sought to protect the public from are 1) the negative consequences created when people enter into mortgage loan transactions without the opportunity to make a meaningful, informed choice about whether to sign on to the terms of that transaction and 2) unscrupulous, abusive acts by the mortgage lender or some other person involved in the transaction. Doe v. McMaster, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing attorney is there to ensure the choice to enter into the mortgage loan is meaningful, the bargaining process is fundamentally fair, and no one unlawfully takes advantage of the customer's ignorance of the law or the process. Doe v. McMaster, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). This is no less so in the context of an out-of-court transaction like a mortgage loan closing. See Doe v. McMaster, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. Representation of a customer in a mortgage loan closing by a loyal, unconflicted attorney of his own selection, there to ensure the customer has a

[4] Under certain circumstances, the closing attorney may also represent the lender. Doe, 355 S.C. at 315.

meaningful choice about whether to enter into the transaction and that the process is fair, is indeed critical to the prevention of misconduct that often has long-lasting and far-reaching consequences. See Hagood, 362 S.C. 191; Doe v. McMaster, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

This Court has been staunch in its adherence to the principle that "UPL rules exist to protect the public, not lawyers[,]" and "attorney involvement and supervision serve the goal of protecting the public." Boone, 420 S.C. at 470. It is only "[o]nce it is determined that sufficient attorney involvement is present and further that the interest of the public is protected [that] this Court should stay its hand and let the marketplace control." Id.

Without meaningful consequences for the unauthorized practice of law, the legal landscape looks a lot like Hambrick: with bad actors engaging in unauthorized practice unfettered by fear of repercussions. See 634 S.E.2d at 6, 9. Free from consequences in a civil action, the financial institutions that make and made the vast majority of mortgage loans would be – and, at present, largely are – free of any meaningful consequences for their misconduct at all. Consequences that do not affect a financial institution monetarily and in a significant way might as well not affect it at all.

IV. How the current Matrix time limit lets scofflaw mortgagees get away with decades of misconduct.

In deciding Matrix, this Court probably did not intend to let financial institutions that had for decades thumbed their noses at the attorney-closing requirement off the hook. See Matrix, 394 S.C. at 140. Indeed, language in the Matrix opinion indicates the opposite intention: "Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." Id. Despite the intention to hold mortgage lending institutions accountable for disregarding the clear mandate of Buyers Service, 292 S.C. at 430-

34, the prospective-only application of Matrix largely does the opposite. Matrix, 394 S.C. at 140.

Mortgage lenders have known since 1987 that closing mortgage loans without attorney supervision constitutes the unauthorized practice of law, because this Court told them that in no uncertain terms. Buyers Service, 292 S.C. at 430-34. Despite that, for the 24 years between the issuance of Buyers Service and the issuance of the Matrix opinion, lenders consistently behaved as though Buyers Service were a dead letter. See Matrix, 394 S.C. at 140. As the master noted at the hearing below, lenders routinely ignored Buyers Service in the years around when the mortgage at issue here was closed. (R. pp. ____; transcript p. 13 ln. 16-21, p. 14 ln. 19-25, p. 15 ln. 18-25.) Mortgage lenders do not routinely violate Buyers Service *now*; they did so, however, for decades *before* the Matrix opinion. (R. pp. ____; transcript p. 13 ln. 16-21, p. 15 ln. 18-25.) Making the consequences of violating Buyers Service fall only on those that do so after August 8, 2011, rewards the financial institutions that were crafty enough to scoff at this Court's mandate between the time the mandate was issued and August 8, 2011. Matrix, 394 S.C. at 140; Buyers Service, 292 S.C. at 430-34.

The prospective-only application of Matrix, therefore, fails to address the majority of the blatant, deliberate unauthorized law practice that occurred in mortgage closings since Buyers Service. See Matrix, 394 S.C. at 140. The consequences for 24 years of scoffing at this Court's mandates? Nothing. Id.

V. It is consistent with other existing law to end this artificial protection for institutions that treated this Court's command with contempt for many years.

The Matrix decision did not take previously lawful conduct and make it unlawful. Id. It was already established that closing a mortgage loan without attorney supervision is the unauthorized practice of law. Matrix, 394 S.C. at 140; Buyers Service, 292 S.C. at 430-34. It

did not create any new rights or a new cause of action. Matrix, 394 S.C. at 140. It did not dissolve any immunities. Id. It announced a limit on remedies. Id.

"The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). Holdings this Court has determined should apply only prospectively "effected more than remedial or procedural changes. They created liability where none had previously existed." Id. at 9. Mere months before the second Matrix opinion, this Court was deciding that a decision of course had retroactive application where it "created no new right or cause of action." Carolina Chloride, Inc. v. S.C. Dept. of Transp., 391 S.C. 429, 434, 706 S.E.2d 501, 503 (2011).

Matrix effected a remedial change, limiting the remedies of those who sought to foreclose or otherwise enforce mortgages. Matrix, 394 S.C. at 140. The attorney closing requirement had been longstanding law by 2011, and "[e]nforcing this requirement [came] as no surprise to any lender." Id. In Linder and Franklin, the Court had already held that those who practice law without authority to do so are not entitled to the benefit that flows from their unlawful activity. Franklin, 640 S.E.2d at 877; Linder, 348 S.C. at 496. It was already the "general rule, well established in South Carolina, . . . that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White, 360 S.C. 366.

Contrast mortgage lenders' longstanding, deliberate indifference to the law in this regard with a very different situation, one in which this Court made a well-reasoned choice to

make one of its decisions prospectively applicable only: the abolition of common law marriage in Stone v. Thompson, 428 S.C. 79, 833 S.E.2d 266 (2019). In Stone, this Court drew on reasoning from a sister state's court that a "new rule should not undermine relationships which were validly entered into at the time, and upending formerly-correct decisions of law served the interests of no one[,]" especially where "the old rule had been in effect for such a length of time that citizens undoubtedly relied upon it[.]" Id. at 87 (citing PNC Bank Corp. v. W.C.A.B. (Stamos), 831 A.2d 1269, 1283 (Pa. Commw. Ct. 2003)).

After 1987 but before Matrix, no mortgages closed through the unauthorized practice of law "were validly entered into at the time[.]" Id. They were all invalidly, unlawfully entered into at the time. Buyers Service, 292 S.C. at 430-34. Matrix did not "upend[] formerly-correct decisions of law[.]" Stone, 428 S.C. at 87. It, rather, "definitively state[d] that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law." Matrix, 394 S.C. at 140. That conclusion was simply consistent with the preexisting law in this area. Franklin, 640 S.E.2d at 877; White, 360 S.C. 366; Linder, 348 S.C. at 496. Matrix's decision that mortgages formed through the unauthorized practice of law are unenforceable should have "come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." Matrix, 394 S.C. at 140.

What Matrix did was announce what existing legal principles and cases already indicated was the law. See id. Any change it effected was to remedies, not to substantive rights, and, under the law of this state, there was no reason for its application to be prospective only. See Toth, 298 S.C. at 6, 9.

VI. The instant case illustrates the unfairness of the arbitrary August 8, 2011, distinction.

U.S. Bank is the assignee of the subject mortgage. (R. pp. ___; complaint.) Under South Carolina law, an assignee takes a mortgage "subject to all the infirmities in and against his assignor." Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463, 467 (1893); accord Woodrow v. Frederick, 133 S.C. 431, 439, 131 S.E. 598, 601 (1926) (same principle described as "settled by an unbroken series of authorities"). The Court of Appeals summarized the law of assignee liability well in Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), noting in pertinent part as follows:

> At common law, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor. Id.

288 S.C. at 522-23.

The lender that closed this loan in 2001 without attorney supervision had been given ample, clear notice by this Court that its conduct was unlawful. Buyers Service, 292 S.C. at 430-34. Why should a pass be given for conduct, established at the time to be unlawful, because the conduct occurred in March of 2001 instead of on or after August 8, 2011? The conduct was the same. The law that prohibited it was the same. Id. The wrong it worked on Mack-Marion was just as harmful.

Also, as discussed above, the time before the Matrix decision was when the bulk of this sort of misconduct was done. (R. pp. ____; transcript p. 13 ln. 16-21, p. 15 ln. 18-25.) After articulating a strong remedy for it in Matrix, the Court in the next sentence nearly neutered that remedy. Matrix, 394 S.C. at 140. The prospective-only limitation keeps this remedy from

most of those who need it. (R. pp. ____; transcript p. 13 ln. 16-21, p. 15 ln. 18-25.) That is arbitrary and wrong.

VII. This Court should modify the Matrix decision to make it more consistent with this Court's other decisions and to make it more just.

This Court should modify Matrix to remove the artificial limitation of its applicability to only mortgages recorded after August 8 of 2011. Matrix, 394 S.C. at 140. This limitation hobbles the remedy this Court stated Matrix was decided to enshrine, leaving untouched the bulk of the misconduct at which it was directed. Id.

The most fair thing to do would be to modify Matrix to eliminate its artificial time limitation, extending it back to the date of the Buyers Service decision. If this Court, however, is not inclined to do that, this Court should not do nothing. What would also be consistent with case law in this area would be a holding that mortgagees under pre-Matrix mortgage loans closed through unauthorized law practice cannot recover their profits, i.e., that they are not entitled to recover interest on the mortgage loan. Franklin, 640 S.E.2d at 877; Linder, 348 S.C. at 496. This would mean that the payments made on the unlawfully closed loan would (except to for escrow items like taxes and insurance) be applied in their entirety to principal – in some cases resulting in trial court orders that the previously made payments have already paid off the mortgage debt. If there is a middle ground here, it is this.

CONCLUSION

To allow lenders to "ignore established laws of this state and yet expect this Court to overlook their unlawful disregard" is just as unjust as the Matrix opinion indicates it is. Matrix, 394 S.C. at 140. Yet that is precisely what, on the ground, the prospective-only application of Matrix's holding does. The court should modify Matrix, state that Hambrick is not good law,

and reverse the master's grant of judgment on the pleadings accordingly, remanding this case for a trial on the merits.

Respectfully submitted,

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