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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Master-in-Equity

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

Case No. 2020-CP-38-00086
Appellate Case No. 2022-001147

US 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 n/k/a Frances L. Mack-Marion, ...Appellant.

AMICUS CURIAE BRIEF OF THE AMERICAN LEGAL & FINANCIAL NETWORK

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INTRODUCTION

American Legal & Financial Network ("ALFN") is a national network of legal and residential mortgage banking professionals that provides training and educational resources for the residential mortgage banking community. Founded in 2001, ALFN's members are attorneys, residential mortgage bankers and investors, title companies, technology companies, and various other entities engaged in consulting, investment research, risk evaluation, asset protection, and technology related to the mortgage industry. ALFN provides a forum for mortgage industry professionals to address issues specific to their industry and their business, including actively litigated appellate issues. ALFN has an interest in the matter because South Carolina mortgage foreclosure practice is a core business of many of their members and members' clients. These entities, consisting of national, regional, and statewide banks, mortgage lenders, and mortgage servicers, rely on the long-established precedent of South Carolina's appellate courts to inform and direct their proper conduct of foreclosure actions in the state.

ARGUMENT

I. As a matter of public policy, the prospective application of *Matrix* should remain.

"[T]he 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*." Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) (*citing State v. Buyers Serv. Co*., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)). Using this framework, *Matrix* created a rule declaring invalid any mortgage that was processed by a lender without the supervision of a South Carolina-licensed attorney. *Id*. "We apply this ruling to all filing dates after the issuance of this opinion". *Id* at 140. Recognizing the importance of prospective effect, Justice Kittredge in his

concurring opinion stated: "Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its prospective-only application." (underline emphasis added). *Id* at 140. The Court later affirmed and clarified the prospective application of *Matrix*. "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." *BAC Home Loan Servicing, LP v. Kinder*, 398 S.C. 619, 624 731 S.E.2d 547, 550 (2012).

As correctly stated by Respondent, *Matrix's* prospective application has been consistently applied since 2011 in both state and federal courts. *See JP Morgan Chase Bank, Nat'l Ass'n v. Acheson*, No. 2016-000028, 2018 WL 776629, at *1 (Ct. App. Feb. 7, 2018). This bright line application is widely understood and recognized by AFLN's membership and comprehensible to the public at large, and therefore should remain to the extent *Matrix* remains good law. Appellant's position that *Matrix* should be expanded to have a retroactive effect would upend certainty in the law that the mortgage industry relies upon. "*Stare decisis* exists to insure a quality of justice which results from certainty and stability." *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996). "[A] due regard for the rule of stare decisis is a matter of commercial importance upon which individuals and the public may have relied in making contracts and in acquiring property rights …." *Poulnot v. Cantwell*, 129 S.C. 171, 123 S.E. 651, 656 (1924). Appellant's effort to undo *Matrix*'s prospective effect invites disruption in the mortgage industry within South Carolina.

Appellant argues that *Matrix* merely created a new remedy to vindicate the violation of an existing rule and thus, retroactive application is appropriate. Appellant ignores that *Buyers Services, supra,* and its successor cases were centered around what conduct constituted the

unauthorized practice of law in the context of a real estate transaction and not the validity of any resulting transaction. *Matrix* created new liability where none previously existed by specifically invalidating a mortgage that was processed without the supervision of a South Carolina-licensed attorney. "Prospective application is required when liability is created where formerly none existed". *Hupman v. Erskine Colleg*e, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984). To switch course now, after thirteen years of reliance by the mortgage industry upon *Matrix*'s prospective application, would be unfair and inappropriate. *See Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 87, 508 S.E.2d 565, 574 (1998) (recognizing fairness as a consideration in deciding whether new rule will apply retroactively or prospectively). Therefore, *Matrix* must be limited to prospective application in accordance with existing jurisprudence and this Court's explicit direction in both *Matrix* and *Kinder*.

II. Alternatively, to the extent this Court may wish to revisit *Matrix*, the *Matrix* decision is problematic and should be reconsidered.

Matrix sets apart mortgage loans as the only legal transaction subject to a civil remedy or affirmative defense based on the unauthorized practice of law.

In *Matrix*, Justice Pleicones' dissenting opinion raised public policy concerns, stating that:

> I cannot square the policy underlying this purpose with the Court's proclamation that refusing equitable relief to "bad" lenders will somehow protect the public at loan closings. I see only detriment to the borrowing public and a windfall to junior lienholders in this decision which would deny all equitable relief to any 'lender who fail[s] to have attorney supervision during the loan process as required by our law…[in] all filing dates after the issuance of this opinion.' I suspect that many mortgagees, denied hope of equitable relief, including the ability to foreclose if an attorney should fail to supervise any of the acts required of him in a loan closing, will choose not to do business in South Carolina, or choose to increase fees to cover potential unrecoverable liabilities.

394 S.C. at 143. As the above dissent aptly predicts, the decision in *Matrix* is a detriment to the public. *Matrix's* creation of a civil remedy or affirmative defense for the unauthorized practice of

law, applied logically, results in a windfall to certain borrowers and ultimately punishes the overall pool of consumers, the very borrowers *Matrix* set out to protect. The increase in fees to cover the potential of unrecoverable liabilities is a real and tangible burden mortgage creditors are forced to bear; and thereby, as a cost of doing business, are passed on to the borrowers, thus driving up the cost of mortgage loans in South Carolina.

a. South Carolina Code Sections 40-5-310 and 40-5-320 provide the sole statutory remedies for a violation of the unauthorized practice of law

"All considerations involving wisdom, policy, or expediency of an Act are addressed exclusively to the Legislature, and **the sole question for a Court is the power to enact the law."** (bold emphasis added). *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539, 545 (1938). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When the statute's language is clear and unambiguous, the rules of statutory interpretation are unnecessary, as a court has no choice but to apply the statute as written. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). This is because the language used in the statute is generally considered to be the best evidence of the legislature's intent. *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008). As a result, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). **Subject to the statutory law,** the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted. (bold emphasis added). S.C. Const. Art. V, § 4.

South Carolina Code Section 40-5-310 explicitly addresses the sole remedy for violation of the unauthorized practice of law by a person, stating:

> No person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina. The type of conduct that is the subject of any charge filed pursuant to this section must have been defined as the unauthorized practice of law by the Supreme Court of South Carolina prior to any charge being filed. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

Furthermore, South Carolina Code Section 40-5-320(A)(3), titled "Practice of law by corporations and voluntary associations unlawful," provides the sole remedy for non-individuals engaged in the unauthorized practice of law:

> It is unlawful for a corporation or voluntary association to hold itself out to the public as being entitled to practice law, render or furnish legal services, advise or to furnish attorneys or counsel, or render legal services in actions or proceedings . . . or to furnish legal advice, services, or counsel … [a violation of the provisions] is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

It is well-established there is no civil remedy or affirmative defense based on the unauthorized practice of law in South Carolina, outside the scope defined in *Matrix*. Additionally, no private right of action for the unauthorized practice of law exists by state statute. *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006). *See also*, *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002).

Appellant's brief lists numerous South Carolina cases involving the unauthorized practice of law: *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); *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006); *In re Hall*, 370 S.C. 496, 636 S.E.2d 621 (2006); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *In re Lester*, 353 S.C. 246, 578 S.E.2d 7 (2003); *State v. Buyers Service Co.*

Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). As discussed previously, all these cases determine what actions constitute the unauthorized practice of law in the context of a real estate transaction. This is proper under the South Carolina Constitution, which assigns to the Supreme Court of South Carolina the duty to regulate the practice of law. As defined, the regulation is the act of establishing policy and procedures. However, the South Carolina Constitution, while granting the Supreme Court the power to govern the practices and procedures in all courts, clearly states that the South Carolina Supreme Court is subject to statutory law as set forth by the General Assembly.

Matrix goes beyond solely regulating the practice of law for public protection and instead usurps the power vested in the General Assembly by providing a civil remedy not granted in the South Carolina Code. Legislative intent, clearly visible and unambiguous in the pertinent South Carolina statutes, does not offer an affirmative defense or other civil remedy for the unauthorized practice of law. The above applicable code sections intentionally address and define the unauthorized practice of law, going as far as focusing its applicability on both individuals and corporations and voluntary associations, showing clear and unambiguous legislative intent.

As a matter of public policy, this Court should acknowledge the previously well-settled law acknowledged by *Linder* and *Hambrick*, *supra*. Any amendments to the remedies for the violation of the unauthorized practice of law should be left to the General Assembly to address accordingly.

The reconsideration of the decision in *Matrix* would not mark the first time in recent history this Court addressed a previously settled area of law and deemed it proper to leave policy concerns to the General Assembly. In *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173 (2018), the Court reversed *Linda Mc Co v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010) and addressed why the

subject statute's legislative history compelled the conclusion that the ten-year effective period for a civil judgment could not be renewed through an "active energy" theory.

Briefly, the pertinent facts in *Linda Mc* are as follows: A monetary judgment was entered and filed with the court. *Linda Mc,* 390 S.C. at 548, 703 S.E.2d at 501. While the judgment debtor paid a portion of the judgment after execution, the judgment creditor filed a petition for supplemental proceedings nine years after the effective date of the judgment, arguing the debtor had assets subject to execution. *Id*. at 549, 703 S.E.2d at 502. In South Carolina at the time (and currently), by statutory law, the bright-line rule was to totally bar collection on a judgment ten years following its execution. The trial court granted the petition and referred the matter to a special referee, who held two hearings before the ten-year time-period expired. *Id*. at 549-50, 703 S.E.2d at 502. The special referee issued a report in favor of the judgment creditor, and the circuit court issued an order of execution, both on June 3, 2005, **one day after the statutory time-period terminated**. *Id*. at 550, 703 S.E.2d at 502. (bold emphasis added). The Court held the judgment continued to have "active energy," although the ten-year statutory window for the collection of the judgment had expired. *Id.*

As stated above, the decision in *Linda Mc* was later reconsidered and overturned by *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173 (2018). The Court in *Gordon* stated that it refused to adopt an exception to the statutory bright-line rule that a judgment expires after ten years from its enrollment. *Id*. The Court further stated it must, "remain faithful to the text of the act." The Court expanded on this explanation, following established case law and statutory effect, by stating: "A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time

fixed by the statute, if such time expires before the action is tried." *Garrison v. Owens*, 258 S.C. 442, 189 S.E.2d 31 (1972) at 446-47.

The Court wrote: "While the *Linda Mc* Court declared in a footnote that the more equitable approach is to provide an exception to the bright-line rule in similar cases – we believe the proper approach is to leave the policy concerns regarding this provision to the General Assembly. Therefore, we overrule *Linda Mc*." 425 S.C. at 392. This correctly follows what the South Carolina Constitution requires as the proper framework of allowing public policy concerns to be addressed by the General Assembly, and as such, the same analysis and application should be made in reconsidering *Matrix*.

b. Innocent assignees and successors-in-interest should not be subject to a violation of the unauthorized practice of law made by the originating lender or originating party

Matrix punishes innocent assignees of mortgages, which is not the aim of the unauthorized practice of law or unclean hands rules. The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010).

According to the Federal Reserve Bank of New York, approximately 65% of total United States home mortgage debt was securitized into mortgage-backed securities.[1] A robust market for the buying and selling of mortgage loans dictates that most mortgage loans are transferred away from the originating lender. In fact, Respondent in this case is a trustee on behalf of a securitized trust. Respondent was not involved in the origination of the subject mortgage loan and as such, could not have participated in the unauthorized practice of law at the loan's closing. It is unfair from a public policy perspective to punish any individual or entity other than those that engaged in the unauthorized practice of law for such offense. Contrary to Appellant's assertion, the remedy for the unauthorized practice of law should be directed at the perpetrator of the unauthorized practice of law as seen in *Buyers Services*, *supra*, where the actual perpetrator was enjoined from continuing to engage in the unauthorized practice of law. *See Matrix* (holding "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." (bold emphasis added)).

CONCLUSION

ALFN respectfully asks the Court to either uphold the prospective application of the rule set forth in *Matrix* or in the event the Court revisits its ruling in *Matrix*, ALFN respectfully asks the Court to reconsider its ruling in *Matix* as outlined above.

[SIGNATURE PAGE TO FOLLOW]

[1] *See* sr1001.pdf (newyorkfed.org)

Respectfully submitted,

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