

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Circuit Court Judge

Case No. 2013-CP-26-02135

Appellate Case No. 2015-001233

Mitchell D. Snider Appellant,

v.

CitiMortgage, Inc. and
Kim Sprinkle Snider, Defendants

Of Whom CitiMortgage, Inc. is Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. CAN A BILATERAL CONTRACT BE MODIFIED UNILATERALLY?
2. DID THE TRIAL COURT ERR IN FAILING TO CONSIDER CITIMORTGAGE'S DUTY TO USE GOOD BUSINESS JUDGMENT IN EXECUTING A LOAN MODIFICATION WITHOUT A CO-BORROWER'S SIGNATURE, AN ISSUE OF FACT, PRIOR TO GRANTING SUMMARY JUDGMENT?
3. IS A LOAN MODIFICATION A "CONSUMER CREDIT TRANSACTION" AND/OR A "CONSUMER LOAN" UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE?
4. IS THE CONSUMER MORTGAGE INDUSTRY EXEMPT FROM THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT?
5. DID THE TRIAL COURT ERR IN DETERMINING THAT APPELLANT WAS JUDICIALLY ESTOPPED FROM SEEKING RESCISSION OF THE LOAN MODIFICATION AGREEMENT?
6. SHOULD A LOAN MODIFICATION AGREEMENT THAT MATERIALLY CHANGES THE TERMS OF A LOAN TO THE DETRIMENT OF ONE BORROWER REQUIRE THE SUPERVISION OF A SOUTH CAROLINA ATTORNEY?

STATEMENT OF THE CASE

Mitchell D. Snider (“Appellant”) brings this action against CitiMortgage, Inc. (“CitiMortgage”) for legal and/or equitable relief following the unilateral modification of a promissory note (“Note”) without his authorization or consent. Appellant and Kim Sprinkle Snider, his ex-wife, are joint obligors on a Note that was executed during their marriage, which is secured by a first mortgage upon their former marital residence located in Horry County, South Carolina. (Verified Complaint, p. 2, para. 6). Respondent, CitiMortgage, is a loan servicer that currently holds the Note and mortgage executed by Appellant and Kim Sprinkle Snider. (Def. Mem. In Support of MSJ, p. 3). On July 1, 2011, Kim Sprinkle Snider and CitiMortgage executed a Loan Modification Agreement (“the Modification”), which modified the Note, without Mr. Snider’s signature, knowledge, or consent. (Verified Complaint, p. 2, paras. 7-10), (Loan Modification Agreement). The Modification increased the principal balance of the Note from \$183,898.55 to \$188,530.68, extended the term of the Note from an end date of May 1, 2025 to July 1, 2051, and increased the amount of interest to be paid over the lifetime of the Note from \$101,644.26 to \$267,872.42. (Note, p. 1), (Loan Modification Agreement, p. 1), (Affidavit of Mitchell Snider, p. 4, para. 22), (CitiMortgage 30(b)(6) Deposition, pp. 70-71), (Snider Deposition pp. 27-28), (Summary Judgment Hearing Transcript, pp. 27-28, 30-32). Additionally, the amount of money from each monthly mortgage payment applied to the principal balance of the Note decreased from \$701.00 per month to only \$108.00 per month after the Modification. (Snider Deposition, pp. 27), (Summary Judgment Hearing Transcript, p. 31).

On April 5, 2013, Appellant commenced this action against CitiMortgage and Kim Sprinkle Snider¹, claiming that CitiMortgage had no right to change the terms of the Note without his consent and seeking rescission of the Modification, amongst other remedies. (Verified Complaint pp. 1-8). Specifically, in his Verified Complaint, Appellant asserted causes of action for Declaratory Judgment/Novation, Estoppel, Rescission, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Interference with a Contractual Relationship, and violations of both the South Carolina Consumer Protection Code and the South Carolina Unfair Trade Practices Act. (Verified Complaint, pp. 1-8). In sum, Appellant's Verified Complaint alleges that the Modification of the Note without Appellant's consent was done in direct contravention of South Carolina law and requests relief in the form of a declaratory judgment either releasing Appellant from his obligations on the Note and Modification or, alternatively, rescission of the Modification and/or damages. (Verified Complaint, pp. 1-8).

On June 10, 2013, CitiMortgage Answered the Verified Complaint, denying all material allegations. (Answer to Complaint, pp. 1-10). Kim Sprinkle Snider has never answered the Complaint nor made an appearance in this case. On August 14, 2014, CitiMortgage filed a Motion for Summary Judgment. (Defendant CitiMortgage's Motion for Summary Judgment). On November 19, 2014, the trial court held a hearing on CitiMortgage's Motion for Summary Judgment and took the Motion under advisement. (Summary Judgment Hearing Transcript, p. 1). On January 23, 2015, the trial court entered

¹ Appellant asserted a single cause of action for Interference with a Contractual Relationship against Kim Sprinkle Snider in his Verified Complaint. Kim Sprinkle Snider is in default.

a Form 4 Order granting CitiMortgage's Motion for Summary Judgment and ending the case (Form 4 Order), which was followed by the trial court's entry of a more detailed Order granting CitiMortgage's Motion for Summary Judgment on February 24, 2015. (Order Granting Motion for Summary Judgment). On March 9, 2015, Appellant filed a Motion for Reconsideration (Motion for Reconsideration), which the trial Court subsequently denied by Order dated June 14, 2015. (Order Denying Motion for Reconsideration). This Appeal followed.

FACTS

In 2000, Appellant and Kim Sprinkle Snider built a residence ("marital residence") located in Myrtle Beach, South Carolina. (Affidavit of Mitchell Snider, p. 1, para. 2). Appellant and Kim Sprinkle Snider financed the construction of the marital residence with a mortgage loan wherein they were named as joint obligors. (Affidavit of Mitchell Snider, p. 1., para. 2). On April 26, 2005, Appellant and Kim Sprinkle Snider refinanced their mortgage loan by the execution of a Note, wherein they were again named as joint obligors. (Verified Complaint, p. 2, para. 6). The Note was for a principal balance of \$225,000.00 plus 5.5% annual interest, to be paid by monthly payments of \$1,547.75 from June 1, 2005 until May 1, 2025. (Note, p. 1).

On March 10, 2009, Appellant and Kim Sprinkle Snider divorced. (Final Decree of Divorce, p. 1-5). Pursuant to the terms of the Final Decree of Divorce, which incorporates a written settlement agreement ("Settlement Agreement"), Appellant deeded his one-half interest in the marital residence to Kim Sprinkle Snider. (Settlement Agreement, p. 5), (Affidavit of Mitchell Snider, p. 2, para. 6), (Summary Judgment Hearing Transcript, pp. 7,

26). However, because Kim Sprinkle Snider was financially unable to refinance the home, both the Appellant and Kim Sprinkle Snider remained jointly obligated on the Note and mortgage. (Settlement Agreement, p. 6), (Affidavit of Mitchell Snider, p. 2, para. 7), (Summary Judgment Hearing Transcript, pp. 7-8). Appellant was ordered to make monthly alimony payments for a period of seventy-two months in the amount of \$1,547.75, which was equivalent to the monthly mortgage payments due to CitiMortgage. (Settlement Agreement, p. 3), (Affidavit of Mitchell Snider, p. 2., para. 8), (Verified Petition For Rule To Show Cause, p. 2, para. 3). The Settlement Agreement gives Appellant the right to directly contact the mortgage company to verify payments are being made timely and further provides that Kim Sprinkle Snider shall indemnify and hold Appellant harmless against any liability due to any default on the mortgage and Note. (Settlement Agreement, p. 6). The Settlement Agreement was structured in this manner for the purpose of enabling Kim Sprinkle Snider to improve her financial situation enough to ultimately refinance the Note into her sole obligation. (Affidavit of Mitchell Snider, p. 2. para. 8-9).

In January 2011, despite timely paying his alimony obligations, CitiMortgage notified Appellant that Kim Sprinkle Snider had not made mortgage payments in December 2010 or January 2011 and that the account was delinquent. (Affidavit of Mitchell Snider, p. 2., paras. 10-13), (Verified Petition For Rule to Show Cause, p. 2, para. 5), (Order Pursuant to Defendant's Order and Rule to Show Cause, p. 2, para. 3). In April 2011, Kim Sprinkle Snider contacted Appellant and stated that she was considering applying for a loan modification with CitiMortgage, which, if executed, would release Appellant from any further obligation or liability on the Note and mortgage. (Affidavit of Mitchell Snider, pp.

2-3, para. 14). On April 11, 2011, Appellant contacted CitiMortgage to ascertain whether Kim Sprinkle Snider had applied for the Modification and to object to a Modification being executed without his consent. (Affidavit of Mitchell Snider, p. 3, para. 15). During Appellant's April 11, 2011 telephone conversation with CitiMortgage, he was informed that Kim Sprinkle Snider had applied for the Modification, her application was being processed, CitiMortgage could proceed with the Modification without his consent, and that even if the loan was modified, Appellant would remain obligated on the Note because it was not a refinance, nor an assumption. (Affidavit of Mitchell Snider, p. 3., para. 15).

On July 1, 2011, Kim Sprinkle Snider and CitiMortgage executed the Modification without Appellant's signature or consent. (Verified Complaint, p. 2, para. 7-9), (Summary Judgment Hearing Transcript, p. 27). The Modification was enforced despite its own terms requiring Appellant's signature:

“Borrower(s) understand that the Lender’s consent to this Agreement is conditioned upon all Borrower(s) properly signing and returning this Agreement without any alterations or deletions and making all monthly payments when due.” (Loan Modification Agreement p. 5, para. 10) (emphasis added).

Appellant received no notification, correspondence, telephone call, or other communication regarding the execution of the Modification, (Affidavit of Mitchell Snider, p. 3, para. 17), (Summary Judgment Hearing Transcript, p. 27), and did not learn that the Modification had been executed until he accessed the CitiMortgage account online, later in July 2011. (Affidavit of Mitchell Snider, p. 3, para. 18).

On September 12, 2011, in an effort to address Kim Sprinkle Snider's default on the Note, Appellant filed a Verified Petition for a Rule to Show Cause in the Horry County Family Court. (Verified Petition for Rule to Show Cause, pp. 1-4). The Verified Petition requests that the Family Court direct the former marital residence to be sold and the mortgage satisfied or, in the alternative, that Appellant be allowed to make the mortgage payments directly to CitiMortgage rather than as alimony to Kim Sprinkle Snider. (Verified Petition for Rule to Show Cause, p. 3). In his Affidavit In Support of the Verified Petition for Rule to Show Cause, Appellant conditioned his request to make his alimony payments directly to CitiMortgage upon the possibility of a scenario in which the loan modification *did not* result in the removal of his obligation on the Note.² (Affidavit of Mitchell Snider in Support of Verified Pet. for Rule to Show Cause, p. 2, para. 7), (Summary Judgment Hearing Transcript, pp. 37-39).

On July 26, 2012, a hearing was held in the Family Court on Appellant's Verified Petition for Rule to Show Cause, at which time the Family Court did not address the validity of the Modification. (Order Pursuant to Defendant's Order and Rule to Show Cause, p. 1). Instead, the Family Court Ordered Appellant to make the monthly mortgage payments directly to CitiMortgage and to offset his alimony to Kim Sprinkle Snider accordingly. (Order Pursuant to Defendant's Order and Rule to Show Cause, pp. 2-3, paras. 6-7).

² "In the event [Kim Sprinkle Snider's] loan modification is concluded, but does not result in my name being removed from the mortgage loan, I would request, in the very least, that I be allowed to make all future mortgage payments directly to CitiMortgage...[.]" (Affidavit of Mitchell Snider in Support of Verified Pet. for Rule to Show Cause, p. 2, para 7).

Appellant has made the remainder of his alimony payments in the manner Ordered by the Family Court. (Affidavit of Mitchell Snider, p. 4, para. 21).

Appellant did not receive any formal notice from CitiMortgage that the unauthorized Modification had been executed until October 23, 2012. (Verified Complaint, p. 2, para. 10). On November 13, 2012, Appellant served CitiMortgage with a letter notice of the unauthorized Modification and requesting that the Modification be deemed a novation, releasing him from his obligation on the Note, since CitiMortgage and Kimberly Sprinkle Snider had elected to enforce the Modifications terms without him. (Verified Complaint, p. 2, para. 11). Since the execution of the Modification without Appellant's consent, Kim Sprinkle Snider and CitiMortgage have elected to perform the terms and conditions of the Note pursuant to the Modification. (Verified Complaint, p. 3, para. 12). The Modification has altered Appellant's credit standing and debt to income ratio by extending the maturity date of the Note by twenty-six years and increasing both the principal balance of the Note and the amount of interest to paid over the life of the Note. (Loan Modification Agreement, p. 2), (Affidavit of Mitchell Snider, p. 4, para. 22) (CitiMortgage 30(b)(6) Deposition, pp. 70-71) (Summary Judgment Hearing Transcript, p. 27-28, 30-32). Appellant's last alimony payment was due in February of 2015. (Summary Judgment Hearing Transcript, p. 22), (Snider Deposition, p. 29).

STANDARD OF REVIEW

“When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRC: summary judgment is proper when there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law.” Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561 (2006). In cases where there is no heightened burden of proof, “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). When a party appeals an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Hurst, 371 S.C. at 36, 637 S.E.2d at 561-62.

ARGUMENT

I. THE TRIAL ERRED IN DETERMINING THAT A BILATERAL CONTRACT MAY BE MODIFIED UNILATERALLY.

The trial court erred in determining that CitiMortgage could change the terms of the Note without Appellant’s consent and over his express objection. First, this holding is in direct contravention of fundamental South Carolina contract law which requires a “meeting of the minds” between all parties to a contract in order to validly modify a contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893-94 (1989). Second, by allowing CitiMortgage to unilaterally execute the Modification pursuant to a Fannie Mae policy, the trial court incorrectly held that a corporate policy preempts state contract law. Finally, CitiMortgage’s own Loan Modification Agreement contains a provision requiring the signatures of all parties to the Note in order to enforce the Modification. (Loan Modification Agreement, p. 5, para. 10). By incorrectly determining that this provision is a condition

precedent, the trial court allowed CitiMortgage to essentially waive acceptance, which is an essential element of contract formation and/or modification under South Carolina law.

A. Fundamental State Contract Law Requires A “Meeting Of The Minds” In Order To Execute A Valid Contract Modification.

CitiMortgage’s execution of the Modification without the consent of Appellant violates fundamental South Carolina contract law. In South Carolina, any modification of a written contract must satisfy all requisites of a valid contract. Chandler, 299 S.C. at 104. A key requisite in forming a valid and enforceable contract is that there be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Id. at 105. This “meeting of the minds” cannot be based upon secret purpose or intention of one of the parties. Id. It must be based upon “purpose and intention which has been made known or which, from all the circumstances, should be known.” Id. “One party to a contract may not unilaterally alter its terms [and a] modification of a contract requires the mutual assent of both, or all, parties to the contract.” 17A Am. Jur. 2d *Contracts* § 507 (2015). Therefore, pursuant to South Carolina law, because a contract cannot be validly created without a meeting of the minds, likewise, a contract cannot be modified without a meeting of the minds. See Chandler, 299 S.C. at 104-05.

It is clear from the record that there was no “meeting of the minds” before the Modification of the Note was executed. Both Kim Sprinkle Snider and Appellant are legally obligated as co-borrowers on the Note, (Verified Complaint, p. 2, para. 6), (Note), meaning that under South Carolina law, in order to execute a valid modification the Note, CitiMortgage, Kim Sprinkle Snider, and Appellant must all consent to the Modification.

Instead, CitiMortgage executed the Modification with only Kim Sprinkle Snider's signature, over Appellant's express objection and without his signature or consent. (Loan Modification Agreement, p. 6), (Affidavit of Mitchell Snider, pp. 3, paras. 15, 17-18), (Verified Complaint, p. 2, para. 7-8), (Summary Judgment Hearing Transcript, p. 27). Pursuant to these facts, the Modification is void under an analysis of fundamental state contract law and the trial court erred in not applying state contract law to this issue.

B. A Fannie Mae Corporate Policy Does Not Preempt Fundamental State Contract Law.

The trial court erred by holding that a Federal National Mortgage Association ("Fannie Mae") guideline preempts the application of fundamental South Carolina contract law to note modifications. In doing so, the trial court has not only allowed CitiMortgage to execute and enforce a Modification of the Note without Appellant's consent, an act which would otherwise be void and unenforceable under the laws of this State, but also effectively held that a corporation's policies and procedures trump South Carolina contract law that has been in existence since before our country's founding. See Essay Upon the Law of Contracts and Agreements (1790) ("We have already suggested, that it is of the essence of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated; for, otherwise, no obligation can be contracted or concomitant right created."); See also Restatement (First) of Contracts § 127 (1932) ("The principles of §§ 85-93 are applicable to several and to joint and to joint and several contracts, so far as concerns the power of a promisor to create a new contract binding himself, or to vary his own previous

duty, but *one promisor has no power to affect other promisors unless they have actually or apparently authorized him to do so.*" (emphasis added).

In its Memorandum In Support of the Motion for Summary Judgment, CitiMortgage argued that the 2011 Fannie Mae servicing guidelines, inclusive of a signature exception³, preempt state contract law, allowing CitiMortgage to modify loans without the signatures and/or consent of all co-borrowers. (Def. Mem. In Support of MSJ, pp. 11-14). Appellant opposed this assertion by arguing that a Fannie Mae corporate guideline neither expressly nor impliedly preempts South Carolina contract law. (Def. Mem. In Support of MSJ, pp. 2-5), (Summary Judgment Hearing Transcript, pp. 28-32, 39-42). The trial court neglected to rule on Appellant's preemption argument in its February 24, 2015 Order Granting Motion for Summary Judgment, therefore, Appellant requested that it do so in Appellant's Motion for Reconsideration. In its Order Denying Motion for Reconsideration, the trial court ruled that the signature exception is considered 'standard industry practice' for purposes of federal law" as part of Congress's enactment of loan servicing standards under the Home Affordable Modification Program ("HAMP") and the Troubled Asset Relief Program, both of which fall under the Emergency Economic Stabilization Act ("the EES Act"). (Order Denying Motion for Reconsideration, p. 3). The trial court Ordered that because the servicing contract between CitiMortgage and third party owner, Fannie Mae, incorporated the loan servicing

³ "In cases where a borrower and co-borrower are unmarried and either borrower or coborrower relinquish all rights to the property securing the mortgage loan through a recorded quitclaim deed, the non-occupying borrower that has relinquished property rights is not required to...sign the HAMP documents but remains liable for the outstanding mortgage debt." Fannie Mae Single Family 2011 Servicing Guide, Pt. VII, Ch. 6, § 609.04.06, *available at* <https://www.efanniemae.com/sf/guides/ssg/svcg/svc061011.pdf>.

guidelines, the signature exception “constitutes ‘standard industry practice for purposes of all Federal and State laws.’” (Order Denying Motion for Reconsideration, p. 4). Appellant maintains that the trial court erred in making this determination because there is nothing within the federal EES Act that expressly or impliedly preempts state contract law.

1. Federal Law Does Not Expressly Preempt South Carolina Contract Law.

There are two types of preemption: express preemption and implied preemption. Jamison v. Ford Motor Co., 373 S.C. 248, 262, 644 S.E.2d 755, 762 (S.C. Ct. App. 2007). If preemption is express, it will be explicitly stated. Id. If preemption is implied it can take two forms, implied conflict preemption or implied field preemption. Implied conflict preemption is found where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. Id. Implied field preemption occurs when federal law so occupies a field that state courts are prevented from asserting jurisdiction. Id. In applying a preemption analysis, South Carolina courts “start with the assumption that the historic police powers of the States are not to be superceded by a Federal Act unless that was the clear and manifest purpose of Congress.” Id. Therefore, Congress’s intent is the ultimate touchstone in every preemption case. Id.

The loan modification guidelines created by the Treasury Department pursuant to the EES Act do not expressly preempt state contract law because there is nothing within the EES Act stating that it preempts state law. In 2008, Congress enacted the EES Act for the purpose of protecting home values, preserving home ownership, and “to immediately provide

authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.” 12 U.S.C. §5201 (2008). Section 5219 of the EES Act, referred to as the Troubled Assets Relief Program, provides, “[T]he Secretary [of Treasury] shall implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages to take advantages of programs to minimize foreclosures.” 12 U.S.C. §5219 (2009). Pursuant to this directive, on March 4, 2009, the Treasury Department issued the HAMP Guidelines as uniform guidance for loan modifications across the mortgage industry. United States Department of Treasury, *Home Affordable Modification Program Guidelines*, (March 4, 2009) available at http://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf. There is nothing within the EES Act, its stated purpose, nor the guidelines issued by the Treasury Department under the EES Act’s directive that expressly states that the Act preempts state law in any form or fashion. Therefore, the loan modification guidelines created by the Treasury Department under the EES Act do not take precedence over state law under a theory of express preemption.

2. Federal Law Does Not Impliedly Preempt South Carolina Contract Law.

There is no implied conflict preemption in this case. Upholding fundamental state contract law, which requires the consent of all parties to modify a contract, does not hinder the accomplishment of the purposes outlined by the EES Act, nor does it make it impossible to comply with both state and federal requirements. As stated, the EES Act was created to

minimize foreclosures and encourage economic stability. 12 U.S.C. § 5201 (2008). South Carolina contract law does not conflict with these goals. To the contrary, state contract law furthers the goals of the EES Act by protecting the rights of an individual against unilateral modifications to contracts, such as the one at issue in this case, which may cause damage and/or injury to an individual's credit standing and ultimately lead to more economic instability. Thus, South Carolina contract law ensures that contract modifications are valid and enforceable, which, in turn, solidifies the goals of the EES Act.

Further, the conflict in this case is not between a federal law and state contract law. Instead, it is between a Fannie Mae corporate policy and state contract law. The March 4, 2009 Treasury Department HAMP guidelines do not contain any signature exception. United States Department of Treasury, *Home Affordable Modification Program Guidelines*, (March 4, 2009) *available at* http://www.treasury.gov/press-center/press-releases/Documents/modification_program_guidelines.pdf. In 2010, Fannie Mae published its own servicing guide, incorporating the Treasury Department HAMP guidelines and expanding upon them. Fannie Mae 2010 Servicing Guide Update, *available at* <https://www.fanniemae.com/content/guide/svc042810.pdf>. This 2010 Fannie Mae servicing guide and subsequent Fannie Mae servicing guide updates are where the signature exception appears. *Id.* at Pt. VII, Ch. 6, § 610.04.06. Accordingly, the signature exception is not a federal law; rather, it was created by Fannie Mae.

Fannie Mae is a corporation; it is neither the legislature nor a regulatory agency. There is no federal statute providing that Fannie Mae guidelines are federal law. Thus, the

trial court has misconstrued CitiMortgage's argument that 15 U.S.C. § 1639a(c)⁴ applies to the signature exception. This federal statute does not refer to the Fannie Mae guidelines, but to the HAMP guidelines issued by the Treasury Department pursuant to the EES Act, which do not include a signature exception. Further, even in the event 15 U.S.C. § 1639a(c) is applicable to Fannie Mae's servicing guidelines, Congress has not specified that these guidelines are intended to preempt or trump existing state contract law. 15 U.S.C. § 1639a does not excuse CitiMortgage from liability toward borrowers. See 15 U.S.C. § 1639a (2010). To the contrary, the federal statute expressly states in subsection (g) that no provision within the statute shall be construed as affecting the liability of the servicer "for the violation of a State or Federal law." 15 U.S.C. § 1639a(g) (2010). Subsection (g) clearly indicates that Congress did not intend to preempt state law and valid actions may be brought against loan servicers for violations thereof. Id.

Finally, there is no implied field preemption in this case. As established, the federal statutes are not so broad as to prohibit state courts from asserting jurisdiction and allow for state law actions against servicers. Id. State actions regarding mortgages and loan documents are commonly instituted against both borrowers and servicers. The South Carolina Consumer Protection Code is a state act that regulates the field in relation to much of the same subject matter as the EES Act covers without conflict arising. S.C. Code Ann. § 37-1-102 (1976). Therefore, federal law does not impliedly preempt South Carolina

⁴ "The qualified loss mitigation plan guidelines issued by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 shall constitute standard industry practice for purposes of all Federal and State laws." 15 U.S.C. § 1639a(c) (2010).

contract law under a theory of implied conflict preemption nor implied field preemption. As a result, the trial court erred either by not releasing Appellant from liability on the modified Note or by not rescinding the Modification.

C. CitiMortgage's Own Loan Modification Agreement Requires The Signature Of All Parties To The Note In Order To Execute A Modification Thereof.

The trial court erred in determining that a provision⁵ in the Loan Modification Agreement requiring the signatures of all co-borrowers prior to execution of the Modification was a condition precedent that could be waived by CitiMortgage. It is a rudimentary principal and axiomatic that one party to an agreement cannot waive another party's acceptance of the agreement's terms. In its Order Denying Motion For Reconsideration, the trial court ruled that this provision "is for the benefit of CitiMortgage and, therefore, could be waived by CitiMortgage as a condition precedent under South Carolina law." (Order Denying Motion For Reconsideration, p. 4). However, the trial court failed to consider first, that a waiver of a signature requirement directly contravenes South Carolina contract law⁶ and second, that the waiver would adversely affect Appellant.

A condition precedent refers to "any fact, other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." Worley v.

⁵ "Borrower(s) understand that the Lender's consent to this Agreement is conditioned upon all Borrower(s) properly signing and returning this Agreement without any alterations or deletions and making all monthly payments when due." (Loan Modification Agreement p. 5, para. 10) (emphasis added).

⁶ In order to validly modify a contract, all parties must consent to the modification. Player v. Chandler, 299 S.C. 101, 382 S.E. 891 (1989).

Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (S.C. Ct. App. 1994). The question of whether something is a condition precedent in a contract depends upon the intent of the parties and the language they employ. Id. At issue here is a provision that attempts to make acceptance, which is a crucial element in contract formation and modification, a condition that may be waived.

The necessary elements of a contract and are an offer, acceptance, and consideration. Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (S.C. Ct. App. 2009). Acceptance of a modification affords protection to all parties to a contract. The Modification in this case affects not only the rights and obligations of CitiMortgage but also the rights and obligations of Kim Sprinkle Snider and Appellant. Thus, to hold that acceptance of a contract modification by co-borrowers signature is a condition precedent beneficial to only CitiMortgage incorrectly characterizes the signature provision. While South Carolina does recognize a party's right to waive strict compliance with a condition precedent, Bishop v. Benson, 297 S.C. 14, 18, 374 S.E.2d 517, 519 (S.C. Ct. App. 1988), that does not negate the necessity of all parties' consent in order to form a valid contract. Chandler, 299 S.C. 101, 382 S.E. 891 (1989). Acceptance is a fundamental element of contract formation and if there is no "meeting of the minds", the contract is invalid. Id. Thus, the trial court erred in its determination that the signature provision is a condition precedent which only benefits CitiMortgage and may be waived.

In the alternative, should the trial court's ruling on the issue of a condition precedent be upheld, the trial court also failed to apply South Carolina law which states, "whether or not a waiver has occurred in a given factual setting is a question of fact for the finder of fact."

Bishop, 297 S.C. at 18, 374 S.E.2d at 519. Therefore, the trial court erred by granting summary judgment in favor of CitiMortgage and not allowing this issue of fact to be presented to a jury, as argued by Appellant its Brief In Opposition to CitiMortgage's Motion for Summary Judgment and at the Summary Judgment hearing. (Plaintiff's Memorandum In Opposition to Defendant's Motion for Summary Judgment, p. 11), (Summary Judgment Hearing Transcript, pp. 49-50).

II. THE TRIAL COURT ERRED IN FAILING TO CONSIDER CITIMORTGAGE'S DUTY TO USE GOOD BUSINESS JUDGMENT IN EXECUTING A LOAN MODIFICATION WITHOUT A CO-BORROWER'S SIGNATURE, AN ISSUE OF FACT, PRIOR TO GRANTING SUMMARY JUDGMENT.

After ruling that Fannie Mae's loan servicing guidelines preempt state law, the trial court failed to consider an additional guideline, found both within Treasury Department's loan servicing guidelines and within the Fannie Mae 2011 Single Family Servicing Guide, which imparts a duty upon CitiMortgage to use good business judgment. First, Fannie Mae's 2011 servicing guide provides, "Fannie Mae requires the servicer to service all mortgage loans in a sound, businesslike manner...[and] to use good judgment." Fannie Mae Single Family 2011 Servicing Guide, Pt. I, Ch. 2, § 202 *available at* <https://www.efanniemae.com/sf/guides/ssg/svcg/svc061011.pdf>. (emphasis added). Second, the Treasury Department issues a Making Home Affordable ("M.H.A.") Program handbook that contains guidelines for non-GSE loan servicers. Version 3.0 of M.H.A. Program handbook, which was the applicable version of this document at the time of the Modification executed by CitiMortgage and Kim Sprinkle Snider, states, "Servicers should use good

business judgment, in accordance with existing servicing agreements and investor guidelines, when determining whether to accept a document without a co-borrowers signature.” M.H.A. Program Handbook v3.0, Ch. II, Section 5.7, *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf. (emphasis added). Whether CitiMortgage used “good judgment” in this case is an issue of fact for a jury and not a dispositive legal issue.

The inclusion of these “good judgment” provisions in both the Fannie Mae servicing guide and the Treasury Department authored M.H.A. Program handbook make it clear that even with the existence of a signature exception, servicers should use caution in executing a loan modification without a co-borrower’s consent. Because the trial court has upheld the application of the Fannie Mae guidelines, inclusive of the signature exception, then the “good judgment” provision found within the same guidelines must also be applied to CitiMortgage’s actions. Accordingly, CitiMortgage has a duty to use good judgment in executing a loan modification without a co-borrowers signature and/or consent. The trial court cannot pick and choose individual Fannie Mae guidelines to apply in this case. If its ruling that the Fannie Mae guidelines preempt state contract law is upheld, then all of the guidelines contained within the Fannie Mae Single Family 2011 Servicing Guide must be applied equally.

Whether CitiMortgage met this duty in executing the Modification is an issue of fact for a jury, as argued by Appellant in his Brief in Opposition to CitiMortgage’s Motion for Summary Judgment. (Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, p. 6). Nevertheless, while applying the signature exception to the facts

of this case, the trial court failed to consider CitiMortgage's duty of "good judgment." Thus the trial court erred in granting summary judgment in favor of CitiMortgage and not allowing this issue of fact to be presented to a jury for determination.

III. THE TRIAL COURT ERRED IN DETERMINING THAT A LOAN MODIFICATION DOES NOT FALL UNDER THE SOUTH CAROLINA CONSUMER PROTECTION CODE'S DEFINITION OF A "CONSUMER CREDIT TRANSACTION" OR A "CONSUMER LOAN."

The trial court erred in holding that a loan modification does not qualify for protection under the South Carolina Consumer Protection Code ("Consumer Protection Act"). In its February 24, 2015 Order Granting Motion For Summary Judgment, the trial court ruled that the Modification executed by CitiMortgage and Kim Sprinkle Snider did not "qualify as a 'consumer credit transaction' or 'consumer loan' to support a claim under the South Carolina Consumer Code." (Order Granting Motion For Summary Judgment, p. 6, para. 18). The Order provides no additional support or basis for the trial court's ruling on this issue. Further, the trial court failed to take into consideration both the stated purpose of Consumer Protection Act and the fact that the Modification directly affects a "consumer loan" protected under the Consumer Protection Act.

A. The Modification Is a Consumer Loan Under the Consumer Protection Act.

The Consumer Protection Act was enacted to "protect...borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interest of legitimate and scrupulous creditors" and to "permit and encourage the development of fair and economically sound consumer credit practices." S.C. Code Ann. § 37-1-102 (1976).

Protection under the Consumer Protection Act is afforded to consumer loans, which are defined as “loan[s] made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, or household purpose, (c) either is payable in installments or a loan finance charge is made; and (d) either the principal does not exceed twenty-five thousand dollars or the debt is secured by interest in land.” S.C. Code Ann. § 37-3-102 (1976); S.C. Code Ann. §37-3-104 (1976). The loan at issue in this case satisfies all four of the Consumer Protection Act’s listed requirements; therefore, the loan is a “consumer loan” under the Consumer Protection Act. The trial court erred in holding it was not.

By unilaterally modifying the loan on which Appellant is a co-borrower, CitiMortgage has violated S.C. Code Ann. § 37-3-303, which states, in pertinent part:

A natural person, other than the spouse of the debtor, is not obligated as a cosigner, comaker, guarantor, indorser, surety, or similar party with respect to a consumer loan, unless before or contemporaneously with signing any separate agreement or obligation or any writing setting forth the terms of the debtor’s agreement, the person receives a separate written notice that contains a completed identification of the debt he may have to pay and reasonably informs him of his obligation with respect to it. (emphasis added).

CitiMortgage did not provide any written notice regarding the loan modification or any of the terms thereof to Appellant, which is a clear violation of the Consumer Protection Act. S.C. Code Ann. § 37-3-303 (1976).

B. Because The Modification Is A Consumer Loan, The Modification Qualifies As A Consumer Credit Transaction Under the Consumer Protection Act.

In its Memorandum In Support of Motion for Summary Judgment and during the summary judgment hearing, CitiMortgage argued that the Consumer Protection Act does not apply to loan modifications because the loan modification does not constitute a “consumer credit transaction.” (Def. Mem. In Support of MSJ, pp. 24-25), (Summary Judgment Hearing Transcript, pp. 19-20). The Consumer Protection Act defines a “consumer credit transaction” as “a consumer credit sale or **consumer loan** or a refinancing or consolidation thereof, a consumer lease, or a consumer rental-purchase agreement.” S.C. Code Ann. § 37-1-301 (1976) (emphasis added). Contrary to CitiMortgage’s argument, this case involves a “consumer loan,” the terms and conditions of which were materially altered unilaterally by CitiMortgage, without notice. This is the precise type of act that the General Assembly sought to control and prevent pursuant to the purposes defined within the Consumer Protection Act. See S.C. Code Ann. § 37-1-102 (1976). Additionally, because the Modification is a consumer loan, it qualifies under the Consumer Protection Act as a “consumer credit transaction.”

CitiMortgage relied heavily on the South Carolina Supreme Court’s decision in Crawford v. Central Mortgage Co., 404 S.C. 39, 744 S.E.2d 538 (2013) in arguing that the Modification was not protected under the Consumer Protection Act. (Def. Mem. In Support of MSJ, pp. 25-26), (Summary Judgment Hearing Transcript, pp. 11-13, 19-20, 53). However, the Crawford decision never addresses the applicability of loan modifications to the Consumer Protection Act, rather, it merely held that the loan modification at issue under a narrow set of facts particular to the Crawford case did not require the supervision of a South Carolina attorney. Id. The Crawford case is inapplicable here. Because the

Modification in this case concerns a consumer loan, it is a consumer credit transaction protected by the Consumer Protection Act.

Another aspect of the Consumer Protection Act that the trial court failed to take into consideration is that there is no provision within the Act that states loan modifications are excluded from protection. Neither S.C. Code Ann. § 37-1-202 nor S.C. Code Ann. § 37-1-108, two sections containing limitations on Consumer Protection Act causes of action, mention the exclusion of protection for loan modifications that do not comply with the Consumer Protection Act's provisions.

Therefore, the Modification is both a consumer loan and a consumer credit transaction protected under the Consumer Protection Act. Further, the trial court failed to consider the absence of any provision excluding loan modifications from protection under the Consumer Act. For these reasons, the trial court incorrectly determined that the Consumer Protection Act did not afford protection to Appellant in this case.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT'S CLAIMS ARE BARRED UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT'S REGULATED INDUSTRY EXCEPTION AND THAT THE PROTECTIONS OF THE UNFAIR TRADE PRACTICES ACT WERE NOT EVOKED DUE TO APPELLANT'S KNOWLEDGE OF THE MODIFICATION.

The trial court erred in holding that Appellant's claims are barred under the South Carolina Unfair Trade Practice Act's ("SC UTPA") regulated industry exception by failing to consider the South Carolina Supreme Court's decision in Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.2d 310 (1991). The trial court further failed in concluding, "The undisputed facts evidence that [Appellant] was aware of the loan

modification review, aware that his signature would not be required for modification, and aware that he would remain liable for the underlying debt even in light of the resulting Loan Modification Agreement.” (Order Granting Motion for Summary Judgment, pp. 6-7, para. 19). Not only is this factual conclusion incorrect, moreover, it led to the trial court’s incorrect determination that CitiMortgage’s conduct was not “unfair or deceptive sufficient to invoke the SC UTPA.” (Order Granting Motion for Summary Judgment, p. 7, para. 19).

By depriving Appellant of his contractual right to consent to a modification of a loan on which he was obligated through a common policy or practice, CitiMortgage engaged in an unfair trade practice. A trade practice is offensive to the public policy when it is immoral, unethical, or oppressive. Bessinger v. BI-LO, Inc., 366 S.C. 426, 432, 622 S.E.2d 564, 567 (S.C. Ct. App. 2005). Pursuant to South Carolina statutory law, unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. S.C. Code Ann. § 39-5-20 (1976). In order to bring a cause of action under the SC UTPA, a plaintiff must show that a defendant’s actions adversely affected the public interest and that the acts have a potential for repetition. Newsmall Clemson, LLC v. Earth Management Systems, Inc., No. 2008-UP-430, 2008 WL 9844679, at *7 (S.C. Ct. App. July 31, 2008). In order to show repetition, a party may show that the same kind of actions have occurred in the past or by showing the party’s procedures create the potential for repetition in the future. Id.

At the summary judgment hearing, CitiMortgage stipulated that its actions affect the public interest and have the potential for repetition. (Summary Judgment Hearing Transcript, pp. 4-5). Thus, the only remaining issue for the trial court to determine was whether the SC UTPA’s regulated industry exception barred Appellant’s claims in this matter.

The trial court incorrectly held that Appellant's claims were excluded from the protections provided by the SC UTPA under the SC UTPA's regulated industry exception⁷ found in S.C. Code Ann. § 39-5-40. In doing so, the trial court failed to consider the South Carolina Supreme Court's decision in Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.2d 310 (1991). In the Ward case, the South Carolina Supreme Court held that almost every type of business is subject to some type of regulation and if they accepted the contention that the SC UTPA did not apply because of the regulated field exception, the SC UTPA would be rendered meaningless. 304 S.C. at 154, 403 S.E.2d at 311. The Supreme Court in Ward reasoned that only activities specifically authorized by statute are exempt; and that the SC UTPA exception is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Id. at 156, 312. (emphasis added).

The fact that there are regulations in place regarding loans does not mean that the entire field is regulated to the extent that protection should not be afforded under the SC UTPA in this case. Here, it is not a federal statute, federal law, or regulation that is in conflict with state law, but a corporate policy. See supra Section I(B). Corporate policies are subject to state law prohibiting unfair and deceptive actions, such as those which have occurred in this case. Therefore, pursuant to the Ward decision, the trial court erred in

⁷ The SC UTPA does not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina law.” S.C. Code § 39-5-40 (1976).

determining that the SC UTPA's regulated industry exception barred Appellant's SC UTPA claims against CitiMortgage.

Additionally, the trial erred in holding that CitiMortgage's acts were not unfair or deceptive under the SC UTPA because it misconstrued the facts in this case by suggesting that Appellant was fully aware of the execution of the Modification and its enforceability. (Order Granting Motion for Summary Judgment, pp. 6-7, para. 19). First and foremost, CitiMortgage executed the Modification **without Appellant's consent and after his express objection**. (Verified Complaint, p. 2, paras. 7-9), (Affidavit of Mitchell Snider, p. 3, para. 15), (Summary Judgment Hearing Transcript, pp. 26-27). Further, Appellant was never given written notice of the execution of the Modification until October 23, 2012, over a year after its execution (Verified Complaint, p. 2, para. 10), did not discover that the Modification had been executed until he logged into his online CitiMortgage account, on his own accord (Affidavit of Mitchell Snider, p. 3, para. 18), Appellant was given conflicting information by Kim Sprinkle Snider and CitiMortgage as to whether he would remain obligated on the Note if the Modification was executed without his consent (Affidavit of Mitchell Snider, p. 3, paras. 14-15), and has continually contested the validity of the Modification and his remaining obligation on the Note subsequent to its execution (Verified Complaint, pp. 1-8), (Affidavit of Mitchell Snider, pp. 1-6), (Affidavit of Mitchell Snider in Support of Verified Petition for Rule to Show Cause, p. 2, para. 7), (Summary Judgment Hearing Transcript, pp. 26-27). The institution of this litigation alone is evidence which demonstrates Appellant contests the validity of CitiMortgage's execution of the Modification without his consent.

Further, as Appellant argued at the Summary Judgment Hearing (Summary Judgment Hearing Transcript, p. 45), whether a practice or act is unfair or deceptive is a question of fact for a jury. deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 270-71, 536 S.E.2d 399, 407-08 (S.C. Ct. App. 2000); See also Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 503 S.E.2d 184 (S.C. Ct. App. 1998), Cert. denied (April 12, 1999) (Holding that a grant of summary judgment was error where questions of fact existed as to whether there was a violation of the SC UTPA). The Court of Appeals in de Bondt reasoned,

Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends upon the surrounding facts and the impact of the transaction on the marketplace. The UTPA should not be construed to increase a Plaintiff's burden of providing liability since its purpose is to give additional protection to victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles.

342 S.C. at 269-70, 536 S.E.2d at 407 (internal quotations omitted).

Therefore, the unfair and deceptive practices of CitiMortgage in executing the Modification without the consent of a party who is obligated on the Note are a clear example of the conduct from which the SC UTPA aims to protect South Carolina citizens. The trial court erred in determining that the Appellant's claims are barred under the regulated industry exception because of a corporate policy. The trial court further erred in making incorrect factual determinations that led to the conclusion that CitiMortgage's acts were not unfair or deceptive enough to warrant SC UTPA protection. This conclusion, while erroneous based upon the facts in the record, is even further erroneous in light of South Carolina law stating

that whether something is unfair or deceptive under the SC UTPA is an issue of fact for the jury, not for the trial court's determination.

V. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT WAS JUDICIALLY ESTOPPED FROM SEEKING RESCISSION OF THE LOAN MODIFICATION AGREEMENT.

The trial court erred in making the determination that Appellant was judicially estopped from seeking rescission of the Modification. In both its Order Granting Motion for Summary Judgment and its Order Denying Motion For Reconsideration, the trial court makes the factual conclusion that “[Appellant] acknowledged...the fact that his name may not be removed from the loan as part of the loan modification.” (Order Granting Motion for Summary Judgment, p. 3, para. 9), (Order Denying Motion For Reconsideration, p. 5, para. 5). Based upon this incorrect factual conclusion, the trial court held that Appellant set forth a position in the Horry County Family Court that is inconsistent with his position in this case and that he was judicially estopped from doing so. (Order Denying Motion For Reconsideration, p. 5, para. 5). This is erroneous because Appellant never acknowledged that his name could not be removed from the Note, rather, he has continuously sought the removal of his name from the Note and/or recession of the Modification. (Summary Judgment Hearing Transcript, pp. 37-40).

In order to prove judicial estoppel, the party asserting the estoppel must show:

1. Two inconsistent positions taken by the same party or parties in privity with one another,
2. The positions must be taken in the same or related proceedings involving the same party or parties in privity with each other,

3. The party taking the position must have been successful in maintaining that position and have received some benefit,
4. The inconsistency must be part of an intentional effort to mislead the court, and
5. The two positions must be totally inconsistent.

Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013).

CitiMortgage has not proven any of these factors. The trial court mischaracterized the position Appellant took in the Family Court when he filed his Petition For Rule to Show Cause against Kim Sprinkle Snider. While Appellant was aware of the Modification at the time he filed his Petition For Rule to Show Cause, he never acknowledged the fact that his name would or could not be removed. (Affidavit of Mitchell Snider In Support of Verified Petition For Rule to Show Cause, p. 2, para. 7), (Summary Judgment Hearing Transcript, pp. 37-39). Appellant filed the Petition in the Horry County Family Court to address his ex-wife's default on the mortgage. (Verified Petition for Rule to Show Cause, pp. 1-4). In his Petition, Appellant first requests that the marital residence be sold. (Verified Petition For Rule to Show Cause, p. 3). Then, in the alternative, Appellant requests that he be allowed to make the mortgage payments directly to CitiMortgage rather than as alimony to Kim Sprinkle Snider. (Verified Petition for Rule to Show Cause, p. 3) (emphasis added) (Summary Judgment Hearing Transcript, pp. 37-39). In his Affidavit In Support of the Verified Petition for Rule to Show Cause, Appellant conditioned his request to make his alimony payments directly to CitiMortgage upon **the possibility of a scenario in which the**

loan modification did not result in the removal of his obligation on the Note.⁸ (Affidavit of Mitchell Snider in Support of Verified Petitioner for Rule to Show Cause, p. 2, para. 7), (Summary Judgment Hearing Transcript, pp. 37-39). This request was made because Appellant had no knowledge of whether the Modification was valid and enforceable against him without his consent, hence the use of the words “in the event,” which are found within the request.

The Family Court chose not to address the validity of the Modification and instead, Ordered Appellant to make the mortgage payments to CitiMortgage. (Order Pursuant to Defendant’s Order and Rule to Show Cause, pp. 1-3, paras. 6-7). Appellant’s compliance with the Family Court’s order cannot be used against him as some form of ratification of the Modification or inconsistent position. Further, the trial court stated in its Order Granting Motion for Summary judgment that it made no ruling on whether Appellant ratified the Modification, which this incorrect factual conclusion by the trial court appears to contradict. (Order Granting Motion for Summary Judgment, p. 6, para. 17).

Based upon the facts in the record, Appellant has consistently asserted that the Modification without his consent is invalid and he should not be judicially estopped from seeking rescission in this case. The trial court’s ruling of judicial estoppel is an error based upon an incorrect factual determination; thus, should be overturned.

⁸ “In the event [Kim Sprinkle Snider’s] loan modification is concluded, but does not result in my name being removed from the mortgage loan, I would request, in the very least, that I be allowed to make all future mortgage payments directly to CitiMortgage...” (Verified Petition for Rule to Show Cause, p. 3).

VI. THE TRIAL COURT ERRED IN DETERMINING THAT A LOAN MODIFICATION AGREEMENT THAT MATERIALLY CHANGES THE TERMS OF A LOAN TO THE DETRIMENT OF ONE BORROWER COULD BE EXECUTED WITHOUT THE SUPERVISION OF A SOUTH CAROLINA ATTORNEY.

The trial court erred in determining that the South Carolina Supreme Court's decision in Crawford applies to this case and bars Appellant from asserting a claim based upon the execution of the Modification without a licensed attorney. 404 S.C. 39, 744 S.E.2d 538 (2013). The Crawford case is distinguishable from this action. In Crawford, the South Carolina Supreme Court held that lenders do not engage in the unauthorized practice of law by preparing and mailing loan modifications to borrowers and recording the executed documents without participation of a licensed attorney. Id. The plaintiffs in Crawford were borrowers that consented to loan modifications without the presence of attorneys. Id. However, when these borrowers failed to make timely payments, they wanted the loan modifications declared invalid to relieve them from the very obligation they voluntarily undertook to obtain. Id.

The Crawford plaintiffs' entire case was predicated on escaping liability for their own actions. Due to these facts, the South Carolina Supreme Court held in favor of the defendant. Nevertheless, the South Carolina Supreme Court went on to state that "the unauthorized practice of law jurisprudence in South Carolina is driven by the public policy of protecting consumers." Id. at 45, 541. While the Court stated the definition of "the practice of law" "remains flexible and turns on the facts of each case.", Id., the Court's prior decisions clearly provide that the "preparation of loan documents" constitutes the practice of law and must be supervised by a licensed South Carolina attorney. Id. at 404 S.C. at 45, 744 S.E.2d at 541,

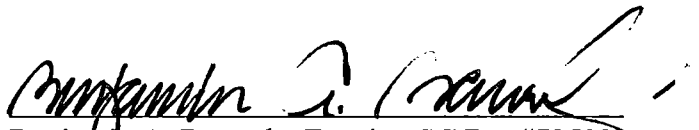
citing State v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) and Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003).

Here, as distinguishable from the plaintiffs in Crawford, Appellant never had a choice in the execution of the Modification; whereas, the Crawford plaintiffs knowingly executed loan modifications without attorneys, essentially waiving their right to an attorney's presence. The facts of this case demonstrate the importance of having an attorney present for loan modification proceedings and the South Carolina Supreme Court indicated that its decision would turn on the facts of individual cases. Id. at 45, 541. Therefore, in this case, unilateral modification of a loan agreement without a co-borrower's signature and without the presence of an attorney should be deemed the unauthorized practice of law and the Modification should be appropriately rescinded. The trial court failed to consider the distinctions between this case and the plaintiffs in Crawford and thus, erred in granting summary judgment in favor of CitiMortgage.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,



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October 7, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable D. Craig Brown, Circuit Court Judge

Case No. 2013-CP-26-02135

Appellate Case No. 2015-001233

Mitchell D. Snider Appellant,

v.

CitiMortgage, Inc. and
Kim Sprinkle Snider, Defendants

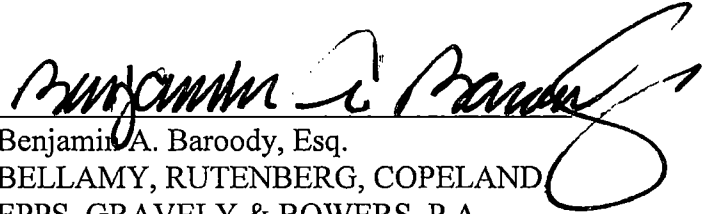
Of Whom CitiMortgage, Inc. is Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant, including all required documents, along with the Designation of Matter to Be Included in the Record on Appeal on the person whose name and address appear below by depositing a copy of it in the United States Mail, postage prepaid, on _____, 2015.

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Dated: October 2, 2015

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October 7, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Mitchell D. Snider v CitiMortgage, Inc. and Kim Sprinkle Snider
Civil Action No.: 2013-CP-26-02135
Appellate Case No.: 2015-001233
Our File No.: 24432.87961.39

Dear Ms. Kitchings:

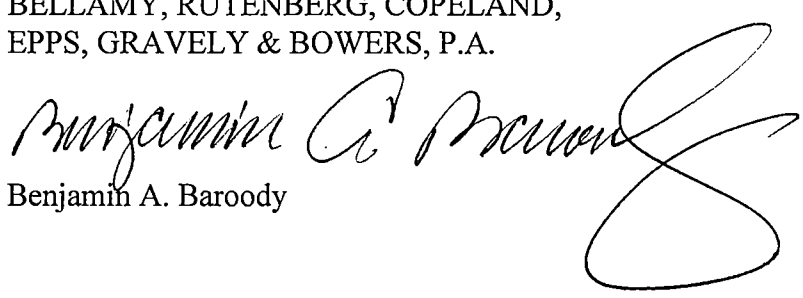
Enclosed please find the originals and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel, and Proof of Service in the above-referenced matter. Please file the original documents and return the clocked copies to me in the self-addressed stamped envelope enclosed for your convenience.

If you have any questions or need additional information, please feel free to contact me.

With kindest regards, I am

Yours very truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.


Benjamin A. Baroody

BAB/dg

Enclosures

cc: Client
Lindsey H. Altman, Esquire
Thad H. Westbrook, Esquire

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PHILLIP H. ALBERGOTTI* ***
HAYES K. STANTON ** ***
KARA J. KEITH


RETIRED:
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JOHN E. COPELAND
DAVID R. GRAVELY
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