

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

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S.C. Supreme Court

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

SECOND AMENDED PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioner Wachovia Bank, N.A. ("Wachovia") petitions this Court for a writ of certiorari to review the opinion of the South Carolina Court of Appeals in this case (Op. No. 4685 filed May 6, 2010) holding that Wachovia is barred by the doctrine of unclean hands from seeking equitable or legal relief to collect an unpaid mortgage loan from Respondent Ann T. Coffey ("Mrs. Coffey") or any other party as a consequence of its unauthorized practice of law in providing a home-equity line of credit to Mrs. Coffey's late husband, Michael D. Coffey ("Dr. Coffey") in 2001.

As Wachovia will demonstrate herein, the decision of the Court of Appeals holds Wachovia to a standard of conduct that was not at all clearly established by this Court until years after Wachovia had made the loan to Dr. Coffey. This Court did not hold that an attorney must be involved in preparing loan documents and closing the loan for the type of loan Wachovia

made to Dr. Coffey until 2006, which was five years after the loan was made in 2001. Wachovia has thus been required to suffer a significant forfeiture for failing to anticipate how the law would evolve *after* the loan was made.

Unless this Court modifies or reverses the decision of the Court of Appeals, virtually every mortgage foreclosure action in South Carolina will become mired in disputes over whether and to what degree an attorney licensed in South Carolina performed or directly supervised numerous aspects of the loan transaction. In addition, hundreds, if not thousands, of outstanding mortgage loans in this state, obtained by lenders acting in good faith in reliance upon this Court's unauthorized practice of law jurisprudence, may be invalidated. The losses stemming from such a wholesale invalidation of mortgage loans will be borne in many cases not by the party that originated the loans but by the subsequent owners of the loans, which in many instances include both public and private pension funds and federal and state agencies. The cost of a remedy supposedly intended to protect the public at large may thus be imposed on innocent investors and U.S. taxpayers.¹

CERTIFICATION BY COUNSEL

The undersigned counsel for Wachovia certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals in this case.

¹ There could also be other unintended consequences if the Court of Appeal's decision is not modified or reversed. For example, the sweeping invalidation of mortgages raises questions of the validity of tax deductions taken by borrowers on mortgages that may be invalidated under the opinion in *Coffey*. Many borrowers would likely be forced to amend and re-file their tax returns to remove the mortgage interest tax deduction, resulting in the payment of unexpected back taxes and penalties.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law and that Wachovia thus had unclean hands?
2. Did the Court of Appeals err in holding that Wachovia's equitable and legal causes of action were barred?
3. Does the holding of the Court of Appeals in this case conflict with the holding of the Court of Appeals in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), which was based on the decision of this Court in *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), to the effect that a trial court does not have jurisdiction to determine whether the unauthorized practice of law has occurred in any given case?

STATEMENT OF THE CASE

Wachovia filed this action on June 30, 2006, to collect the balance due on a home-equity line of credit in the principal amount of \$125,000 that Wachovia had made on July 23, 2001, to Dr. Coffey, Mrs. Coffey's late husband. (R. pp. 15-26.) In its First Amended Complaint, Wachovia asserted six causes of action against Mrs. Coffey for (1) mortgage foreclosure; (2) ratification of a mortgage; (3) unjust enrichment; (4) equitable lien; (5) equitable mortgage; and (6) prejudgment interest. (R. pp. 57-72.)

Summary of Material Facts

As stated in the order of the trial court (R. pp. 5-7) and in the opinion of the Court of Appeals, the following facts are not in dispute:

Dr. Coffey, an obstetrician-gynecologist on Hilton Head Island since the mid-1980s, was diagnosed with end-stage lung cancer in early 2001. Dr. Coffey had owned sailboats over the years and decided to buy another one after his diagnosis. On July 30, 2001, Dr. Coffey

purchased a thirty-six foot sailboat from Hilton Head Yachts for \$125,000. (R. pp. 189-221.) The entire purchase amount was borrowed from Wachovia through a \$125,000 home-equity line of credit secured by a mortgage on Dr. and Mrs. Coffey's residence on Hilton Head Island. (R. pp. 171-78.)

Mrs. Coffey testified at her deposition that she knew about the purchase of the sailboat several weeks before it occurred, although at the time she did not know the details of how Dr. Coffey paid for the sailboat. (R. p. 363.) Dr. Coffey primarily handled the household finances, although Mrs. Coffey signed twenty-nine mortgages, one deed, and a power of attorney from 1980 to 2005 relating to properties owned by her and Dr. Coffey. (R. pp. 415-19, 423, 334-40.)

Dr. Coffey was a respected and long-time customer of Wachovia, and when he requested the home-equity line of credit, he did not explain to Wachovia's bank officers that he had previously deeded his share of the residence to Mrs. Coffey in 1984 and did not own the property. The mortgage that Dr. Coffey signed contained an explicit affirmation that he "lawfully own[ed] the property in fee simple" and that he had "the right to mortgage" the property to Wachovia. (R. p. 176). Given Dr. Coffey's creditworthiness and long history as a customer, Wachovia did not verify the legal title of Dr. Coffey's residence before approving and closing the home-equity loan to Dr. Coffey, and Wachovia thus did not require Mrs. Coffey to sign the mortgage. (R. pp. 162-78.) The home-equity line of credit allowed Dr. and Mrs. Coffey to deduct the interest paid on the sailboat loan on their federal and state income tax returns.

The sailboat was titled to A & M Partners, Inc., a Delaware corporation established by Dr. Coffey, whose only asset was the sailboat. Dr. and Mrs. Coffey were the only officers and stockholders of the corporation. (R. pp. 267-72, 378-80, 483-84, 490-91.) Mrs. Coffey testified

the boat was available for her and her husband or other family members to use and enjoy. (R. pp. 364-68.)

Dr. Coffey made regular payments on the Wachovia home-equity loan from July 2001 until he died on March 21, 2005, with funds drawn on a personal checking account jointly held by himself and Mrs. Coffey. (R. pp. 249-66, 386-88, 493-94.) Dr. and Mrs. Coffey claimed a deduction for interest paid on the Wachovia home-equity loan on their joint federal tax returns in 2001, 2002, 2004, and 2005. (R. pp. 273-77, 380-86.)

After Dr. Coffey's death, Mrs. Coffey made regular payments on the home-equity loan until December 2005 (about nine months),² using the couple's joint checking account. (R. pp. 243-48.) In or about September 2005, Mrs. Coffey found a "scrap of paper" while going through Dr. Coffey's records that said "Wachovia boat loan." She then realized there must be a loan or mortgage on the sailboat, although she thought it must be a "small mortgage." Mrs. Coffey wrote "boat loan" or "boat" on the memo line of her payment checks to Wachovia on three occasions from September to November 2005. (R. pp. 243-48, 372-73, 388-396, 408-11.)

Mrs. Coffey, acting as the personal representative of her husband's estate, listed the sailboat as a jointly owned asset to which she obtained sole title in the estate inventory filed in Beaufort County Probate Court.³ Dr. Coffey left nearly all his assets in a marital credit shelter trust to Mrs. Coffey, and his estate had no assets to pay any debts, including the subject loan to Wachovia. (R. pp. 180-88, 356-59, 484-87.)

² As discussed below, Mrs. Coffey sold the boat in January 2006, and never made any further payments on the Wachovia loan, so the loan was current until the boat was sold.

³ The inventory and appraisal of Dr. Coffey's estate was not signed by Mrs. Coffey until September 1, 2006—*after* she had sold the sailboat and ceased making monthly payments on the Wachovia loan, but the estate's inventory was listed as of the time of Dr. Coffey's death. (R. pp. 180-7.)

In the fall of 2005, Mrs. Coffey decided to intensify her ongoing effort to sell the sailboat and, based on a friend's recommendation, contacted St. Barts Yachts to act as a broker in the sale. (R. pp. 400-02.) On September 28, 2005, Mrs. Coffey signed a "Yacht Brokerage Central Listing Agreement" with St. Barts Yachts to sell the sailboat. The sailboat was listed for sale for \$119,000. (R. pp. 278-87, 402.)

Mrs. Coffey's daughter, Maureen Coffey-Edri, helped her mother sell the yacht. Ms. Coffey-Edri informed St. Barts Yachts by email on December 22, 2005, that "[t]he boat loan information is: Wachovia Bank Acct. [xxxx-xxxx-xxxx]-1495 pay off \$125,643.30." (R. p. 302, 480-84, 498-501.)

Ron Stoddard, the St. Barts Yachts salesman, in turn, passed the boat loan information from Ms. Coffey-Edri on to the buyer's lender. St. Barts Yachts also prepared a draft "Seller's Disbursement Summary" showing a "Payoff with Wachovia Bank" of \$125,600, with a balance due from Mrs. Coffey of \$25,525. (R. pp. 304, 315.)

Mrs. Coffey testified that she asked Mr. Stoddard of St. Barts Yachts to check on the status of the loan and gave him the Wachovia home-equity loan account number, and Mr. Stoddard told her there was no lien or mortgage on the sailboat. Mrs. Coffey took Mr. Stoddard's word for it; she never called Wachovia herself to ask about the home-equity loan or the status of any boat loan. Mrs. Coffey testified she did not confer with Ms. Coffey-Edri or her son, who is a lawyer in Illinois, about the issue, although both had been helping her with various matters related to Dr. Coffey's estate and financial affairs. (R. pp. 407-13, 495-97.) Mrs. Coffey and Ms. Coffey-Edri testified they did not fully realize and understand that the entire proceeds of the loan to buy the sailboat came from the Wachovia home-equity loan until June 2007, when they received affidavits and other documents gathered by Wachovia's counsel in this case that

conclusively prove that Dr. Coffey used the entire loan proceeds to buy the sailboat. Mrs. Coffey and her daughter now fully admit this fact. (R. pp. 440-41, 455-63, 507-08, 515-18.)

Mrs. Coffey ultimately sold the sailboat to a Virginia couple for \$112,000, receiving \$100,075 after sale expenses were paid. The sale closed on January 5, 2006, but the “Seller’s Disbursement Summary” did not mention the loan to Wachovia. (R. pp. 309-13, 316, 404-05.) Mrs. Coffey deposited the entire amount of the sale proceeds in her personal bank account, and that amount remains on deposit or otherwise invested in her personal accounts. (R. pp. 405-07, 424-25, 491-92.)

The net worth of Dr. Coffey and Mrs. Coffey in 2001, when they obtained an unrelated home mortgage loan on their residence, was more than \$1.2 million. (R. pp. 241, 397-98.) Their home at the time had an appraised value of \$2.1 million. (R. pp. 230-39, 242, 397-98.)

As of January 3, 2006, the due date of the first payment that Mrs. Coffey refused to pay on the Wachovia home-equity loan, the balance due on the loan was \$126,256.58. (R. pp. 532-34.)

Procedural History and Rulings Below

Wachovia filed a motion for summary judgment on its third cause of action for unjust enrichment (R. pp. 31-45) and an amended motion for summary judgment on its fourth cause of action for equitable lien (R. pp. 46-54). Mrs. Coffey responded with her own motion for summary judgment. (R. pp. 97-121.) By an order dated June 23, 2008, the trial court granted Mrs. Coffey’s motion for summary judgment and denied Wachovia’s motions. (R. pp. 5-14.)

In granting Mrs. Coffey’s motion for summary judgment on all of Wachovia’s causes of action, the trial court ruled that although “no private right of action exists from the unauthorized practice of law, it can, however, be the basis for ‘unclean hands’.” (R. p. 13.) The trial court

further held that “Wachovia does not . . . have clean hands and cannot now seek *equitable relief* arising out of those acts and their own failures in carrying out those acts.” (*Id.*) (Emphasis added).

Wachovia appealed from the order of the trial court, and in its opinion, the Court of Appeals stated the issue on appeal as follows: “Is Wachovia barred from seeking *relief in the courts* due to its unauthorized practice of law in the loan transaction with Dr. Coffey?” *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 73, 698 S.E.2d 244, 247 (Ct. App. 2010) (emphasis added) (hereinafter cited as “*Coffey*”). The Court of Appeals answered this question in the affirmative and held not only that Wachovia’s equitable claims were barred by the doctrine of unclean hands but that “Wachovia’s legal causes of action are barred as well.” *Id.* at 77, 698 S.E.2d at 248.

The facts of this case are distinctly different from the facts of *Matrix Fin. Servs. Corp. v. Frazer*, 2010 S.C. LEXIS 289 (S.C. Sup. Ct. Aug. 16, 2010). In *Matrix*, the lender, Matrix, had made a mortgage loan in 2001 and had “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.” *Id.* at *6. Matrix had thus done exactly what this Court had proscribed 14 years earlier in *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), which was to hire an independent title company to perform most of the functions constituting the practice of law normally associated with making and closing a mortgage loan.

In this case, the lender, Wachovia, did not hire a title company or any third party to do anything with respect to the loan to Dr. Coffey. Wachovia merely prepared the mortgage that was intended to secure a loan to which Wachovia was a party, and, along with Dr. Coffey, participated in closing the loan. *Matrix* is readily distinguishable because it involved a third

party to the transaction who received payment for services constituting the unauthorized practice of law, and *Matrix* thus does not control this case.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT WACHOVIA WAS ON NOTICE THAT ITS CONDUCT CONSTITUTED THE UNAUTHORIZED PRACTICE OF LAW.

In affirming the trial court, the Court of Appeals stated, “As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney.” *Coffey*, 389 S.C. at 75, 698 S.E.2d at 247-248 (citing *State v. Buyers Serv. Co.*, 292 S.C. at 431-434, 357 S.E.2d at 18-19). This statement misconstrues the holding in *Buyers Service*.

Buyers Service held only that a commercial title company had unlawfully engaged in the unauthorized practice of law by performing, for a fee, various functions constituting the unauthorized practice of law in the course of closing real estate transactions to which the title company was not itself a party. Additionally, the loan at issue in *Buyers Service* was a purchase-money mortgage loan in which title was transferred from the seller to the purchaser. *Buyers Service*, 292 S.C. at 428, 357 S.E.2d at 16.

Following *Buyers Service*, this Court did not address whether a lender may lawfully prepare documents for a non-purchase-money mortgage loan that does not involve the transfer of title until *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002), *withdrawn and reissued as Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), which was *two years after* Wachovia made the loan to Dr. Coffey in 2001. Moreover, the opinion in *McMaster* addressed only a refinance transaction and expressly limited itself to the facts of that case. *McMaster*, 355 S.C. at 311 n.2, 585 S.E.2d at 775 n.2. The issues of whether or not a lender could lawfully prepare documents

for a home-equity loan, the type of loan involved in this case, and whether an attorney was required to close a home-equity loan was not settled until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), which was *five years after* Wachovia made the loan to Dr. Coffey. *See id.* at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added).

Prior to the decisions of this Court in *Doe v. McMaster* and *Doe v. Richardson*, it was by no means clear that a bank in South Carolina could not lawfully prepare a mortgage to secure a loan the bank intended to make or that an attorney was required to close any type of loan secured by real estate other than a purchase-money mortgage loan. On the contrary, the courts of other states had held that banks and other corporations could lawfully prepare documents relating to loans they made. *See State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961); *Title Guaranty Co. v. Denver Bar Ass’n*, 312 P.2d 1011 (Colo. 1957).⁴

Similarly, members of the South Carolina Bar did not generally interpret *Buyers Service* as prohibiting banks from preparing mortgages for all types of loans secured by real estate that the banks intended to make as or requiring an attorney to close all types of loans secured by real estate. The most public and direct expression of the collective opinions of attorneys in South

⁴ In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961), the Arizona Supreme Court held, as this Court did in *Buyers Service*, that title insurance companies engaged in the unauthorized practice of law by preparing documents affecting the title to real property for their clients and customers. The Arizona Supreme Court was careful to note, however, that a person or corporation having an interest in real property could lawfully prepare documents and stated, “a person or corporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan.” *Id.* at 12. A slightly earlier case, *Title Guaranty Co. v. Denver Bar Ass’n*, 312 P.2d 1011 (Colo. 1957), held that a title company that was in the business of lending its own money could lawfully prepare documents relating to loans that it made. According to the Colorado Supreme Court, “It is elementary that a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law.” *Id.* at 1014.

Carolina concerning the status of the law after *Buyers Service* can be found in the proposed Rules Governing the Unauthorized Practice of Law that the South Carolina Bar submitted to this Court in 1991. The proposed rules were prepared by a special subcommittee of the Unauthorized Practice of Law Committee and, in the words of this Court, “represent[ed] the Committee’s collective wisdom accumulated during its thirteen years of existence.” *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

The proposed rules included the following rule:

UPR 7.3 Preparation of Legal Instruments

(A) A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except: . . .

(2) A regular employee may prepare legal instruments for use by his employer, other than in aid of his employer’s unauthorized practice of law, for which no separate charge shall be made. . . .

(4) *A lending institution may in the regular course of conducting its business prepare its own loan documents for which no separate charge shall be made.*

(Emphasis added.) In addition, another proposed rule stated, “Closings *involving the purchase and sale of real estate* should be conducted only under the supervision of attorneys.” UPR 7.4(A) (emphasis added). The proposed rules were silent with regards to closings not involving the purchase and sale of real estate.

The fact that the South Carolina Bar proposed the rules quoted above indicates that most members of the Bar did not believe that *Buyers Service* prohibited lenders from preparing mortgages to secure their loans. This Court ultimately declined to adopt the rules proposed by the Bar, and it did so because it concluded that “it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules” and “the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.” *In*

re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124. This Court did not comment on the merits of any of the proposed rules, and in particular, the Court did not express disapproval of the proposed rule that would have allowed a lending institution to prepare its own loan documents if no separate charge was made for the documents. This Court also did not disapprove the proposed rule that only closings involving the purchase and sale of real estate had to be conducted under the supervision of attorneys.

Following the publication of this Court's opinion in *In re Unauthorized Practice of Law Rules*, federal judges in the District of South Carolina and the Fourth Circuit continued to believe that a lender could lawfully prepare loan documents and close certain mortgage loans in South Carolina. For example, in 1993 the Court of Appeals for the Fourth Circuit rendered a decision in a case arising in South Carolina demonstrating that neither the federal district judge nor the federal circuit judges who decided the case thought that lenders engaged in the unauthorized practice of law by closing their own mortgage loans. *White v. TRW Real Estate Loan Services, Inc.*, 1993 U.S. App. LEXIS 33456 at **2-5 (4th Cir. Dec. 22, 1993).

In that case, two lawyers sued TRW Real Estate Loan Services, Inc., alleging that TRW was engaged in the unauthorized practice of law by preparing and selling property reports consisting of summaries of information appearing in public real property records. The Honorable William B. Traxler, Jr., District Judge (now Circuit Judge), granted summary judgment for TRW, and on appeal, the Fourth Circuit affirmed the trial court's decision, stating:

The purchasers of these property reports are typically lending institutions with underwriting guidelines which allow them to close certain mortgage loans without hiring an attorney. The loans are generally smaller loans used to refinance an existing loan or a second mortgage. . . .

[T]he [district] court found that the lending institutions purchasing the reports have made a business decision to spare the cost of an attorney and to finance a loan based on the public facts contained in the property reports.

[W]e agree with the reasoning of the district court and hold that under *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (S.C. 1987), TRW's activities do not constitute the unauthorized practice of law.

Id. Clearly implicit in this opinion is the assumption that a lender did not engage in the unauthorized practice of law by preparing its own mortgage document and closing its own mortgage loans.

The belief that a lender could lawfully prepare loan documents for its own use and close its own loans remained undisturbed until this Court rendered its opinion in *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002). In that opinion, this Court stated for the first time that a lender does not have a *pro se* right to prepare documents to which it is a party. *Id.* at 164, 568 S.E.2d at 359; *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003). This statement clearly constituted a change in the law as attorneys and lenders had previously understood it.

For example, the Petitioner in *Condon*, who was a practicing attorney and who was represented by another practicing attorney, argued as follows in his brief:

It is widely accepted that "a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice". *Perkins v. CTX Mort. Co.*, 969 P.2d 93, 96 (Wash. 1999). See also *Johnson v. Pistakee Highlands Community Ass'n*, 390 N.E.2d 640 (Ill. 1979) (holding that preparation of legal documents by a corporation on its own behalf did not constitute the unauthorized practice of law); *Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n*, 586 P.2d 870 (Wash. 1978) (holding that a corporation may select, prepare or draft legal documents to which it is a party); *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962) (holding that a corporation having a primary interest in a transaction may prepare documents necessary to furtherance and completion of transaction without engaging in unauthorized practice of law). This "*pro se* exception" is founded upon the belief that a corporation may desire to act on its own behalf with respect to its legal rights and obligations without the benefit of counsel.

It's only when a corporation seeks to act on behalf of others in the legal arena that it potentially implicates the elusive concept of the "practice of law." *Cf. In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); *State of South Carolina v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the

practice of law); *In re Duncan*, 83 S.C. 186, 65 S.E. 210, 211 (1909) (practice of law involves “in general, all advice to clients”) (emphases added).

In the present case, the Lender is a party to the loan and is authorized to prepare the legal instruments necessarily involved in the completion of the loan transaction such as the note and mortgage.

(*Condon*, Brief of Petitioner filed Jan. 31, 2002, pp. 6-7.)

The Petitioner’s position in *Condon* also reflected the understanding of the lending industry at the time. The amicus brief filed by the American Financial Services Association contains the following arguments:

Buyers Service is not proper authority to rely upon to prohibit lenders from closing their own real estate transactions. . . . This case [*i.e.*, *Buyers Service*] never considered the propriety of a lender acting on its own behalf in real estate or non-real estate transactions. Many lenders in this State have relied on *Buyers Service* as very properly holding that *non-attorney third parties* cannot be employed to close real estate loans for lenders, particularly in a purchase-money loan transaction where the third party must assist in the transfer of title to the borrower.

This is not the same situation that exists when a consumer seeks a mortgage refinancing or home-equity loan directly from a lender with no third party involvement. . . . Consequently, *Buyers Service* does not provide guidance to the Court and should not be relied upon as somehow elevating all real estate loan transactions to a level which automatically requires attorney involvement, irrespective of the parties involved and the complexity.

Buyers Service does not alter the traditional concept which exists in virtually all business transactions in the United States, namely that absent extraordinary circumstances, entities or individuals may participate directly in such business transactions without attorney involvement as long as the entity or person has a primary interest in the transaction and does not engage non-attorney third parties to provide legal services. *See State v. Pledger*, 127 S.E.2d 337, 339 (N.C. 1962).

(*Condon*, Amicus Brief by the American Financial Services Association pp. 3-4.)

In addition, the South Carolina Bankers Association intervened in *Condon* and filed a brief arguing:

The parties to a mortgage loan refinancing transaction, or any other non-purchase-money mortgage loan transaction for that matter, should be free to

consummate the transaction without being required to hire a lawyer, if they choose to do so, and, under such circumstances, their conduct should not be prohibited as the unauthorized practice of law but should be recognized as falling within the pro se exception to the prohibition on the unauthorized practice of law.

(*Condon*, Brief of Intervenor The South Carolina Bankers Association in Reply to the Briefs of Petitioner John Doe, etc. p. 2.) The brief of the Bankers Association further argued that in *Buyers Service*, “this Court sought to protect the *transferee’s* interest in obtaining good and marketable title to the real estate. In a mortgage refinancing transaction, a home-equity loan or line of credit, or other consumer loan secured by real estate, however, title to the property is not changing hands.” (*Id.* at 3-4, citation omitted.)

Even after the holding in *Condon/McMaster* in 2002 and 2003, the full scope of attorney involvement required for loans secured by real estate was not fully resolved until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), when this Court held for the first time that the disbursement of loan proceeds in conjunction with a credit-line transaction is the practice of law and must be conducted under the supervision of an attorney. In doing so, the Court again recognized that *Buyers Service* and *Condon/McMaster* had not yet fully resolved the issue of what constitutes the unauthorized practice of law with regards to certain real estate-secured loan transactions. See *Richardson*, 371 S.C. at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added); *Id.* (“In [*McMaster*], we *refined* the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in [*Buyers Service*].” (emphasis added)). It was thus not until *Richardson* that this Court ultimately concluded that an attorney was required to close all mortgage loan transactions, including loans for home-equity lines of credit. *Id.*

Given the widely prevailing and reasonable belief, prior to *Condon/McMaster* and *Richardson*, of the limited effect of this Court's holding in *Buyers Service*, it was unfair and unreasonable for the Court of Appeals to hold that Wachovia should have known in 2001 that preparing a mortgage to secure a home-equity line of credit to Dr. Coffey and conducting the closing without an attorney constituted the unauthorized practice of law. The holdings of *Condon/McMaster* and *Richardson* should not be applied retroactively, especially when the result of doing so is to impose a forfeiture on Wachovia for engaging in a practice that was legal in other states and that was generally and justifiably thought to be legal in this state at the time. See *Richardson*, 371 S.C. 14, 636 S.E.2d 866 (delaying for three months the effective date of a decision establishing a new rule defining conduct that constitutes the practice of law).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNAUTHORIZED PRACTICE OF LAW GIVES RISE TO A PRIVATE REMEDY.

In *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), this Court held that there is no private right of action for the unauthorized practice of law, regardless of the theory on which a claim for unauthorized practice might be based. Implicit in the holding of *Linder* is the proposition that the unauthorized practice of law does not give rise to any private rights or remedies, regardless of the form in which the rights or remedies might be asserted.

Furthermore, cases decided in other jurisdictions have held that contracts and conveyances prepared by persons not licensed to practice law are not void. See, e.g., *Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904 (Ind. Ct. App. 1999) (holding that deeds that were the products of the unauthorized practice of law were not void); *Frank v. Moore*, 198 N.E.2d 82 (Ohio. Ct. App. 1963) (holding that the fact that a contract to purchase real property had been prepared by a person not licensed to practice law did not make the contract void); *Wyche v. Works*, 373 S.W.2d 558 (Tex. Ct. App. 1963) (holding that even if a contract for the purchase of

land was prepared by a person not licensed to practice law, the validity of the contract would not be affected); *Gaylor v. Gaylor*, 275 S.W.2d 644 (Ark. 1955) (holding that deeds prepared by a title abstract company were not void). The holding of the Court of Appeals to the effect that Mrs. Coffey was entitled to assert the unauthorized practice of law as an affirmative defense to Wachovia's claims was thus at irreconcilable odds with the well-settled rule stated in *Linder* and cases decided in other jurisdictions.

The Court of Appeals cited *Linder* for the proposition that "Wachovia's legal causes of action are barred as well," *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248, but *Linder* held only that a public insurance-adjusting business was not entitled to compensation for rendering services that constituted the unauthorized practice of law. *Linder* did not hold that the unauthorized practice of law precluded the business from collecting compensation for other services rendered or that the unauthorized practice of law invalidated the contract between the business and its client. *Linder* thus does not support the decision of the Court of Appeals.

In this case, Wachovia has not sought compensation for any conduct constituting the unauthorized practice of law and instead has sought only to recover the money that it lent to Dr. Coffey. *Linder* might bar Wachovia from collecting fees for document preparation and title examination if it had charged such fees because those fees could be construed as compensation for the unauthorized practice of law, but the holding of *Linder* cannot and should not be interpreted, especially retroactively, to invalidate otherwise valid mortgage contracts securing loans. To do so imposes an unjustified forfeiture on lenders and awards an unearned and undeserved windfall to borrowers.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT MRS. COFFEY WAS ENTITLED TO ASSERT UNCLEAN HANDS AS A DEFENSE TO WACHOVIA'S CLAIMS.

"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." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (citing *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)). "[P]rejudice to the defendant is a necessary element of the 'unclean hands' defense" *Wilson v. Landstrom*, 281 S.C. 260, 267, 315 S.E.2d 130, 134 (Ct. App. 1984). A defendant asserting the defense of unclean hands must thus prove (1) that the plaintiff acted unfairly in a matter that is the subject of the litigation, (2) to the prejudice of the defendant. Both elements of the defense are missing in this case, and the Master erred in concluding that Wachovia was guilty of unclean hands.

Wachovia did not act unfairly in making the loan to Dr. Coffey. If anyone acted unfairly, it was Dr. Coffey, who represented that he could give Wachovia a mortgage lien on his home to secure the loan when in fact he had previously conveyed the home to his wife.⁵ After the loan was made, Dr. Coffey had what he wanted and expected to receive—the money to purchase a sailboat, which Dr. and Mrs. Coffey used with their family for approximately four years; but Wachovia did not have what it wanted and expected to receive—a valid mortgage lien on Dr. Coffey's home. Moreover, Mrs. Coffey has *benefited from* Wachovia's conduct. If Dr. Coffey had not borrowed the funds to purchase the boat, then he would have presumably used the couple's savings or other assets. In this instance, Mrs. Coffey got the full benefit of Wachovia's loan, *and* tax deductions for the interest paid, *and* full title to the boat, *and* the proceeds from selling it, *all* without having to repay Wachovia.

⁵ An unsecured loan most likely would have carried a higher rate of interest and the interest payments on a loan not secured by the borrower's principal residence would not have been deductible on Dr. Coffey's federal and state income tax returns.

Furthermore, before a party to litigation can be found guilty of unclean hands, it must be proven that the party had actual notice, and not just constructive notice, that its conduct was improper. *See Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) (holding that where parties had only constructive notice rather than actual notice of restrictive covenants, their violation of the restrictive covenants did not constitute unclean hands). As previously discussed, Wachovia was not on notice when it made the loan to Dr. Coffey that preparing a mortgage to secure the a home-equity loan or closing that type of loan constituted the unauthorized practice of law. Wachovia relied on the prevailing understanding of the law at the time, and Wachovia thus did not act unfairly merely by preparing the mortgage and having it executed.

Contrary to the opinion of the Court of Appeals, Mrs. Coffey was not prejudiced by Wachovia's preparation of the mortgage her husband signed. The recording of the mortgage had no effect on Mrs. Coffey's title to the property described in the mortgage because Mrs. Coffey, rather than Dr. Coffey, was the record owner of the property when Dr. Coffey executed the mortgage. Consequently, the mortgage was not in the chain of title and did not affect Mrs. Coffey's title to the property. *See Liberty Loan Corp. v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (holding that a mortgage from a former owner that was not properly recorded until after the former owner no longer owned the mortgaged property was not in the chain of title and did not constitute a lien against the property).

Mrs. Coffey was also not prejudiced by having to defend Wachovia's claims against her because being required to defend claims does not constitute legal prejudice. For example, "[a] party opposing [a] motion for voluntary nonsuit without prejudice must show prejudice (i.e., 'legal' prejudice) to successfully defeat the motion. That prejudice is not merely the possibility

of defending another suit.” *Walker v. Jones*, 269 S.C. 19, 21, 235 S.E.2d 810, 810-811 (1977) (internal citations omitted). Similarly, a defendant does not suffer legal prejudice as the result of an amendment to a complaint even though the amendment will require the defendant to file additional pleadings, engage in additional discovery, and incur additional costs. *Forrester v. Smith & Steele Bldrs., Inc.*, 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988).

Moreover, Mrs. Coffey was not entitled to assert the defense of unclean hands because she was not a party to the loan transaction on which she based the defense. “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). To avoid this limitation, the Court of Appeals asserted, “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,” and cited *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), to support the assertion. *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248.

In so stating, the Court of Appeals misconstrued *Buyers Service* because *Buyers Service* did not address or decide the issue of who is prejudiced by the unauthorized practice of law. Instead, *Buyers Service* merely explained that the prohibition on the unauthorized practice of law exists not to protect the legal profession but instead to protect the public. A similar statement could be made with respect to most licensing and regulatory schemes. *Buyers Service* does not support the conclusion that each and every member of the public is a person prejudiced by unauthorized practice of law occurring in a private transaction involving only two parties. Indeed, to extend the right to assert remedies beyond the parties to a transaction would raise serious issues of standing.

Mrs. Coffey was also not entitled to assert the doctrine of unclean hands for the additional reason that she did not plead the doctrine as an affirmative defense. Rule 8(c), SCRPC, requires party pleading defenses to set forth affirmatively any “matter constituting an avoidance or affirmative defense,” and Mrs. Coffey implicitly admitted in the brief she filed with the Court of Appeals that she did not plead “unclean hands” in her Answer. (Brief of Respondent pp. 9-10.) Consequently, it was not necessary for Wachovia to include the Answer in the Record on Appeal.

The Court of Appeals held that the issue of whether Mrs. Coffey had waived the defense of unclean hands was not preserved for appeal because the Master did not address the issue when he ruled that Wachovia had unclean hands and Wachovia failed to file a motion to alter or amend pursuant to Rule 59(e), SCRPC. In a memorandum filed with the circuit court, however, Wachovia expressly asserted that “Defendants are barred from raising the affirmative defense of unclean hands because they failed to raise it in their Answer, Counterclaims and Affirmative Defenses filed August 15, 2006.” (R. p. 77.) Although the Master did not specifically address Mrs. Coffey’s failure to plead the unclean hands defense in his order, the Master did grant judgment for Mrs. Coffey on this defense, thus implicitly ruling on the issue. A Rule 59(e) motion is not necessary to preserve an issue for appeal when the trial court has implicitly ruled on the issue. *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (holding that an appellant did not need to file a Rule 59(e) motion where the trial court “implicitly denied” the appellant’s claims by adopting a particular analysis proposed by the other side); *Pryor v. Northwest Apts., Ltd.*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App. 1996) (holding that where a tenant’s pleadings clearly asserted that the Residential Landlord Tenant Act (the “RLTA”) was applicable to a case and imposed on a landlord a particular duty to warn of

dangerous conditions, and where the trial court found that a landlord had no duty to warn of such conditions on the property, there was no need for a tenant to file a Rule 59(e) motion as to whether the RLTA applied because the court had “implicitly ruled on and rejected [the tenant’s] argument”).

Finally, the decision of the Court of Appeals had the effect of imposing a forfeiture on Wachovia, which is contrary to principles of equity. “Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.” *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) (quoting *Bangert v. Lumber Co.*, 169 N.C. 628, 630, 86 S.E. 516, 517 (1915)). In this case, both the Court of Appeals and the Master expressed reservations about the conduct of Mrs. Coffey, and the Master acknowledged that “there is some perception of unfairness to Wachovia.” (R. p. 12.) Despite these reservations, both the Court of Appeals and the Master permitted Mrs. Coffey to invoke an equitable principle—the clean hands doctrine—to achieve a clearly inequitable result—a forfeiture imposed on Wachovia and an unearned windfall to Mrs. Coffey. The Court of Appeals and the Master should not have permitted such a gross misuse of an equitable doctrine, and thus the holding of the Court of Appeals should be reversed or applied prospectively only.

IV. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE HOLDING OF THE COURT OF APPEALS IN A PRIOR CASE TO THE EFFECT THAT A TRIAL COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER THE UNAUTHORIZED PRACTICE OF LAW HAS OCCURRED IN ANY GIVEN CASE.

The Court of Appeals and the trial court held that Wachovia had unclean hands because “Wachovia’s employees processed the home-equity loan to Dr. Coffey without the supervision of an attorney.” (*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248; R. pp. 12-13.) The Court of Appeals had previously ruled, however, in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), that “[o]nly our supreme court has the constitutional duty to determine what

acts constitute the unauthorized practice of law.” *Id.* at 124-125, 634 S.E.2d at 8-9. The Court of Appeals then proceeded to hold in *Hambrick* that a circuit court lacks jurisdiction to determine whether a party engaged in the unauthorized practice of law. *Id.* at 125, 634 S.E.2d at 9.

The Court of Appeals further held in *Hambrick* that the fact that “actions attributed to [a party] have already been deemed the unauthorized practice of law by prior case law” is of no consequence. *Id.* at 124, 634 S.E.2d at 8. According to *Hambrick*, the circuit court would still lack jurisdiction to determine whether the conduct in question constituted the unauthorized practice of law.

The trial judge stated, “While this Court recognizes that no private right of action exists from the unauthorized practice of law, it can, however, be the basis for ‘unclean hands,’ and I so find.” (R. p. 13.) The conclusion that Wachovia had unclean hands thus rests squarely on the trial court’s determination that Wachovia had engaged in the unauthorized practice of law, and the trial court simply did not have jurisdiction to make such a determination.

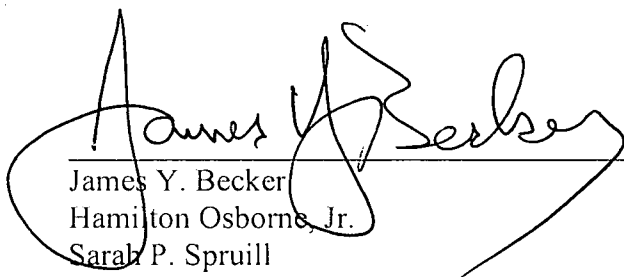
“The question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be waived or conferred by consent.” *Gnoc Corp. v. Estate of Rhyne*, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (citing *Petroleum Transp., Inc. v. Public Service Comm’n*, 255 S.C. 419, 179 S.E.2d 326 (1971)); see also *Normandy Corp. v. South Carolina Dep’t of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009) (“Issues involving subject matter jurisdiction may be raised at any time, including on appeal.”) (citing *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007)).

The holding of the Court of Appeals in this case cannot be reconciled with the holding of the Court of Appeals in *Hambrick*. The holding in *Coffey* should thus be rejected or applied prospectively only.

CONCLUSION

For the foregoing reasons, Wachovia thus respectfully submits that this Court should issue a writ of certiorari to review the decision of the Court of Appeals in this case and that the decision of the Court of Appeals should be reversed or applied prospectively only as explained herein.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "James Y. Becker". The signature is written over a horizontal line.

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February 8, 2011

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

FEB - 8 2011

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

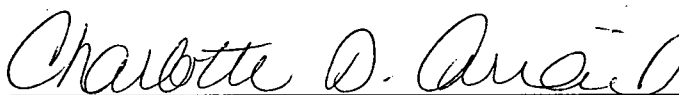
I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Petition to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

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APR 15 2011

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master In Equity

Case Number 2006-CP-07-1655

WACHOVIA BANK, N. A.,.....Petitioner,

vs.

ANNE T. COFFEY AND BANK OF AMERICA, N. A.,.....Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Ann T. Coffey (hereinafter, "Coffey") files her Return to the Second Amended Petition for Writ of Certiorari of Wachovia Bank, N.A. (hereinafter, "Wachovia"), pursuant to Rule 242(f), SCACR.

As an initial matter, pursuant to Rule 242(b) SCACR, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons." These conditions are identified in the Rule as 1) where there are novel questions of law; 2) where there is a dissent in the decision of the Court of Appeals; 3) where the decision of the Court of Appeals is in conflict with a prior decision of

the Supreme Court; 4) where substantial constitutional issues are directly involved; and 5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Wachovia's petition fails to meet any of the above criteria. The Supreme Court has already upheld the decision of the Court of Appeals in this matter by virtue of *Matrix Financial Services Corp. v. Frazer*, Op. 26859, August 16, 2010, (SCSC) and accordingly, there are no novel questions of law to decide and the Court of Appeals decision does not conflict with a prior decision of the Supreme Court, criteria 1 and 3. The decision of the Court of Appeals was unanimous, which eliminates criteria number 2. There are no constitutional issues to be decided and this is not a federal question of law, eliminating criteria 4 and 5. Accordingly, Wachovia's petition fails to meet any of the criteria set forth in Rule 242(b) to be considered by this Court.

REPLY TO WACHOVIA'S ARGUMENT 1

THE VERY ACTS UNDERTAKEN BY WACHOVIA IN THIS CASE WERE DECLARED TO CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW IN 1987.

In *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (S.C. 1987), the Supreme Court, in unequivocal language, declared the following actions, when undertaken by lay persons, to constitute the unauthorized practice of law:

1. The preparation of the preparation of deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property.
2. Conducting real estate and mortgage loan closings.
3. Recording instruments in the public records.

Wachovia argues that the Supreme Court's decision in *State v. Buyer's Service Co., Inc., supra.*, "... held only that a commercial title company had unlawfully engaged in the

unauthorized practice of law by performing, for a fee, various functions constituting the unauthorized practice of law”¹ *State v. Buyer’s Service Co., Inc., supra.*, contains no such limitation.² The language of the Supreme Court is:

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.* (emphasis supplied)

There is no limitation of the holding in *State v. Buyer’s Service Co., Inc., supra.*, to a commercial title company. Rather, the holding of the case applies to all lay persons, which would include the employees of Wachovia who prepared the note, mortgage and other documents at issue in this case, conducted the closing and recorded the documents.³

Wachovia argues that the Supreme Court “. . . did not address whether a lender may lawfully prepare documents for a non-purchase money mortgage loan that does not involve a transfer of title until *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002), *withdrawn and reissued as Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), which was **two years after** Wachovia mad the loan to Dr. Coffey in 2001.”⁴

However, what the Supreme Court actually held in *Doe v. McMaster, supra.*, was

¹ See: Second Amended Petition for Writ of Certiorari, p. 9.

² Wachovia never made these arguments related to lack of notice to the Trial Court, and did not argue it in its or Oral Arguments before the Brief to the Court of Appeals. Wachovia did raise it in the Petition for Rehearing to the Court of Appeals, that is the first time it was raised, and thus, the error has not been properly preserved. Rule 242(d), SCACR.

³ In fact, the preparation of legal instruments by lay persons was declared to constitute the unauthorized practice of law in 1909. See: *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (S.C. 1909). As is the case in *State v. Buyer’s Service Co., Inc., supra.*, the proscription applies to all non-lawyers, without regard to by whom or by what entity the lay person may be employed.

⁴ See: Second Amended Petition for Writ of Certiorari, p. 9, emphasis in the original.

that there was no distinction between a closing involving a purchase money mortgage, and a closing involving a non-purchase money mortgage. The language of the Supreme Court could not be more clear on this point:

Initially, Doe suggests the present case is different from *Buyers Service* because the buyer and Lender are attempting to refinance an existing mortgage and not to purchase new property. This distinction is without significance.

In refinancing a real estate mortgage the four steps in the initial purchase situations still exist. A title examination is conducted to determine the current status of the title and any new encumbrances; new loan documents and instruments must be crafted to ensure buyer obtains funds to pay off an existing mortgage and Lender receives a mortgage to protect its interest; buyer and Lender must close on the loan; and the settlement of the old mortgage and recordation of the new mortgage must be perfected. In sum, refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law.

Wachovia's argument that it was not on notice that its preparation of the note and mortgage and conducting the real estate transaction until *Doe v. Condon, supra.*, and *Doe v. McMaster, supra.*, is without merit.

Wachovia next argues that it was not on notice that the disbursement of loan proceeds in conjunction with a residential refinancing or credit line transaction constituted the practice of law until the Supreme Court's decision in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (S.C. 2006). In *Doe Law Firm v. Richardson, supra.*, the Supreme Court did hold that the disbursement of funds in the context of a real estate loan closing constituted the practice of law, but also said that this was a "new rule".

Nonetheless, in *Doe Law Firm v. Richardson, supra.*, the Supreme Court reiterated that the preparation of loan documents, conducting a mortgage loan closing and recording documents are the practice of law, and nothing in the language of *Doe Law Firm v.*

Richardson, supra., suggests that there was any “new rule” regarding these acts.

Wachovia’s argument that a lack of clarity existed as to what did and did not constitute the unauthorized practice of law after *State v. Buyer’s Service Co., Inc., supra.*, is undone by the language of the subsequent cases Wachovia relies on.

For example, in *Doe v. McMaster, supra.*, the following appears:

In *Buyers Service* we specifically held the preparation of real estate instruments by lay persons constituted the unauthorized practice of law. See *Buyers Service*, 292 S.C. at 430-31, 357 S.E.2d at 17-18.

And, in *Doe v. Condon, supra.*, the following appears:

In *McMaster* and *Buyers Service* the Court identified four steps in a residential real estate closing that involve the practice of law.

1) *Title Search*

The title search and preparation of title documents for the lender and subsequent preparation of related documents is the practice of law which must be performed or supervised by an attorney.

2) *Loan Documents*

A lender may prepare legal documents for use in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any corrections necessary “to ensure their compliance with law.”

3) *Closing*

Real estate closings and mortgage loan closings should be conducted only under an attorney’s supervision. The supervising attorney may represent both the lender and the borrower after full disclosure and with each party’s consent.

4) *Recordation of Documents*

The recording of documents is the “final phase” of the real estate loan process and must be done under the supervision of an attorney.

The notion that the Supreme Court left any doubt that doing these things by lay persons constituted the unauthorized practice of law with its decision in *State v. Buyer’s Service Co., Inc., supra.*, is simply without any support.⁵ The plain language in *State v.*

⁵ Wachovia’s reliance of cases from other jurisdictions, briefs of the Petitioner in *Condon v. Doe, supra.*, the amicus brief in *State v. Buyer’s Service, supra.*, the unadopted proposed rules of the “Unauthorized Practice of Law Committee”, and Wachovia’s speculation about what “most members of the Bar” believed flies in the face of the of the plain language of these cases, and is no basis upon which to grant

Buyer's Service Co., Inc., supra., and the subsequent cases of *Doe v. Condon, supra.*, *Doe v. McMaster, supra.*, and *Doe Law Firm v. Richardson, supra.*, is clear and applies to the very actions of Wachovia in this case.

Wachovia's first argument sets out no ground sufficient for this Court to grant its Petition under the requirements of Rule 242(b), SCACR, and Coffey urges this Court to dismiss the same.

REPLY TO WACHOVIA'S ARGUMENTS II, III AND IV

THE HOLDINGS OF THE COURT OF APPEALS WITH RESPECT TO:

1. WACHOVIA'S ACTS CONSTITUTING THE UNAUTHORIZED PRACTICE OF LAW;
 2. COFFEY'S ABILITY TO ASSERT WACHOVIA'S UNAUTHORIZED PRACTICE OF LAW AS A DEFENSE; AND,
 3. WACHOVIA'S UNAUTHORIZED PRACTICE OF LAW ESTABLISHING COFFEY'S UNCLEAN HANDS DEFENSE,
- WERE ADDRESSED AND APPROVED BY THE SOUTH CAROLINA SUPREME COURT IN *MATRIX FINANCIAL SERVICES CORP. V. FRAZER*.

In *Matrix Financial Services Corp. v. Frazer*, Op. 26859, August 16, 2010, (SCSC), the South Carolina Supreme Court adopted and approved the holding of the Court of Appeals with the following language:

In *Wachovia Bank v. Coffey*, Op. No. 4685, 2010, WL 1904876 (S.C.Ct.App. May 6, 2010), Wachovia close a home equity loan without the supervision of an attorney. The 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 not only to 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

the Petition in this case. Further, these arguments were not made to the Court of Appeals and are thus not properly made to this Court. Rule 242(d)(2), SCACR, limits arguments in a Petition for Writ of Certiorari to: "Only those questions raised in the Court of Appeals and in the petition for rehearing. . ."

of the legal profession. Rather, it is for the protection of the public from potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, at *3 (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15,18 (1987)).

...

... 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.

Accordingly, the arguments of Wachovia notwithstanding, the last word from the South Carolina Supreme Court directly and specifically addressed the Court of Appeals' ruling in this case found the same to be in keeping with the law of South Carolina, and found the same to be part of the foundation for its own ruling in *Matrix Financial Services Corp. v. Frazer, supra*.⁶

Arguments II, III and IV of Wachovia set out no ground sufficient for this Court to grant its Petition under the requirements of Rule 242(b), SCACR, and Coffey urges this Court to dismiss the same.

Finally, Wachovia's complete and utter mishandling of the loan transaction with Dr. Coffey, whereby Wachovia placed an encumbrance upon real property without the owner's consent is exactly the reason that lay persons cannot and should not prepare legal

⁶ In its Arguments II, III and IV, Wachovia attempts to blame Coffey for the predicament it finds itself in. Wachovia's search for the party to blame should take it no further than the closest mirror. Wachovia's problems arise solely from Wachovia's unauthorized practice law, and its own incompetence in its handling of this transaction. In this case, the relief Wachovia seeks is collection of a note and foreclosure of a mortgage of real property. In the underlying transaction Wachovia loaned money to Michael Coffey for the purpose of financing the purchase of a boat by Michael Coffey. Wachovia, through its own employees, and with no participation by or communication with Anne T. Coffey, "secured" the loan by having Michael Coffey execute a mortgage of real property that Michael Coffey did not own, and the record does not reflect that Wachovia made any effort to secure a lien on the boat that Michael Coffey purchased and could easily have granted an valid lien on. Thus, Wachovia, and Wachovia alone, is the author of its own misery.

documents which affect rights and title to property. Not only did Wachovia violate the law, but the complete ineptness with which they handled the matter is the very reason for the rules so wisely codified by the Legislature and enforced by the Courts.

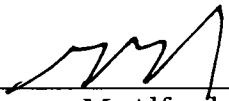
CONCLUSION

For the foregoing reasons Anne T. Coffey respectfully requests that the Supreme Court dismiss the Petition for a Writ of Certiorari of Wachovia Bank, N. A.

Respectfully Submitted:

ALFORD, WILKINS & COLTRANE, L. L. C.

By: _____


Gregory M. Alford
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for Anne T. Coffey

Hilton Head Island, South Carolina

This 11th Day of April, 2010.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 15 2011

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, Gregory M. Alford, Attorney for Respondent Ann T. Coffey, do hereby certify that on April 11, 2011, I served the following:

- 1) Respondent's Return to Petition for Writ of Certiorari

by depositing a copy of the document in the United States mail, with postage prepaid, at Hilton Head Island, South Carolina, addressed as follows:

James Y. Becker
R. David Proffitt
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

Steven R. Anderson
P.O. Box 12188
Columbia, SC 29211-2188

April 11, 2011



Gregory M. Alford
Curtis L. Coltrane
Alford, Wilkins & Coltrane, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY - 2 2011

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

Petitioner Wachovia Bank, N.A. ("Wachovia") submits this Reply in response to the Return of Respondent Ann T. Coffey ("Mrs. Coffey"). In her Return, Mrs. Coffey seeks to create the impression that the decision of the Court of Appeals in this case is entirely consistent with the prior law of this state and that the decision is thus in no way novel or in conflict with prior decisions of this Court. As Wachovia will demonstrate herein, however, the decision of the Court of Appeals constitutes a radical departure from the prior law of this state.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NOVEL QUESTIONS OF LAW AND IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

A. The decision of the Court of Appeals conflicts with prior rulings that circuit courts do not have jurisdiction to determine whether the unauthorized practice of law had occurred.

Prior to the decision of the Court of Appeals in this case, the Court of Appeals had held that “[o]nly our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law.” *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-25, 634 S.E.2d 5, 8-9 (Ct. App. 2006). The Court of Appeals based this holding on *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 209 S.C. 304, 422 S.E.2d 123 (1992), in which this Court stated as follows:

[W]e recognize that other situations will arise which will require this Court to determine whether the conduct at issue involves the unauthorized practice of law. We urge any interested individual who becomes aware of such conduct to bring a declaratory judgment action in this Court’s original jurisdiction to determine the validity of the conduct.

Id. at 307, 422 S.E.2d at 125. By so stating, this Court said, in essence, that only this Court has jurisdiction to determine whether particular conduct constitutes the unauthorized practice of law.

In *Hambrick*, the Court of Appeals further held that the fact that “actions attributed to [a party] have already been deemed the unauthorized practice of law by prior case law” is of no consequence. *Id.* at 124, 634 S.E.2d at 8. According to *Hambrick*, a circuit court simply lacks jurisdiction to determine whether the conduct in question constituted the unauthorized practice of law, regardless of whether this Court has already determined that the type of conduct in question constituted the unauthorized practice of law.

In re Unauthorized Practice Rules and *Hambrick* were the law of South Carolina until the Court of Appeals effectively overruled them by holding in this case that the circuit court properly found that Wachovia had committed the unauthorized practice of law. This Court should address and resolve the obvious conflict between *In re Unauthorized Practice Rules* and *Hambrick* and the decision of the Court of Appeals in this case.

B. Prior to the decision of the Court of Appeals, no private remedy existed for the unauthorized practice of law.

In *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), this Court held that there is no private right of action for the unauthorized practice of law, regardless of the theory on which a claim for unauthorized practice might be based. Implicit in the holding of *Linder* is the proposition that the unauthorized practice of law does not give rise to any private rights or remedies, regardless of the form in which the rights or remedies might be asserted (for example, as an affirmative defense).

Linder was the law of this state until the Court of Appeals held in this case that a private party could assert the unauthorized practice of law as a defense to both equitable and legal claims. This Court should address and resolve the obvious conflict between *Linder* and the decision of the Court of Appeals in this case.

C. Prior to the decision of the Court of Appeals, a stranger to a transaction could not assert “unclean hands” with respect to conduct relating to the transaction.

“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). *Arnold* was the law of this state until the Court of Appeals held that Mrs. Coffey, who was not a party to the loan transaction with Wachovia, could

assert unclean hands as a defense to Wachovia's claim against her. This Court should address and resolve the obvious conflict between *Arnold* and the decision of the Court of Appeals in this case.

D. Prior to the decision of the Court of Appeals, the unauthorized practice of law did not render contracts or conveyances unenforceable.

In *Linder*, this Court held that a public insurance adjuster that had engaged in the unauthorized practice of law in rendering services pursuant to a contract with an insured was nevertheless entitled to compensation for services that did not constitute the unauthorized practice of law. 348 S.C. at 495, 560 S.E.2d at 622. *Linder* thus established the principle that a contract did not become unenforceable *in toto* merely because one of the parties had committed the unauthorized practice of law in conjunction with the contract.

Similarly, cases in other jurisdictions have held that contracts and conveyances prepared by persons not licensed to practice law are not void simply because a party engaged in the unauthorized practice of law. *See, e.g., Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904 (Ind. Ct. App. 1999) (holding that deeds that were the products of the unauthorized practice of law were not void); *Frank v. Moore*, 198 N.E.2d 82 (Ohio. Ct. App. 1963) (holding that the fact that a contract to purchase real property had been prepared by a person not licensed to practice law did not make the contract void); *Wyche v. Works*, 373 S.W.2d 558 (Tex. Ct. App. 1963) (holding that even if a contract for the purchase of land was prepared by a person not licensed to practice law, the validity of the contract would not be affected); *Gaylor v. Gaylor*, 275 S.W.2d 644 (Ark. 1955) (holding that deeds prepared by a title abstract company were not void).

By holding that Wachovia's legal and equitable remedies are barred, the decision of the Court of Appeals effectively invalidated the home equity line of credit agreement evidencing the

loans to Mr. Coffey and the mortgage securing the agreement. The ruling of the Court of Appeals is thus at odds with this Court's decision in *Linder* and with cases decided in other jurisdictions.

II. THE DECISION OF THE COURT OF APPEALS SHOULD NOT BE APPLIED RETROACTIVELY.

Even if this Court affirms the decision of the Court of Appeals, the decision should not be applied retroactively in this case or any other case. As Wachovia has demonstrated in its Second Amended Petition for a Writ of Certiorari, members of the South Carolina Bar and the federal judiciary did not interpret *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), to prohibit a lending institutions from preparing mortgages and other related loan documents for its own use. As Wachovia has further demonstrated, this issue was not addressed and resolved until this Court decided *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002), *withdrawn and reissued as Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). Until *Doe* was decided, lenders could reasonably look to the law of the neighboring state of North Carolina for guidance.

Under the law of North Carolina, a bank may lawfully prepare documents for a loan to be made by the bank without the assistance of an attorney. *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962). As the Supreme Court of North Carolina has explained,

Banks prepare promissory notes, drafts and letters of credit. Many lending institutions prepare deeds of trust and chattel mortgages. Owner-vendors and purchasers of land prepare deeds. Almost all business concerns prepare contracts in one form or another. All such activities are legal and do not violate the [North Carolina] statute [prohibiting the unauthorized practice of law] so long as the actor has a primary interest in the transaction.

Id. at 637 (citations omitted).

Similarly, under North Carolina law, lay employees and agents of a bank do not engage in the unauthorized practice of law by preparing documents for a loan to be made by the bank.

A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute [prohibiting the unauthorized practice of law], for his act in so doing is the act of the corporation in the furtherance of its own business.

Id. at 637-38. Until *Doe* was decided, lenders could reasonably believe that the foregoing statements of the North Carolina Supreme Court might someday be adopted by this Court. See *Matrix Fin. Servs. Corp. v. Frazer*, 2010 S.C. LEXIS 289, at *15 (S.C. Sup. Ct. Aug. 16, 2010) (Pleicones, J., dissenting) (“[T]he Court should acknowledge in fairness and equity, that the law has been evolving in the area of residential real estate closings, and thus many mortgagees may hold mortgages that were closed “unlawfully.”).

Until the decision of the Court of Appeals in this case, lenders had no warning that they could be required to forfeit their right to collect loans made in good faith merely because they failed to understand or predict the decisions of this Court and the Court of Appeals relating to the unauthorized practice of law. To make matters worse, the defense of unclean hands as applied by the Court of Appeals is not subject to any time limitation, and as a result, the holders of mortgage loans can now be required to defend the process by which their loans were closed many years ago, sometimes by lenders that are no longer in business. In many instances, the passage of time will have deprived creditors of the evidence they need to prove that their mortgage loans were properly closed by attorneys. Loan files can be lost or discarded, especially if the original lender has gone out of business, and witnesses can become unavailable or unable to recall important facts for any number of reasons. Consequently, if this Court affirms the decision of the Court of Appeals, it should apply the holding prospectively only. See *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006) (delaying for three months the effective date of a decision establishing a new rule defining conduct that constitutes the practice of law).

III. THE DECISION OF THIS COURT IN *MATRIX FINANCIAL SERVICES CORP. v. FRAZER* SHOULD NOT PREVENT WACHOVIA FROM BEING HEARD.

Mrs. Coffey argues that the decision of this Court in *Matrix Financial Services Corp. v. Frazer*, 2010 S.C. LEXIS 289 (S.C. Sup. Ct. Aug. 16, 2010), in effect resolves all issues in this case adversely to Wachovia. *Matrix* does not, however, control this case for the following reasons:

First, the facts of this case are distinctly different from the facts of *Matrix*. In *Matrix*, the lender had made a mortgage loan in 2001 and had hired a title insurance company to search the title, to prepare the loan documents, and to close the loan, thus doing exactly what this Court had proscribed 14 years earlier in *State v. Buyers Service*. In this case, Wachovia did not hire a title insurance company but instead prepared the loan documents itself.

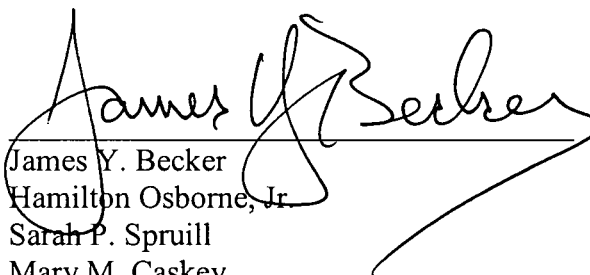
Second, *Matrix* itself is not yet a final decision because a petition for rehearing is still pending.

Finally, Wachovia should not be deprived of an opportunity to present its own arguments on the merits of this case, especially given the wide-ranging ramifications of the decision of the Court of Appeals, which are more fully set forth in the Second Amended Petition for a Writ of Certiorari. See *Matrix*, 2010 S.C. LEXIS 289, at *15 (Pleicones, J., dissenting) (“[T]he impact of a decision holding that equity will not aid a mortgagee when the closing was unlawful will be devastating, undermining lender confidence in an already unstable market, and making title insurance virtually unavailable in South Carolina.”)

CONCLUSION

For the foregoing reasons, Wachovia submits that this Court should issue a writ of certiorari to review the decision of the Court of Appeals in this case and that the decision of the Court of Appeals should be reversed or applied prospectively only as explained herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker", is written over a horizontal line. The signature is fluid and cursive.

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey
Haynsworth Sinkler Boyd, P.A.
1201 Main St., 22nd Floor (29201-3226)
P.O. Box 11889 (29211-1889)
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Tel: (803) 779-3080
Fax: (803) 765-1243
Email: jbecker@hsblawfirm.com

Attorneys for Petitioner Wachovia Bank, N.A.

May 2, 2011

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Reply to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
Alford & Wilkins, P.C.
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500

Fax: (843) 842-8400

Email: gregg@alfordandwilkins.com

Steven R. Anderson, Esquire

Attorney at Law

P.O. Box 12188

Columbia, SC 29211-2188

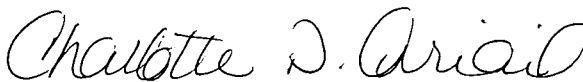
(803) 252-2828

Fax: (803) 254-1935

Email: sraatlaw@bellsouth.net

Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.



Charlotte D. Ariail

Date mailed: May 2, 2011

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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WEBSITE www.hsblawfirm.com

JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

May 2, 2011

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

RECEIVED

MAY - 2 2011

S.C. Supreme Court

Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

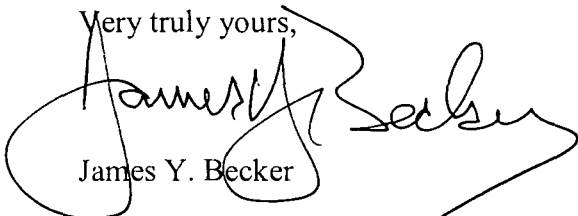
Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter.

Enclosed for filing are an original and seven (7) copies of Petitioner's Reply to Respondent's Return. I would appreciate your filing the original and six (6) copies of the Return and then returning a filed-stamped copy to the bearer of this letter.

With kind regards, I am

Very truly yours,



James Y. Becker

JYB:ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

The Supreme Court of South Carolina

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of
America, N.A.,

Respondents.

The Honorable Marvin Dukes
Beaufort County
Trial Court Case No. 2006-CP-07-1655

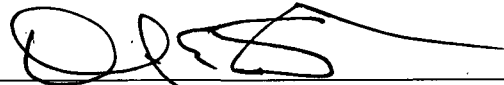
ORDER

For good cause having been shown, the time for serving and filing the
Reply to Return to Petition for Writ of Certiorari in the above entitled matter
is hereby extended until May 2, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 20, 2011

cc: James Y. Becker, Esquire
Hamilton Osborne, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, PA.

ATTORNEYS AND COUNSELORS AT LAW

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MARY M. CASKEY
DIRECT DIAL NUMBER 803.540.7870
EMAIL MCASKEY@hsblawfirm.com

April 19, 2011

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

RE: *Wachovia Bank, N.A. v. Estate of Michael D. Coffey, Ann T. Coffey et al.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

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APR 19 2011

S.C. Supreme Court

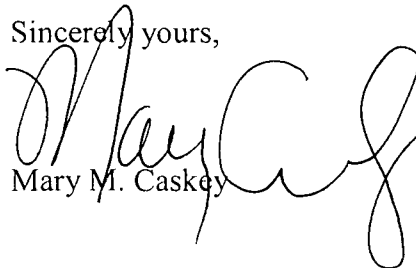
HTD

Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter. Petitioner's Reply to Respondent's Return to the Petition for Writ of Certiorari is currently due on April 21, 2011. Pursuant to Rule 263(b), SCACR, we respectfully request a 10 day extension of time in which to file Petitioner's Reply, making it due on May 2, 2011. Counsel for the Respondent, Gregory M. Alford, has graciously consented to this request.

I am enclosing a check for the filing fee in the amount of \$25.00. Please note service on the Respondent by copy of this letter. In the meantime, we ask that the current deadline for filing the Reply be stayed pending resolution of this request.

Sincerely yours,


Mary M. Caskey

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

Check # 50445
\$25.00

ALFORD, WILKINS & COLTRANE, LLC

Attorneys at Law

18 Executive Park Road, Building 1

P.O. Drawer 8008

Hilton Head Island, SC 29938-8008

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AMANDA C. DuBOSE- PARALEGAL

EMAIL: AMANDA@AWC-LAWFIRM.COM

(NOT FOR CONFIDENTIAL COMMUNICATIONS)

GREGORY M. ALFORD*

JOHN W. WILKINS

CURTIS L. COLTRANE*

MITCHELL J. THORESON

*Also member Georgia Bar

+Also member of Virginia Bar

April 11, 2011

Via U.S. Mail

The Honorable Daniel E. Shearhouse, Clerk

Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211

Re: Wachovia v. Ann T. Coffey et al.
Trial Court Case No. 2006-CP-07-1655
Tracking No.: 2010-174086

Dear Mr. Shearhouse:

Please find enclosed an original and seven (7) copies of the following:

- 1) Respondent's Return to Petition for Writ of Certiorari;
- 2) Proof of Service

Please file these documents as appropriate and return a clocked copy to this office in the enclosed self addressed stamped envelope. Please allow me to thank you for your assistance and attention to this matter. If you have any questions or comments please do not hesitate to call me. With best regards, I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, LLC


Amanda C. DuBose
Paralegal

RECEIVED

APR 15 2011

S.C. SUPREME COURT

pm 4-11-11

Enclosures

Cc: James Y. Becker
R. David Proffitt
Steven R. Anderson

The Supreme Court of South Carolina

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of
America, N.A.,

Respondents.

The Honorable Marvin Dukes
Beaufort County
Trial Court Case No. 2006-CP-07-1655

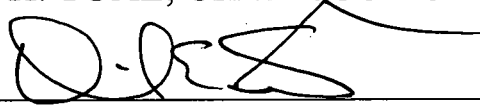
ORDER

For good cause having been shown, the time for serving and filing the Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until April 11, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 4, 2011

cc: James Y. Becker, Esquire
Hamilton Osborne, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI**

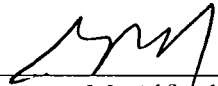
The Respondent respectfully requests a 30 day extension of time to file its Return to Petition for Writ of Certiorari. Respondent's Return to Petition for Writ of Certiorari is currently due March 8, 2011.

Respondent needs this additional time to formulate its arguments against Appellant's new arguments presented in its Petition for Writ of Certiorari. Respondent has attempted to contact counsel for Appellant to obtain his consent, however Respondent has not received a response as of the filing of this Motion.

Respectfully submitted this 15th day of March 1, 2011

RECEIVED

MAR 04 2011



Gregory M. Alford
Curtis L. Coltrane
Alford, Wilkins & Coltrane, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, Gregory M. Alford, Attorney for Respondent Ann T. Coffey, do hereby certify that on March 1, 2011, I served the following:

1) Respondent's Motion for Extension of Time to File Return to Petition for Writ of Certiorari

by depositing a copy of the document in the United States mail, with postage prepaid, at Hilton Head Island, South Carolina, addressed as follows:

James Y. Becker
R. David Proffitt
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

Steven R. Anderson
P.O. Box 12188
Columbia, SC 29211-2188

March 1, 2011



Gregory M. Alford
Curtis L. Coltrane
Alford, Wilkins & Coltrane, LLC
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for Respondent

ALFORD, WILKINS & COLTRANE, LLC

Attorneys at Law

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www.awc-lawfirm.com

AMANDA C. DuBOSE- PARALEGAL
EMAIL: AMANDA@AWC-LAWFIRM.COM

(NOT FOR CONFIDENTIAL COMMUNICATIONS)

GREGORY M. ALFORD*
JOHN W. WILKINS
CURTIS L. COLTRANE*
MITCHELL J. THORESON
*Also member Georgia Bar
*Also member of Virginia Bar

March 1, 2011

Via U.S. Mail

The Honorable Daniel E. Shearhouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Wachovia v. Ann T. Coffey et al.
Trial Court Case No. 2006-CP-07-1655
Tracking No.: 2010-174086

Dear Mr. Shearhouse:

Please find enclosed an original and seven (7) copies of the following:

- 1) Respondent's Motion for an Extension of Time to File Return to Petition;
- 2) Proof of Service

Please file these documents as appropriate and return a clocked copy to this office in the enclosed self addressed stamped envelope.

Also, please be advised that Curtis L. Coltrane of this firm is being added as counsel of record for Respondent.

Please allow me to thank you for your assistance and attention to this matter. If you have any questions or comments please do not hesitate to call me. With best regards, I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, LLC


Amanda C. DuBose
Paralegal

RECEIVED

MAR 04 2011

Enclosures

Cc: James Y. Becker
R. David Proffitt
Steven R. Anderson

S.C. SUPREME COURT

pm 3-1-11

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

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JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

February 8, 2011

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

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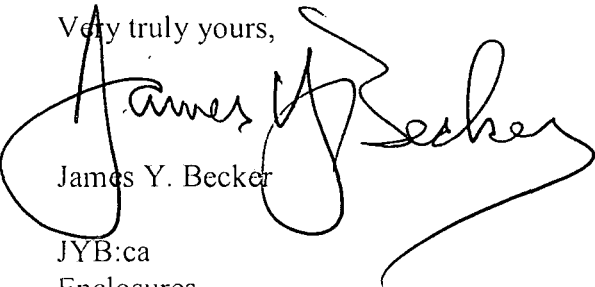
S.C. Supreme Court

Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter. Enclosed for filing are an original and seven (7) copies of Petitioner's Second Amended Petition for a Writ of Certiorari. I would appreciate your filing the original and six (6) copies of the Second Amended Petition and return a file stamped copy to the bearer of this letter.

With kind regards, I am

Very truly yours,



James Y. Becker

JYB:ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

The Supreme Court of South Carolina

Wachovia Bank, N.A., Petitioner,

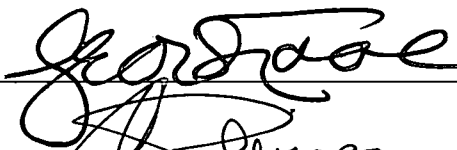
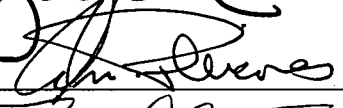
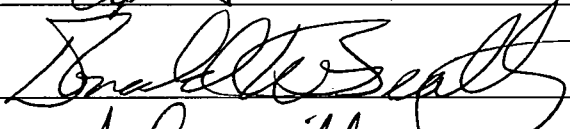
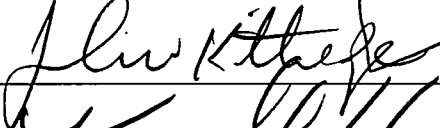
v.

Ann T. Coffey and Bank of
America, N.A., Respondents.

ORDER

Respondents move to strike petitioner's amended petition for a writ of certiorari in this matter. We grant the motion as to petitioner's reference to its reliance on the advice of outside counsel and footnote 1 of the amended petition. The motion is denied as to the remainder of the amended petition without prejudice to respondents' right to argue in their return that petitioner failed to preserve arguments for appellate review.

Petitioner shall, within ten days of the date of this order, serve and file a second amended petition which complies with this order. Respondents shall serve and file their return within thirty days after service of the second amended petition.


C. J.

J.

J.

J.

J.

Columbia, South Carolina

February 2, 2011

cc: James Y. Becker, Esquire
Hamilton Osborne, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

JAN 04 2011

S.C. Supreme Court

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

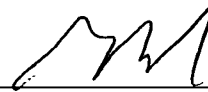
Respondents.

**RESPONDENT'S MOTION TO STRIKE AMENDED PETITION AND/OR
PORTIONS OF AMENDED PETITION FOR WRIT OF CERTIORARI AND
MOTION FOR AN EXTENSION OF TIME TO FILE RETURN**

COMES NOW Respondent, Ann T. Coffey, moving to Strike Appellant's Amended Petition for Writ of Certiorari and/or portions of Appellant's Amended Petition for Writ of Certiorari based on the grounds that Appellant seeks to enter into the Record new arguments and new statistical data never presented previously to either the Circuit Court or Appellate Court. This attempt to introduce new evidence and arguments is in clear violation of Rule 242(d)(1) SCACR and Rule 210(c) and (h) SCACR. To allow Appellant to now, at this late stage of this action, enter new evidence and arguments, would be highly prejudicial to Respondent and completely contradict the South Carolina Appellate Court Rules. Respondent respectfully requests the Court strike the whole Amended Petition or in the

alternative strike those portions of Appellant's Amended Petition for Writ of Certiorari which refer to new information or attempts to present a new argument to the Court.

Respondent Coffey also moves for an extension of time to file a Return to Appellant's Petition. Respondent requests 30 days to file her Return from either the date of this Court's Order on this Motion or from the date of filing of any amended Petition by Appellant.



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent

December 30, 2010
Hilton Head Island, South Carolina.

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master In Equity

Case Number 2006-CP-07-1655

WACHOVIA BANK, N.A.,.....Petitioner,

vs.

ANNET T. COFFEY AND BANK OF AMERICA, N.A.,.....Respondents.

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION
TO STRIKE AND MOTION FOR AN EXTENSION
OF TIME TO FILE RETURN

Respondent Ann T. Coffey (hereinafter, "Coffey") moves to strike the Amended Petition for Writ of Certiorari of Wachovia Bank, N.A. (hereinafter, "Wachovia"), or those portions of it that do not comply with this Court's Order of December 2, 2010, and also for an extension of time to file her Return to the Petition. Coffey's motion is made on the grounds that Wachovia has failed to comply with this Court's Order of December 2, 2010, and Rule 242(d), SCACR, and continues its effort to introduce new evidence and arguments in violation of the Order and the South Carolina Appellate Court Rules.

COFFEY'S MOTION TO STRIKE

On May 6, 2010, the South Carolina Court of Appeals issued its Opinion holding Wachovia was barred from seeking equitable relief from Coffey due to Wachovia's unauthorized practice of law in a loan transaction.¹ Wachovia's Petition for Rehearing was denied. Wachovia filed a Petition for Writ of Certiorari and simultaneously filed a "Motion to Include Exhibits Into the Petition for Writ of Certiorari." Coffey opposed the motion and moved to strike Wachovia's Petition because both included matters that were not in the record. This Court granted Coffey's motion on December 2, 2010. Under the Order, Wachovia was given 10 days to file an Amended Petition which

"... does not make reference to documents or include arguments that were not presented to the lower courts, including opinion letters."²

In its Amended Petition, Wachovia did not remove all references to the opinion letters from Wachovia's former counsel.³ Wachovia also continues to make arguments not previously made, and refer to other documents, in violation of this Court's Order and Rule 242(d), SCACR.⁴

¹ Wachovia's unauthorized practice law led to its problems in more ways than one. In this case, the equitable relief Wachovia seeks is foreclosure of a mortgage of real property. In the underlying transaction Wachovia loaned money to Michael Coffey for the purpose of financing the purchase of a boat by Michael Coffey. Wachovia "secured" the loan by having Michael Coffey execute a mortgage of real property that Michael Coffey did not own, and the record does not reflect that Wachovia made any effort to secure a lien on the boat that Michael Coffey purchased.

² See: Order of the Supreme Court in this case dated December 2, 2010.

³ See: Amended Petition for Writ of Certiorari, p. 19, where Wachovia argues:

Wachovia relied on the advice of outside legal counsel and the prevailing understanding of the law at the time, and Wachovia thus did not act unfairly merely by preparing the mortgage and having it executed. (emphasis added.)

This is a clear and direct violation of this Court's December 2, 2010, Order.

⁴ See: Amended Petition for Writ of Certiorari, pp. 2-3; Footnotes 2 and 3.

The arguments appearing on Page 2 to the top of Page 3 of Wachovia's Petition were not made before the Circuit Court or the Court of Appeals, and there is no evidence in the record to support Wachovia's speculation as to the extent of the unauthorized practice of law in this State.⁵ The entirety of Footnote 1 on Page 2 of Wachovia's Petition is a reference to documents not in the record for this case. The same applies to Footnote 2 on Page 3 of the Petition. By including these arguments and references to documents not in the record, Wachovia has violated the December 2, 2010, Order, and Rule 242(d), SCACR.

The sum total of the arguments presented by Wachovia to either the Circuit Court or the Court of Appeals is as follows:

From Wachovia's Brief to the Court of Appeals:

As for the allegation that Wachovia engaged in the unauthorized practice of law" in connection with the home equity loan, this reasoning is an obvious red herring offered up by Mrs. Coffey and mistakenly endorsed by the trial court. "To protect the public from unsound legal advice and incompetent representation, South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. Doe v. Condon, 431 S.C. 22, 25, 523 S.E.2d 879, 881 (2000); accord In re: Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992) (observing that state Constitution and statutes commit to Supreme Court the duty of regulating the practice of law, and goal of preventing unauthorized practice of law is to protect public from harm). In the case, the only entity harmed by the lack of an attorney is Wachovia. Mrs. Coffey has benefited (*sic*) greatly from Wachovia's mistake, which occurred because Wachovia trusted a long-time respected customer instead of following usual procedures.

In any event, the Supreme Court and Court of Appeals have held that there is no private right of action for the unauthorized practice of law. The proper and exclusive remedy for any claims arising out of the alleged unauthorized practice of law is a declaratory judgment action in the original jurisdiction of the Supreme Court. See Linder v. Ins. Claims Consultants,

⁵ Further, the argument is not an argument on the facts or the law at all, but rather is rank conjecture that any action by the Court than to simply allow these bad acts to stand will lead to disastrous consequences, presumably because the unauthorized practice of law by lending institutions in South Carolina is so pervasive.

Inc., 348 S.C. 477, 560 S.E.2d 612 (2001); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006). The trial court, at Mrs. Coffey's urging, erroneously inserted into this case a concept that has no application.⁶

From Wachovia's Petition for Rehearing to the Court of Appeals:

In its Opinion in this case, the Court stated, "As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney." (Opinion p. 6.) This statement is not accurate.

To support the foregoing statement, this Court cited, among other cases, *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). *Buyers Service* however, held only that a commercial title company had engaged in the unauthorized practice of law by performing various functions constituting the practice of law in the course of closing real estate transactions to which the title company itself was not a party. The issue of whether a lender has a *pro se* right to prepare documents relating to a transaction to which the lender is a party was not addressed or decided until our Supreme Court issued its opinion in *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), and the opinion in *Doe* was published more than two years after Wachovia made the loan to Dr. Coffey. It is thus unfair to apply the holding in *Doe* retroactively to Wachovia for purposes of this case, especially when the issue to be decided is whether Wachovia engaged in conduct that it should have known was improper. See *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006) (delaying for three months the effective date of a decision establishing a new rule defining conduct that constitutes the practice of law).⁷

In its Amended Petition for A Writ of Certiorari, Wachovia reprints the text from its Petition for Rehearing, verbatim.⁸ Beginning with the last paragraph on Page 10 of the Amended Petition for A Writ of Certiorari, however, Wachovia presents a series of arguments and references to documents that were not made to either the Circuit Court or

⁶ See: Wachovia's Brief of Appellant, pp. 24-25. Coffey publishes Wachovia's arguments for the purpose of showing what Wachovia has actually argued to the lower courts, and by doing so Coffey neither endorses the arguments nor waives her right to contest them if and when Wachovia files a Petition for Writ of Certiorari that complies with this Court's Order of December 2, 2010, and Rule 242(d), SCACR.

⁷ See: Wachovia's Petition for Rehearing to the Court of Appeals dated June 4, 2010.

⁸ See: Amended Petition for A Writ of Certiorari, pp. 9-10.

the Court of Appeals.⁹ The appearance of these arguments in the Amended Petition for A Writ of Certiorari is a violation of the Order of December 2, 2010, in which Wachovia was directed to file an Amended Petition which:

“... does not make reference to documents or include arguments that were not presented to the lower courts, including opinion letters.”¹⁰

Because Wachovia has failed to comply with this Court’s Order of December 2, 2010, and Rule 242(d), SCACR, Coffey moves to strike the Petition, or those portions of it that do not comply.

COFFEY’S MOTION FOR AN EXTENSION OF TIME

Because Wachovia failed to comply with this Court’s Order of December 2, 2010, and Rule 242(d), SCACR, Coffey also moves for an extension of time to file her Return to Wachovia’s Petition for A Writ of Certiorari, and requests 30 days to file her Return from either the date of this Court’s Order on her Motion, or from the date of the filing of any amended petition by Wachovia should the same be ordered by the Court.

CONCLUSION

Because Wachovia has violated this Court’s Order of December 2, 2010, the Court should strike its Amended Petition for A Writ of Certiorari. At a minimum, the Court should strike those portions that do not comply with this Court’s Order of December 2, 2010, and Rule 242(d), SCACR. Coffey should also be granted an extension of time to file her Return from either the date of this Court’s Order on her Motion, or from the date of the

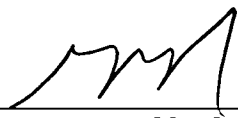
⁹ By way of example, Wachovia quotes proposed and unadopted rules related to the unauthorized practice of law and speculates about what the proposed but unadopted rules mean. *See*: Petition For A Writ of Certiorari, pp, 11-12.

¹⁰ *See*: Order of the Supreme Court in this case dated December 2, 2010.

filing of any amended petition by Wachovia should the same be ordered by the Court.

Respectfully Submitted:

By: _____


Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorneys for Anne T. Coffey

Hilton Head Island, South Carolina

This 30 Day of December, 2010.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, Gregory M. Alford, Attorney for Respondent Ann T. Coffey, do hereby certify that on December 30, 2010, I served the following:

- 1) Respondent's Motion to Strike Amended Petition and/or Portions of Amended Petition for Writ of Certiorari and Motion for Extension of Time to File Return;
- 2) Respondent's Memorandum in Support of Respondent's Motion to Strike and Motion for an Extension of Time;

by depositing a copy of the document in the United States mail, with postage prepaid, at Hilton Head Island, South Carolina, addressed as follows:

James Y. Becker
R. David Proffitt
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

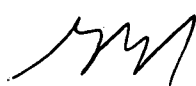
Steven R. Anderson
P.O. Box 12188
Columbia, SC 29211-2188

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JAN 04 2011

S.C. Supreme Court

December 30, 2010



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

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JAN 12 2011

S.C. Supreme Court

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

**PETITIONER'S RETURN TO
RESPONDENT'S MOTION TO STRIKE AMENDED PETITION
AND/OR PORTIONS OF AMENDED PETITION FOR WRIT OF CERTIORARI**

Petitioner Wachovia Bank, N.A. ("Wachovia") submits this Return to Respondent's Motion to Strike Amended Petition and/or Portions of Amended Petition for Writ of Certiorari, dated December 30, 2010. The motion is Respondent's second motion to strike Wachovia's petition.

In her first motion, Respondent Ann T. Coffey ("Coffey") requested only that the Court strike Wachovia's initial petition or the portions of the petition "which refer to new information or exhibits or attempts [sic] to present a new argument to the Court." Coffey failed to specify, however, the particular portions of the petition to which she objected although she did indicate that she objected to Wachovia's reference to certain opinion letters that Wachovia sought to file as exhibits to its petition.

In an order dated December 2, 2010, this Court denied Wachovia's motion to file the opinion letters with its petition and granted Coffey's motion to strike. The order required Wachovia to file a new petition for a writ of certiorari "which does not make reference to documents or include arguments that were not presented to the lower courts, including the opinion letters."

Pursuant to the order, Wachovia filed its Amended Petition on December 7, 2010. Wachovia deleted from the Amended Petition all discussion of the opinion letters that Wachovia had sought to file as exhibits to its initial petition. As Coffey points out, however, Wachovia inadvertently failed to delete one brief reference to the opinion letters in a sentence appearing on page 19 of the Amended Petition. That sentence should read, "Wachovia relied on the prevailing understanding of the law at the time" Wachovia apologizes for failing to revise this sentence and is prepared to correct the mistake in whatever manner this Court might specify.

Coffey complains that Wachovia's Amended Petition contains arguments that Wachovia did not make to the circuit court or to the Court of Appeals. This complaint has no merit. The South Carolina Appellate Court Rules do not prohibit new arguments from being made in a petition for a writ of certiorari. Instead, the Appellate Court Rules merely prohibit the raising of new *questions* that were not presented to the Court of Appeals. Rule 242(d)(2), SCACR, on which Coffey relies, states as follows:

Only those *questions* raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a *question* presented to the Supreme Court. A *question* presented will be deemed to include every subsidiary *question* fairly comprised therein.

(Emphasis added.) As Wachovia will demonstrate, every question that Wachovia has raised in its Amended Petition to this Court was previously raised to the Court of Appeals in Wachovia's briefs or in its Petition for Rehearing.

- In Part I of its Amended Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law. (Amended Petition p. 9.) In Part III of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “Wachovia was not on notice when it made the loan to Dr. Coffey that preparing a mortgage to secure the loan constituted the unauthorized practice of law.” (Petition for Rehearing p. 5.)

- In Part II of its Amended Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that the unauthorized practice of law gives rise to a private remedy. (Amended Petition p. 17.) In Part II of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “The unauthorized practice of law does not create private rights or remedies, and it does not render contracts or conveyances invalid.” (Petition for Rehearing p. 3.) In its Brief to the Court of Appeals, Wachovia had earlier argued that “there is no private right of action for the unauthorized practice of law.” (Brief of Appellant p. 25.)

- In Part III of its Amended Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that Mrs. Coffey was entitled to assert unclean hands as a defense to Wachovia’s claims. (Amended Petition p. 18.) In Part IV of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “Mrs. Coffey was not entitled to assert unclean hands as a defense to Wachovia’s claims.” (Petition for Rehearing p. 6.) In its Brief to the Court of Appeals, Wachovia had earlier argued, “The equitable doctrine of unclean hands has no application under the facts and circumstances of this case and does not prevent the award of equitable relief to Wachovia.” (Brief of Appellant p. 20.)

- In Part IV of its Amended Petition to this Court, Wachovia argues that the holding of the Court of Appeals in this case conflicts with the holding of the Court of Appeals in a prior

case to the effect that a trial court does not have jurisdiction to determine whether the unauthorized practice of law has occurred in any given case. (Amended Petition p. 23.) In Part I of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “The circuit court lacked jurisdiction to determine whether Wachovia had engaged in the unauthorized practice of law.” (Petition for Rehearing p. 2.)

Having preserved the foregoing questions for review by this Court, Wachovia is now entitled to present whatever arguments it deems appropriate to support its positions with respect to the questions. Wachovia is not limited to arguments it previously made. Rule 242(d)(2), SCACR.

Coffey also complains that in footnote 1 to its Amended Petition, Wachovia has cited a report published by the Federal Reserve System, data published by the Securities Industry and Financial Markets Association, and two articles published in the *Wall Street Journal*. Courts not infrequently cite such sources as support for their opinions, and this Court is free to accept or reject the cited materials as it deems appropriate. The mere citation of the materials in a footnote is not a sufficient basis for granting Coffey’s motion to strike.

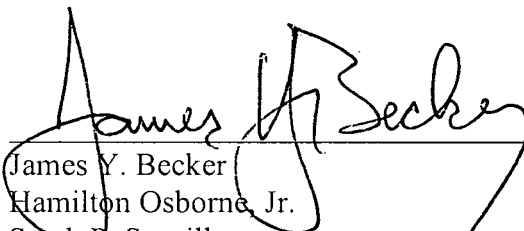
Coffey also complains about footnote 2 to Wachovia’s Amended Petition, but that footnote contains no citation to documents or other materials not in the record. It merely contains a subsidiary argument that this Court is free to accept or reject as it deems appropriate.

All portions of the Amended Petition about which Coffey now complains appeared in Wachovia’s initial petition to this Court, but Coffey failed to particularize her complaints in her motion to strike the initial petition. She should not be permitted to raise new objections in successive motions to strike essentially the same petition, especially when her objections are so patently without merit.

CONCLUSION

For the foregoing reasons, Coffey's motion to strike the Amended Complaint should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker", is written over a horizontal line. The signature is stylized with a large, looping initial "J" and a prominent "B".

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey
Haynsworth Sinkler Boyd, P.A.
1201 Main St., 22nd Floor (29201-3226)
P.O. Box 11889 (29211-1889)
Columbia, S.C.
Tel: (803) 779-3080
Fax: (803) 765-1243
Email: jbecker@hsblawfirm.com

Attorneys for Petitioner Wachovia Bank, N.A.

January 12, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

The Honorable Marvin H. Dukes, III, Master-in-Equity

JAN 12 2011

S.C. Supreme Court

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Petitioner

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Petitioner's Return to Respondent's Motion to Strike Amended Petition and/or Portions of Amended Petition for Writ of Certiorari to be served on Respondent on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
Alford & Wilkins, P.C.
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Fax: (843) 842-8400
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Steven R. Anderson, Esquire
Attorney at Law
P.O. Box 12188
Columbia, SC 29211-2188
(803) 252-2828
Fax: (803) 254-1935
Email: sraatlaw@bellsouth.net

Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.



Charlotte Ariail

Date mailed: January 12, 2011

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

DEC - 7 2010

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

AMENDED PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioner Wachovia Bank, N.A. ("Wachovia") petitions this Court for a writ of certiorari to review the opinion of the South Carolina Court of Appeals in this case (Op. No. 4685 filed May 6, 2010) holding that Wachovia is barred by the doctrine of unclean hands from seeking equitable or legal relief to collect an unpaid mortgage loan from Respondent Ann T. Coffey ("Mrs. Coffey") or any other party as a consequence of its unauthorized practice of law in providing a home equity line of credit to Mrs. Coffey's late husband, Michael D. Coffey ("Dr. Coffey") in 2001.

As Wachovia will demonstrate herein, the decision of the Court of Appeals holds Wachovia to a standard of conduct that was not at all clearly established by this Court until years after Wachovia had made the loan to Dr. Coffey. This Court did not hold that an attorney must be involved in preparing loan documents and closing the loan for the type of loan Wachovia

made to Dr. Coffey until 2006, which was five years after the loan was made in 2001. Wachovia has thus been required to suffer a significant forfeiture for failing to anticipate how the law would evolve *after* the loan was made.

Unless this Court modifies or reverses the decision of the Court of Appeals, virtually every mortgage foreclosure action in South Carolina will become mired in disputes over whether and to what degree an attorney licensed in South Carolina performed or directly supervised numerous aspects of the loan transaction. In addition, hundreds, if not thousands, of outstanding mortgage loans in this state, obtained by lenders acting in good faith in reliance upon this Court's unauthorized practice of law jurisprudence, may be invalidated. The losses stemming from such a wholesale invalidation of mortgage loans will be borne in many cases not by the party that originated the loans but by the subsequent owners of the loans, which in many instances include both public and private pension funds and federal and state agencies.¹ The cost of a remedy

¹ According to the Federal Reserve, there were over \$10 trillion dollars in outstanding residential mortgage debt as of September 2010, and Fannie Mae, Freddie Mac, and other government agencies own almost half of all outstanding residential mortgage debt in the United States. Federal Reserve Statistical Release, *Mortgage Debt Outstanding* (Sept. 2010), available at <http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm>; Nick Timiraos, et al, *Mortgage Damage Spreads*, Wall. St. J., Oct. 16, 2010 (including chart analyzing mortgage debt outstanding and percent of loans past due); Nick Timiraos, *Fannie, Freddie Elicit Grim Forecast*, Wall. St. J., Oct. 22, 2010 ("Fannie and Freddie own or guarantee about half of the nation's 10.6 trillion in [residential] mortgages."). Additionally, the majority of residential mortgages are held by securitization trusts, and as of September 2010, there were almost \$9 trillion dollars of outstanding mortgage related securities. See Securities Industry and Financial Markets Assoc., *US Mortgage-Related Securities Outstanding*, available at <http://www.sifma.org/research/research.aspx?ID=10806>; Adam J. Levitin, *The Flaws in the FHA Housing Bill*, Wall. St. J., July 11, 2008. Almost half of the outstanding securitized mortgages are insured or guaranteed by Fannie Mae, Freddie Mac, or other government agencies. See Federal Reserve Statistical Release, *Mortgage Debt Outstanding* (Sept. 2010).

supposedly intended to protect the public at large may thus be imposed on innocent investors and U.S. taxpayers.²

CERTIFICATION BY COUNSEL

The undersigned counsel for Wachovia certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals in this case.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law and that Wachovia thus had unclean hands?

2. Did the Court of Appeals err in holding that Wachovia's equitable and legal causes of action were barred?

3. Does the holding of the Court of Appeals in this case conflict with the holding of the Court of Appeals in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), which was based on the decision of this Court in *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), to the effect that a trial court does not have jurisdiction to determine whether the unauthorized practice of law has occurred in any given case?

STATEMENT OF THE CASE

Wachovia filed this action on June 30, 2006, to collect the balance due on a home-equity line of credit in the principal amount of \$125,000 that Wachovia had made on July 23, 2001, to Dr. Coffey, Mrs. Coffey's late husband. (R. pp. 15-26.) In its First Amended Complaint, Wachovia asserted six causes of action against Mrs. Coffey for (1) mortgage foreclosure; (2)

² There could also be other unintended consequences if the Court of Appeal's decision is not modified or reversed. For example, the sweeping invalidation of mortgages raises questions of the validity of tax deductions taken by borrowers on mortgages that may be invalidated under the opinion in *Coffey*. Many borrowers would likely be forced to amend and re-file their tax returns to remove the mortgage interest tax deduction, resulting in the payment of unexpected back taxes and penalties.

ratification of a mortgage; (3) unjust enrichment; (4) equitable lien; (5) equitable mortgage; and (6) prejudgment interest. (R. pp. 57-72.)

Summary of Material Facts

As stated in the order of the trial court (R. pp. 5-7) and in the opinion of the Court of Appeals, the following facts are not in dispute:

Dr. Coffey, an obstetrician-gynecologist on Hilton Head Island since the mid-1980s, was diagnosed with end-stage lung cancer in early 2001. Dr. Coffey had owned sailboats over the years and decided to buy another one after his diagnosis. On July 30, 2001, Dr. Coffey purchased a thirty-six foot sailboat from Hilton Head Yachts for \$125,000. (R. pp. 189-221.) The entire purchase amount was borrowed from Wachovia through a \$125,000 home equity line of credit secured by a mortgage on Dr. and Mrs. Coffey's residence on Hilton Head Island. (R. pp. 171-78.)

Mrs. Coffey testified at her deposition that she knew about the purchase of the sailboat several weeks before it occurred, although at the time she did not know the details of how Dr. Coffey paid for the sailboat. (R. p. 363.) Dr. Coffey primarily handled the household finances, although Mrs. Coffey signed twenty-nine mortgages, one deed, and a power of attorney from 1980 to 2005 relating to properties owned by her and Dr. Coffey. (R. pp. 415-19, 423, 334-40.)

Dr. Coffey was a respected and long-time customer of Wachovia, and when he requested the home equity line of credit, he did not explain to Wachovia's bank officers that he had previously deeded his share of the residence to Mrs. Coffey in 1984 and did not own the property. The mortgage that Dr. Coffey signed contained an explicit affirmation that he "lawfully own[ed] the property in fee simple" and that he had "the right to mortgage" the property to Wachovia. (R. p. 176). Given Dr. Coffey's creditworthiness and long history as a

customer, Wachovia did not verify the legal title of Dr. Coffey's residence before approving and closing the home equity loan to Dr. Coffey, and Wachovia thus did not require Mrs. Coffey to sign the mortgage. (R. pp. 162-78.) The home equity line of credit allowed Dr. and Mrs. Coffey to deduct the interest paid on the sailboat loan on their federal and state income tax returns.

The sailboat was titled to A & M Partners, Inc., a Delaware corporation established by Dr. Coffey, whose only asset was the sailboat. Dr. and Mrs. Coffey were the only officers and stockholders of the corporation. (R. pp. 267-72, 378-80, 483-84, 490-91.) Mrs. Coffey testified the boat was available for her and her husband or other family members to use and enjoy. (R. pp. 364-68.)

Dr. Coffey made regular payments on the Wachovia home equity loan from July 2001 until he died on March 21, 2005, with funds drawn on a personal checking account jointly held by himself and Mrs. Coffey. (R. pp. 249-66, 386-88, 493-94.) Dr. and Mrs. Coffey claimed a deduction for interest paid on the Wachovia home equity loan on their joint federal tax returns in 2001, 2002, 2004, and 2005. (R. pp. 273-77, 380-86.)

After Dr. Coffey's death, Mrs. Coffey made regular payments on the home equity loan until December 2005 (about nine months),³ using the couple's joint checking account. (R. pp. 243-48.) In or about September 2005, Mrs. Coffey found a "scrap of paper" while going through Dr. Coffey's records that said "Wachovia boat loan." She then realized there must be a loan or mortgage on the sailboat, although she thought it must be a "small mortgage." Mrs. Coffey wrote "boat loan" or "boat" on the memo line of her payment checks to Wachovia on three occasions from September to November 2005. (R. pp. 243-48, 372-73, 388-396, 408-11.)

³ As discussed below, Mrs. Coffey sold the boat in January 2006, and never made any further payments on the Wachovia loan, so the loan was current until the boat was sold.

Mrs. Coffey, acting as the personal representative of her husband's estate, listed the sailboat as a jointly owned asset to which she obtained sole title in the estate inventory filed in Beaufort County Probate Court.⁴ Dr. Coffey left nearly all his assets in a marital credit shelter trust to Mrs. Coffey, and his estate had no assets to pay any debts, including the subject loan to Wachovia. (R. pp. 180-88, 356-59, 484-87.)

In the fall of 2005, Mrs. Coffey decided to intensify her ongoing effort to sell the sailboat and, based on a friend's recommendation, contacted St. Barts Yachts to act as a broker in the sale. (R. pp. 400-02.) On September 28, 2005, Mrs. Coffey signed a "Yacht Brokerage Central Listing Agreement" with St. Barts Yachts to sell the sailboat. The sailboat was listed for sale for \$119,000. (R. pp. 278-87, 402.)

Mrs. Coffey's daughter, Maureen Coffey-Edri, helped her mother sell the yacht. Ms. Coffey-Edri informed St. Barts Yachts by email on December 22, 2005, that "[t]he boat loan information is: Wachovia Bank Acct. [xxxx-xxxx-xxxx]-1495 pay off \$125,643.30." (R. p. 302, 480-84, 498-501.)

Ron Stoddard, the St. Barts Yachts salesman, in turn, passed the boat loan information from Ms. Coffey-Edri on to the buyer's lender. St. Barts Yachts also prepared a draft "Seller's Disbursement Summary" showing a "Payoff with Wachovia Bank" of \$125,600, with a balance due from Mrs. Coffey of \$25,525. (R. pp. 304, 315.)

Mrs. Coffey testified that she asked Mr. Stoddard of St. Barts Yachts to check on the status of the loan and gave him the Wachovia home equity loan account number, and Mr. Stoddard told her there was no lien or mortgage on the sailboat. Mrs. Coffey took Mr.

⁴The inventory and appraisal of Dr. Coffey's estate was not signed by Mrs. Coffey until September 1, 2006—*after* she had sold the sailboat and ceased making monthly payments on the Wachovia loan, but the estate's inventory was listed as of the time of Dr. Coffey's death. (R. pp. 180-7.)

Stoddard's word for it; she never called Wachovia herself to ask about the home equity loan or the status of any boat loan. Mrs. Coffey testified she did not confer with Ms. Coffey-Edri or her son, who is a lawyer in Illinois, about the issue, although both had been helping her with various matters related to Dr. Coffey's estate and financial affairs. (R. pp. 407-13, 495-97.) Mrs. Coffey and Ms. Coffey-Edri testified they did not fully realize and understand that the entire proceeds of the loan to buy the sailboat came from the Wachovia home equity loan until June 2007, when they received affidavits and other documents gathered by Wachovia's counsel in this case that conclusively prove that Dr. Coffey used the entire loan proceeds to buy the sailboat. Mrs. Coffey and her daughter now fully admit this fact. (R. pp. 440-41, 455-63, 507-08, 515-18.)

Mrs. Coffey ultimately sold the sailboat to a Virginia couple for \$112,000, receiving \$100,075 after sale expenses were paid. The sale closed on January 5, 2006, but the "Seller's Disbursement Summary" did not mention the loan to Wachovia. (R. pp. 309-13, 316, 404-05.) Mrs. Coffey deposited the entire amount of the sale proceeds in her personal bank account, and that amount remains on deposit or otherwise invested in her personal accounts. (R. pp. 405-07, 424-25, 491-92.)

The net worth of Dr. Coffey and Mrs. Coffey in 2001, when they obtained an unrelated home mortgage loan on their residence, was more than \$1.2 million. (R. pp. 241, 397-98.) Their home at the time had an appraised value of \$2.1 million. (R. pp. 230-39, 242, 397-98.)

As of January 3, 2006, the due date of the first payment that Mrs. Coffey refused to pay on the Wachovia home equity loan, the balance due on the loan was \$126,256.58. (R. pp. 532-34.)

Procedural History and Rulings Below

Wachovia filed a motion for summary judgment on its third cause of action for unjust enrichment (R. pp. 31-45) and an amended motion for summary judgment on its fourth cause of action for equitable lien (R. pp. 46-54). Mrs. Coffey responded with her own motion for summary judgment. (R. pp. 97-121.) By an order dated June 23, 2008, the trial court granted Mrs. Coffey's motion for summary judgment and denied Wachovia's motions. (R. pp. 5-14.)

In granting Mrs. Coffey's motion for summary judgment on all of Wachovia's causes of action, the trial court ruled that although "no private right of action exists from the unauthorized practice of law, it can, however, be the basis for 'unclean hands'." (R. p. 13.) The trial court further held that "Wachovia does not . . . have clean hands and cannot now seek *equitable relief* arising out of those acts and their own failures in carrying out those acts." (*Id.*) (Emphasis added).

Wachovia appealed from the order of the trial court, and in its opinion, the Court of Appeals stated the issue on appeal as follows: "Is Wachovia barred from seeking *relief in the courts* due to its unauthorized practice of law in the loan transaction with Dr. Coffey?" *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 73, 698 S.E.2d 244, 247 (Ct. App. 2010) (emphasis added) (hereinafter cited as "*Coffey*"). The Court of Appeals answered this question in the affirmative and held not only that Wachovia's equitable claims were barred by the doctrine of unclean hands but that "Wachovia's legal causes of action are barred as well." *Id.* at 77, 698 S.E.2d at 248.

The facts of this case are distinctly different from the facts of *Matrix Fin. Servs. Corp. v. Frazer*, 2010 S.C. LEXIS 289 (S.C. Sup. Ct. Aug. 16, 2010). In *Matrix*, the lender, Matrix, had made a mortgage loan in 2001 and had "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.” *Id.* at *6. Matrix had thus done exactly what this Court had proscribed 14 years earlier in *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), which was to hire an independent title company to perform most of the functions constituting the practice of law normally associated with making and closing a mortgage loan.

In this case, the lender, Wachovia, did not hire a title company or any third party to do anything with respect to the loan to Dr. Coffey. Wachovia merely prepared the mortgage that was intended to secure a loan to which Wachovia was a party, and, along with Dr. Coffey, participated in closing the loan. *Matrix* is readily distinguishable because it involved a third party to the transaction who received payment for services constituting the unauthorized practice of law, and *Matrix* thus does not control this case.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT WACHOVIA WAS ON NOTICE THAT ITS CONDUCT CONSTITUTED THE UNAUTHORIZED PRACTICE OF LAW.

In affirming the trial court, the Court of Appeals stated, “As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney.” *Coffey*, 389 S.C. at 75, 698 S.E.2d at 247-248 (citing *State v. Buyers Serv. Co.*, 292 S.C. at 431-434, 357 S.E.2d at 18-19). This overstates the effect of the holding in *Buyers Service*.

Buyers Service held only that a commercial title company had unlawfully engaged in the unauthorized practice of law by performing, for a fee, various functions constituting the unauthorized practice of law in the course of closing real estate transactions to which the title company was not itself a party. Additionally, the loan at issue in *Buyers Service* was a purchase

money mortgage loan in which title was transferred from the seller to the purchaser. *Buyers Service*, 292 S.C. at 428, 357 S.E.2d at 16.

Following *Buyers Service*, this Court did not address whether a lender may lawfully prepare documents for a non-purchase money mortgage loan that does not involve the transfer of title until *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002), *withdrawn and reissued as Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), which was two years *after* the Wachovia loan to Dr. Coffey in 2001. Moreover, the opinion in *McMaster* addressed only a refinance transaction and expressly limited itself to the facts of that case. *McMaster*, 355 S.C. at 311 n.2, 585 S.E.2d at 775 n.2. The issues of whether or not a lender could lawfully prepare documents for a home equity loan, the type of loan involved in this case, and whether an attorney was required to close a home equity loan was not settled until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), which was five years *after* Wachovia made the loan to Dr. Coffey. *See id.* at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added).

Prior to the decisions of this Court in *Doe v. McMaster* and *Doe v. Richardson*, it was by no means clear that a bank in South Carolina could not lawfully prepare a mortgage to secure a loan the bank intended to make or that an attorney was required to close any type of loan secured by real estate other than a purchase money mortgage loan. On the contrary, the courts of other states had held that banks and other corporations could lawfully prepare documents relating to

loans they made. See *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961); *Title Guaranty Co. v. Denver Bar Ass'n*, 312 P.2d 1011 (Colo. 1957).⁵

Similarly, members of the South Carolina Bar did not generally interpret *Buyers Service* as prohibiting banks from preparing mortgages for all types of loans secured by real estate that the banks intended to make as or requiring an attorney to close all types of loans secured by real estate. The most public and direct expression of the collective opinions of attorneys in South Carolina concerning the status of the law after *Buyers Service* can be found in the proposed Rules Governing the Unauthorized Practice of Law that the South Carolina Bar submitted to this Court in 1991. The proposed rules were prepared by a special subcommittee of the Unauthorized Practice of Law Committee and, in the words of this Court, “represent[ed] the Committee’s collective wisdom accumulated during its thirteen years of existence.” *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

The proposed rules included the following rule:

UPR 7.3 Preparation of Legal Instruments

(A) A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except: . . .

⁵ In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961), the Arizona Supreme Court held, as this Court did in *Buyers Service*, that title insurance companies engaged in the unauthorized practice of law by preparing documents affecting the title to real property for their clients and customers. The Arizona Supreme Court was careful to note, however, that a person or corporation having an interest in real property could lawfully prepare documents and stated, “a person or corporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan.” *Id.* at 12. A slightly earlier case, *Title Guaranty Co. v. Denver Bar Ass'n*, 312 P.2d 1011 (Colo. 1957), held that a title company that was in the business of lending its own money could lawfully prepare documents relating to loans that it made. According to the Colorado Supreme Court, “It is elementary that a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law.” *Id.* at 1014.

(2) A regular employee may prepare legal instruments for use by his employer, other than in aid of his employer's unauthorized practice of law, for which no separate charge shall be made. . . .

(4) *A lending institution may in the regular course of conducting its business prepare its own loan documents for which no separate charge shall be made.*

(Emphasis added.) In addition, another proposed rule stated, “Closings *involving the purchase and sale of real estate* should be conducted only under the supervision of attorneys.” UPR 7.4(A) (emphasis added). The proposed rules were silent with regards to closings not involving the purchase and sale of real estate.

The fact that the South Carolina Bar proposed the rules quoted above indicates that most members of the Bar did not believe that *Buyers Service* prohibited lenders from preparing mortgages to secure their loans. This Court ultimately declined to adopt the rules proposed by the Bar, and it did so because it concluded that “it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules” and “the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.” *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124. This Court did not comment on the merits of any of the proposed rules, and in particular, the Court did not express disapproval of the proposed rule that would have allowed a lending institution to prepare its own loan documents if no separate charge was made for the documents. This Court also did not disapprove the proposed rule that only closings involving the purchase and sale of real estate had to be conducted under the supervision of attorneys.

Following the publication of this Court's opinion in *In re Unauthorized Practice of Law Rules*, federal judges in the District of South Carolina and the Fourth Circuit continued to believe that a lender could lawfully prepare loan documents and close certain mortgage loans in South Carolina. For example, in 1993 the Fourth Circuit Court of Appeals rendered a decision in a

case arising in South Carolina demonstrating that neither the federal district judge nor the federal circuit judges who decided the case thought that lenders engaged in the unauthorized practice of law by closing their own mortgage loans. *White v. TRW Real Estate Loan Services, Inc.*, 1993 U.S. App. LEXIS 33456 at **2-5 (4th Cir. Dec. 22, 1993).

In that case, two lawyers sued TRW Real Estate Loan Services, Inc., alleging that TRW was engaged in the unauthorized practice of law by preparing and selling property reports consisting of summaries of information appearing in public real property records. The Honorable William B. Traxler, Jr., District Judge, granted summary judgment for TRW, and on appeal, the Fourth Circuit affirmed the trial court's decision, stating:

The purchasers of these property reports are typically lending institutions with underwriting guidelines which allow them to close certain mortgage loans without hiring an attorney. The loans are generally smaller loans used to refinance an existing loan or a second mortgage. . . .

. . .

[T]he [district] court found that the lending institutions purchasing the reports have made a business decision to spare the cost of an attorney and to finance a loan based on the public facts contained in the property reports.

[W]e agree with the reasoning of the district court and hold that under *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (S.C. 1987), TRW's activities do not constitute the unauthorized practice of law.

Id. Clearly implicit in this opinion is the assumption that a lender did not engage in the unauthorized practice of law by preparing its own mortgage document and closing its own mortgage loans.

The belief that a lender could lawfully prepare loan documents for its own use and close its own loans remained undisturbed until this Court rendered its opinion in *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002). In that opinion, this Court stated for the first time that a lender does not have a *pro se* right to prepare documents to which it is a party. *Id.* at 164, 568 S.E.2d at

359; *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003). This statement clearly constituted a change in the law as attorneys and lenders had previously understood it.

For example, the Petitioner in *Condon*, who was a practicing attorney and who was represented by another practicing attorney, argued as follows in his brief:

It is widely accepted that “a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice”. *Perkins v. CTX Mort. Co.*, 969 P.2d 93, 96 (Wash. 1999). See also *Johnson v. Pistakee Highlands Community Ass’n*, 390 N.E.2d 640 (Ill. 1979) (holding that preparation of legal documents by a corporation on its own behalf did not constitute the unauthorized practice of law); *Washington State Bar Ass’n v. Great Western Union Fed. Sav. & Loan Ass’n*, 586 P.2d 870 (Wash. 1978) (holding that a corporation may select, prepare or draft legal documents to which it is a party); *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962) (holding that a corporation having a primary interest in a transaction may prepare documents necessary to furtherance and completion of transaction without engaging in unauthorized practice of law). This “*pro se* exception” is founded upon the belief that a corporation may desire to act on its own behalf with respect to its legal rights and obligations without the benefit of counsel.

It’s only when a corporation seeks to act on behalf of others in the legal arena that it potentially implicates the elusive concept of the “practice of law.” *Cf. In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); *State of South Carolina v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law); *In re Duncan*, 83 S.C. 186, 65 S.E. 210, 211 (1909) (practice of law involves “in general, all advice to clients”) (emphases added).

In the present case, the Lender is a party to the loan and is authorized to prepare the legal instruments necessarily involved in the completion of the loan transaction such as the note and mortgage.

(*Condon*, Brief of Petitioner filed Jan. 31, 2002, pp. 6-7.)

The Petitioner’s position in *Condon* also reflected the understanding of the lending industry at the time. The amicus brief filed by the American Financial Services Association contains the following arguments:

Buyers Service is not proper authority to rely upon to prohibit lenders from closing their own real estate transactions. . . . This case [*i.e.*, *Buyers Service*] never considered the propriety of a lender acting on its own behalf in real estate or

non-real estate transactions. Many lenders in this State have relied on *Buyers Service* as very properly holding that *non-attorney third parties* cannot be employed to close real estate loans for lenders, particularly in a purchase-money loan transaction where the third party must assist in the transfer of title to the borrower.

This is not the same situation that exists when a consumer seeks a mortgage refinancing or home equity loan directly from a lender with no third party involvement. . . . Consequently, *Buyers Service* does not provide guidance to the Court and should not be relied upon as somehow elevating all real estate loan transactions to a level which automatically requires attorney involvement, irrespective of the parties involved and the complexity.

Buyers Service does not alter the traditional concept which exists in virtually all business transactions in the United States, namely that absent extraordinary circumstances, entities or individuals may participate directly in such business transactions without attorney involvement as long as the entity or person has a primary interest in the transaction and does not engage non-attorney third parties to provide legal services. See *State v. Pledger*, 127 S.E.2d 337, 339 (N.C. 1962).

(*Condon*, Amicus Brief by the American Financial Services Association pp. 3-4.)

In addition, the South Carolina Bankers Association intervened in *Condon* and filed a brief arguing:

The parties to a mortgage loan refinancing transaction, or any other non-purchase money mortgage loan transaction for that matter, should be free to consummate the transaction without being required to hire a lawyer, if they choose to do so, and, under such circumstances, their conduct should not be prohibited as the unauthorized practice of law but should be recognized as falling within the pro se exception to the prohibition on the unauthorized practice of law.

(*Condon*, Brief of Intervenor The South Carolina Bankers Association in Reply to the Briefs of Petitioner John Doe, etc. p. 2.) The brief of the Bankers Association further argued that in *Buyers Service*, “this Court sought to protect the *transferee’s* interest in obtaining good and marketable title to the real estate. In a mortgage refinancing transaction, a home equity loan or line of credit, or other consumer loan secured by real estate, however, title to the property is not changing hands.” (*Id.* at 3-4, citation omitted.)

Even after the holding in *Condon/McMaster* in 2002 and 2003, the full scope of attorney involvement required for loans secured by real estate was not fully resolved until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), when this Court held for the first time that the disbursement of loan proceeds in conjunction with a credit-line transaction is the practice of law and must be conducted under the supervision of an attorney. In doing so, the Court again recognized that *Buyers Service* and *Condon/McMaster* had not yet fully resolved the issue of what constitutes the unauthorized practice of law with regards to certain real estate-secured loan transactions. See *Richardson*, 371 S.C. at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added); *Id.* (“In [*McMaster*], we *refined* the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in [*Buyers Service*].” (emphasis added)). It was thus not until *Richardson* that this Court ultimately concluded that an attorney was required to close all mortgage loan transactions, including loans for home-equity lines of credit. *Id.*

Given the widely prevailing and reasonable belief, prior to *Condon/McMaster* and *Richardson*, of the limited effect of this Court’s holding in *Buyers Service*, it was unfair and unreasonable for the Court of Appeals to hold that Wachovia should have known in 2001 that preparing a mortgage to secure a home-equity line of credit to Dr. Coffey and conducting the closing without an attorney constituted the unauthorized practice of law. The holdings of *Condon/McMaster* and *Richardson* should not be applied retroactively, especially when the result of doing so is to impose a forfeiture on Wachovia for engaging in a practice that was legal in other states and that was generally and justifiably thought to be legal in this state at the time.

See *Richardson*, 371 S.C. 14, 636 S.E.2d 866 (delaying for three months the effective date of a decision establishing a new rule defining conduct that constitutes the practice of law).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNAUTHORIZED PRACTICE OF LAW GIVES RISE TO A PRIVATE REMEDY.

In *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), this Court held that there is no private right of action for the unauthorized practice of law, regardless of the theory on which a claim for unauthorized practice might be based. Implicit in the holding of *Linder* is the proposition that the unauthorized practice of law does not give rise to any private rights or remedies, regardless of the form in which the rights or remedies might be asserted.

Furthermore, cases decided in other jurisdictions have held that contracts and conveyances prepared by persons not licensed to practice law are not void. See, e.g., *Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904 (Ind. Ct. App. 1999) (holding that deeds that were the products of the unauthorized practice of law were not void); *Frank v. Moore*, 198 N.E.2d 82 (Ohio. Ct. App. 1963) (holding that the fact that a contract to purchase real property had been prepared by a person not licensed to practice law did not make the contract void); *Wyche v. Works*, 373 S.W.2d 558 (Tex. Ct. App. 1963) (holding that even if a contract for the purchase of land was prepared by a person not licensed to practice law, the validity of the contract would not be affected); *Gaylor v. Gaylor*, 275 S.W.2d 644 (Ark. 1955) (holding that deeds prepared by a title abstract company were not void). The holding of the Court of Appeals to the effect that Mrs. Coffey was entitled to assert the unauthorized practice of law as an affirmative defense to Wachovia's claims was thus at irreconcilable odds with the well-settled rule stated in *Linder* and cases decided in other jurisdictions.

The Court of Appeals cited *Linder* for the proposition that "Wachovia's legal causes of action are barred as well" (*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248), but *Linder* held only that a

public insurance-adjusting business was not entitled to compensation for rendering services that constituted the unauthorized practice of law. *Linder* did not hold that the unauthorized practice of law precluded the business from collecting compensation for other services rendered or that the unauthorized practice invalidated the contract between the business and its client. *Linder* thus does not support the decision of the Court of Appeals.

In this case, Wachovia has not sought compensation for any conduct constituting the unauthorized practice of law and instead has sought only to recover the money that it lent to Dr. Coffey. While *Linder* might bar Wachovia from collecting fees for deed and title work if it had charged them, as those fees could be construed as compensation for the unauthorized practice of law, the holding of *Linder* cannot and should not be interpreted, especially retroactively, to invalidate otherwise valid mortgage contracts securing loans. To do so imposes an unjustified forfeiture on lenders and awards an unearned and undeserved windfall to borrowers.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT MRS. COFFEY WAS ENTITLED TO ASSERT UNCLEAN HANDS AS A DEFENSE TO WACHOVIA'S CLAIMS.

“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.” *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (citing *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)). “[P]rejudice to the defendant is a necessary element of the ‘unclean hands’ defense” *Wilson v. Landstrom*, 281 S.C. 260, 267, 315 S.E.2d 130, 134 (Ct. App. 1984). A defendant asserting the defense of unclean hands must thus prove (1) that the plaintiff acted unfairly in a matter that is the subject of the litigation, (2) to the prejudice of the defendant. Both elements of the defense are missing in this case, and the Master erred in concluding that Wachovia was guilty of unclean hands.

Wachovia did not act unfairly in making the loan to Dr. Coffey. If anyone acted unfairly, it was Dr. Coffey, who represented that he could give Wachovia a mortgage lien on his home to secure the loan when in fact he had previously conveyed the home to his wife.⁶ After the loan was made, Dr. Coffey had what he wanted and expected to receive—the money to purchase a sailboat, which Dr. and Mrs. Coffey used with their family for approximately four years; but Wachovia did not have what it wanted and expected to receive—a valid mortgage lien on Dr. Coffey's home. Moreover, Mrs. Coffey has *benefited from* Wachovia's conduct. If Dr. Coffey had not borrowed the funds to purchase the boat, then he would have presumably used the couple's savings or other assets. In this instance, Mrs. Coffey got the full benefit of Wachovia's loan, *and* tax deductions for the interest paid, *and* full title to the boat, *and* the proceeds from selling it, *all* without having to repay Wachovia.

Furthermore, before a party to litigation can be found guilty of unclean hands, it must be proven that the party had actual notice, and not just constructive notice, that its conduct was improper. *See Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) (holding that where parties had only constructive notice rather than actual notice of restrictive covenants, their violation of the restrictive covenants did not constitute unclean hands). As previously discussed, Wachovia was not on notice when it made the loan to Dr. Coffey that preparing a mortgage to secure the a home equity loan or closing that type of loan constituted the unauthorized practice of law. Wachovia relied on the advice of outside legal counsel and the prevailing understanding of the law at the time, and Wachovia thus did not act unfairly merely by preparing the mortgage and having it executed.

⁶ An unsecured loan most likely would have carried a higher rate of interest and the interest payments on a loan not secured by the borrower's principal residence would not have been deductible on Dr. Coffey's federal and state income tax returns.

Contrary to the opinion of the Court of Appeals, Mrs. Coffey was not prejudiced by Wachovia's preparation of the mortgage her husband signed. The recording of the mortgage had no effect on Mrs. Coffey's title to the property described in the mortgage because Mrs. Coffey, rather than Dr. Coffey, was the record owner of the property when Dr. Coffey executed the mortgage. Consequently, the mortgage was not in the chain of title and did not affect Mrs. Coffey's title to the property. See *Liberty Loan Corp. v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (holding that a mortgage from a former owner that was not properly recorded until after the former owner no longer owned the mortgaged property was not in the chain of title and did not constitute a lien against the property).

Mrs. Coffey was also not prejudiced by having to defend Wachovia's claims against her because being required to defend claims does not constitute legal prejudice. For example, "[a] party opposing [a] motion for voluntary nonsuit without prejudice must show prejudice (i.e., 'legal' prejudice) to successfully defeat the motion. That prejudice is not merely the possibility of defending another suit." *Walker v. Jones*, 269 S.C. 19, 21, 235 S.E.2d 810, 810-811 (1977) (internal citations omitted). Similarly, a defendant does not suffer legal prejudice as the result of an amendment to a complaint even though the amendment will require the defendant to file additional pleadings, engage in additional discovery, and incur additional costs. *Forrester v. Smith & Steele Bldrs., Inc.*, 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988).

Moreover, Mrs. Coffey was not entitled to assert the defense of unclean hands because she was not a party to the loan transaction on which she based the defense. "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). To avoid this limitation, the Court of Appeals asserted, "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,” and cited *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), to support the assertion. *Coffey*, 389 S.C at 76, 698 S.E.2d at 248.

In so stating, the Court of Appeals misconstrued *Buyers Service* because *Buyers Service* did not address or decide the issue of who is prejudiced by the unauthorized practice of law. Instead, *Buyers Service* merely explained that the prohibition on the unauthorized practice of law exists not to protect the legal profession but instead to protect the public. A similar statement could be made with respect to most licensing and regulatory schemes. *Buyers Service* does not support the conclusion that each and every member of the public is a person prejudiced by unauthorized practice of law occurring in a private transaction involving only two parties. Indeed, to extend the right to assert remedies beyond the parties to a transaction would raise serious issues of standing.

Mrs. Coffey was also not entitled to assert the doctrine of unclean hands for the additional reason that she did not plead the doctrine as an affirmative defense. Rule 8(c), SCRPC, requires party pleading defenses to set forth affirmatively any “matter constituting an avoidance or affirmative defense,” and Mrs. Coffey implicitly admitted in the brief she filed with the Court of Appeals that she did not plead “unclean hands” in her Answer. (Brief of Respondent pp. 9-10.) Consequently, it was not necessary for Wachovia to include the Answer in the Record on Appeal.

The Court of Appeals held that the issue of whether Mrs. Coffey had waived the defense of unclean hands was not preserved for appeal because the Master did not address the issue when he ruled that Wachovia had unclean hands and Wachovia failed to file a motion to alter or amend pursuant to Rule 59(e), SCRPC. In a memorandum filed with the circuit court, however,

Wachovia expressly asserted that “Defendants are barred from raising the affirmative defense of unclean hands because they failed to raise it in their Answer, Counterclaims and Affirmative Defenses filed August 15, 2006.” (R. p. 77.) Although the Master did not specifically address Mrs. Coffey’s failure to plead the unclean hands defense in his order, the Master did grant judgment for Mrs. Coffey on this defense, thus implicitly ruling on the issue. A Rule 59(e) motion is not necessary to preserve an issue for appeal when the trial court has implicitly ruled on the issue. *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (holding that an appellant did not need to file a Rule 59(e) motion where the trial court “implicitly denied” the appellant’s claims by adopting a particular analysis proposed by the other side); *Pryor v. Northwest Apts., Ltd.*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App. 1996) (holding that where a tenant’s pleadings clearly asserted that the Residential Landlord Tenant Act (the “RLTA”) was applicable to a case and imposed on a landlord a particular duty to warn of dangerous conditions, and where the trial court found that a landlord had no duty to warn of such conditions on the property, there was no need for a tenant to file a Rule 59(e) motion as to whether the RLTA applied because the court had “implicitly ruled on and rejected [the tenant’s] argument”).

Finally, the decision of the Court of Appeals had the effect of imposing a forfeiture on Wachovia, which is contrary to principles of equity. “Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.” *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) (quoting *Bangert v. Lumber Co.*, 169 N.C. 628, 630, 86 S.E. 516, 517 (1915)). In this case, both the Court of Appeals and the Master expressed reservations about the conduct of Mrs. Coffey, and the Master acknowledged that “there is some perception of unfairness to Wachovia.” (R. p. 12.) Despite these

reservations, both the Court of Appeals and the Master permitted Mrs. Coffey to invoke an equitable principle—the clean hands doctrine—to achieve a clearly inequitable result—a forfeiture imposed on Wachovia and an unearned windfall to Mrs. Coffey. The Court of Appeals and the Master should not have permitted such a gross misuse of an equitable doctrine, and thus the holding of the Court of Appeals should be reversed or applied prospectively only.

IV. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE HOLDING OF THE COURT OF APPEALS IN A PRIOR CASE TO THE EFFECT THAT A TRIAL COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER THE UNAUTHORIZED PRACTICE OF LAW HAS OCCURRED IN ANY GIVEN CASE.

The Court of Appeals and the trial court held that Wachovia had unclean hands because “Wachovia’s employees processed the home equity loan to Dr. Coffey without the supervision of an attorney.” (*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248; R. pp. 12-13.) The Court of Appeals had previously ruled, however, in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), that “[o]nly our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law.” *Id.* at 124-125, 634 S.E.2d at 8-9. The Court of Appeals then proceeded to hold in *Hambrick* that a circuit court lacks jurisdiction to determine whether a party engaged in the unauthorized practice of law. *Id.* at 125, 634 S.E.2d at 9.

The Court of Appeals further held in *Hambrick* that the fact that “actions attributed to [a party] have already been deemed the unauthorized practice of law by prior case law” is of no consequence. *Id.* at 124, 634 S.E.2d at 8. According to *Hambrick*, the circuit court would still lack jurisdiction to determine whether the conduct in question constituted the unauthorized practice of law.

The trial judge stated, “While this Court recognizes that no private right of action exists from the unauthorized practice of law, it can, however, be the basis for ‘unclean hands,’ and I so find.” (R. p. 13.) The conclusion that Wachovia had unclean hands thus rests squarely on the

trial court's determination that Wachovia had engaged in the unauthorized practice of law, and the trial court simply did not have jurisdiction to make such a determination.

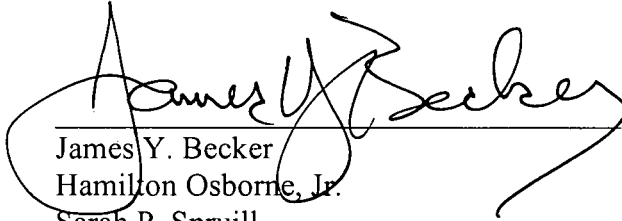
"The question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be waived or conferred by consent." *Gnoc Corp. v. Estate of Rhyne*, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (citing *Petroleum Transp., Inc. v. Public Service Comm'n*, 255 S.C. 419, 179 S.E.2d 326 (1971)); see also *Normandy Corp. v. South Carolina Dep't of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009) ("Issues involving subject matter jurisdiction may be raised at any time, including on appeal.") (citing *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007)).

The holding of the Court of Appeals in this case cannot be reconciled with the holding of the Court of Appeals in *Hambrick*. The holding in *Coffey* should thus be rejected or applied prospectively only.

CONCLUSION

For the foregoing reasons, Wachovia thus respectfully submits that this Court should issue a writ of certiorari to review the decision of the Court of Appeals in this case and that the decision of the Court of Appeals should be reversed or applied prospectively only as explained herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker". The signature is written over a horizontal line that separates it from the printed name below. The signature is fluid and cursive, with a large loop at the end.

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey

Haynsworth Sinkler Boyd, P.A.

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Attorneys for Petitioner Wachovia Bank, N.A.

December 7, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

DEC - 7 2010

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Petition to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

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Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.

Charlotte D. Anderson

Date mailed: December 7, 2010

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

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January 12, 2011

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

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JAN 12 2011

S.C. Supreme Court

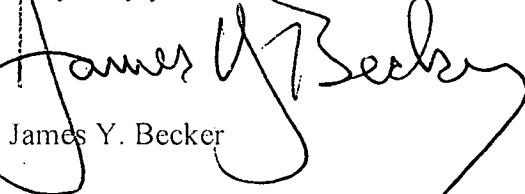
Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter. Enclosed for filing are an original and seven (7) copies of Petitioner's Return to Respondent's Motion to Strike Amended Petition and/or Portions of Amended Petition for Writ of Certiorari. I would appreciate your filing the original and six (6) copies of the Amended Petition and return a file stamped copy to the bearer of this letter.

With kind regards, I am

Very truly yours,



James Y. Becker

JYB:mmc

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

South Carolina Supreme Court

January 12, 2011

Page 2

bcc: Janice Tucker, Esq. (via e-mail only)

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(NOT FOR CONFIDENTIAL COMMUNICATIONS)

GREGORY M. ALFORD*

JOHN W. WILKINS

CURTIS L. COLTRANE*

MITCHELL J. THORESON

*Also member Georgia Bar

*Also member of Virginia Bar

December 30, 2010

Via U.S. Mail

The Honorable Daniel E. Shearhouse, Clerk

Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211

Re: Wachovia v. Ann T. Coffey et al.
Trial Court Case No. 2006-CP-07-1655
Tracking No.: 2010-174086

Dear Mr. Shearhouse:

Please find enclosed an original and seven (7) copies of the following:

- 1) Respondent's Motion to Strike Amended Petition and/or Portions of Amended Petition for Writ of Certiorari and Motion for an Extension of Time to File Return;
- 2) Respondent's Memorandum in Support of Respondent's Motion to Strike and Motion for Extension of Time to File Return;
- 3) Proof of Service

Please file these documents as appropriate and return a clocked copy to this office in the enclosed self addressed stamped envelope. Please allow me to thank you for your assistance and attention to this matter. If you have any questions or comments please do not hesitate to call me. With best regards, I am,

Sincerely,

ALFORD, WILKINS & COLTRANE, P.C.


Amanda C. DuBose
Paralegal

RECEIVED

JAN 04 2011

S.C. Supreme Court
pm 12-30-10

Enclosures

Cc: James Y. Becker
R. David Proffitt
Steven R. Anderson

COLUMBIA

CHARLES

FLORENCE

GREENVILLE

Haynsworth
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December 7, 2010

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

RECEIVED

DEC - 7 2010

S.C. Supreme Court

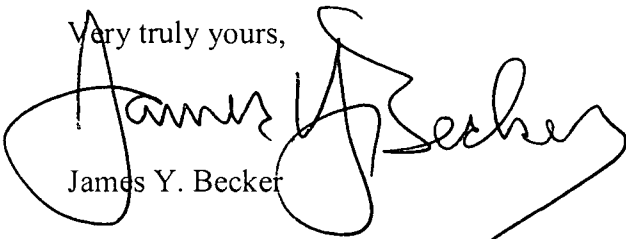
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With kind regards, I am

Very truly yours,



James Y. Becker

JYB:ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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NOV - 5 2010

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, Petitioner Wachovia Bank, N.A. ("Wachovia") petitions this Court for a writ of certiorari to review the opinion of the South Carolina Court of Appeals in this case (Op. No. 4685 filed May 6, 2010) holding that Wachovia is barred by the doctrine of unclean hands from seeking equitable or legal relief to collect an unpaid mortgage loan from Respondent Ann T. Coffey ("Mrs. Coffey") or any other party as a consequence of its unauthorized practice of law in providing a home equity line of credit to Mrs. Coffey's late husband, Michael D. Coffey ("Dr. Coffey") in 2001.

As Wachovia will demonstrate herein, the decision of the Court of Appeals holds Wachovia to a standard of conduct that was not at all clearly established by this Court until years after Wachovia had made the loan to Dr. Coffey. This Court did not hold that an attorney must be involved in preparing loan documents and closing the loan for the type of loan Wachovia

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made to Dr. Coffey until 2006, which was five years after the loan was made in 2001. Wachovia has thus been required to suffer a significant forfeiture for failing to anticipate how the law would evolve *after* the loan was made.

Unless this Court modifies or reverses the decision of the Court of Appeals, virtually every mortgage foreclosure action in South Carolina will become mired in disputes over whether and to what degree an attorney licensed in South Carolina performed or directly supervised numerous aspects of the loan transaction. In addition, hundreds, if not thousands, of outstanding mortgage loans in this state, obtained by lenders acting in good faith in reliance upon this Court's unauthorized practice of law jurisprudence, may be invalidated. The losses stemming from such a wholesale invalidation of mortgage loans will be borne in many cases not by the party that originated the loans but by the subsequent owners of the loans, which in many instances include both public and private pension funds and federal and state agencies.¹ The cost of a remedy

¹ According to the Federal Reserve, there were over \$10 trillion dollars in outstanding residential mortgage debt as of September 2010, and Fannie Mae, Freddie Mac, and other government agencies own almost half of all outstanding residential mortgage debt in the United States. Federal Reserve Statistical Release, *Mortgage Debt Outstanding* (Sept. 2010), available at <http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm>; Nick Timiraos, et al, *Mortgage Damage Spreads*, Wall. St. J., Oct. 16, 2010 (including chart analyzing mortgage debt outstanding and percent of loans past due); Nick Timiraos, *Fannie, Freddie Elicit Grim Forecast*, Wall. St. J., Oct. 22, 2010 ("Fannie and Freddie own or guarantee about half of the nation's 10.6 trillion in [residential] mortgages."). Additionally, the majority of residential mortgages are held by securitization trusts, and as of September 2010, there were almost \$9 trillion dollars of outstanding mortgage related securities. See Securities Industry and Financial Markets Assoc., *US Mortgage-Related Securities Outstanding*, available at <http://www.sifma.org/research/research.aspx?ID=10806>; Adam J. Levitin, *The Flaws in the FHA Housing Bill*, Wall. St. J., July 11, 2008. Almost half of the outstanding securitized mortgages are insured or guaranteed by Fannie Mae, Freddie Mac, or other government agencies. See Federal Reserve Statistical Release, *Mortgage Debt Outstanding* (Sept. 2010).

supposedly intended to protect the public at large may thus be imposed on innocent investors and U.S. taxpayers.²

CERTIFICATION BY COUNSEL

The undersigned counsel for Wachovia certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals in this case.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law and that Wachovia thus had unclean hands?

2. Did the Court of Appeals err in holding that Wachovia's equitable and legal causes of action were barred?

3. Does the holding of the Court of Appeals in this case conflict with the holding of the Court of Appeals in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), which was based on the decision of this Court in *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), to the effect that a trial court does not have jurisdiction to determine whether the unauthorized practice of law has occurred in any given case?

STATEMENT OF THE CASE

Wachovia filed this action on June 30, 2006, to collect the balance due on a home-equity line of credit in the principal amount of \$125,000 that Wachovia had made on July 23, 2001, to Dr. Coffey, Mrs. Coffey's late husband. (R. pp. 15-26.) In its First Amended Complaint, Wachovia asserted six causes of action against Mrs. Coffey for (1) mortgage foreclosure; (2)

² There could also be other unintended consequences if the Court of Appeal's decision is not modified or reversed. For example, the sweeping invalidation of mortgages raises questions of the validity of tax deductions taken by borrowers on mortgages that may be invalidated under the opinion in *Coffey*. Many borrowers would likely be forced to amend and refile their tax returns to remove the mortgage interest tax deduction, resulting in the payment of unexpected back taxes and penalties.

ratification of a mortgage; (3) unjust enrichment; (4) equitable lien; (5) equitable mortgage; and (6) prejudgment interest. (R. pp. 57-72.)

Summary of Material Facts

As stated in the order of the trial court (R. pp. 5-7) and in the opinion of the Court of Appeals, the following facts are not in dispute:

Dr. Coffey, an obstetrician-gynecologist on Hilton Head Island since the mid-1980s, was diagnosed with end-stage lung cancer in early 2001. Dr. Coffey had owned sailboats over the years and decided to buy another one after his diagnosis. On July 30, 2001, Dr. Coffey purchased a thirty-six foot sailboat from Hilton Head Yachts for \$125,000. (R. pp. 189-221.) The entire purchase amount was borrowed from Wachovia through a \$125,000 home equity line of credit secured by a mortgage on Dr. and Mrs. Coffey's residence on Hilton Head Island. (R. pp. 171-78.)

Mrs. Coffey testified at her deposition that she knew about the purchase of the sailboat several weeks before it occurred, although at the time she did not know the details of how Dr. Coffey paid for the sailboat. (R. p. 363.) Dr. Coffey primarily handled the household finances, although Mrs. Coffey signed twenty-nine mortgages, one deed, and a power of attorney from 1980 to 2005 relating to properties owned by her and Dr. Coffey. (R. pp. 415-19, 423, 334-40.)

Dr. Coffey was a respected and long-time customer of Wachovia, and when he requested the home equity line of credit, he did not explain to Wachovia's bank officers that he had previously deeded his share of the residence to Mrs. Coffey in 1984 and did not own the property. The mortgage that Dr. Coffey signed contained an explicit affirmation that he "lawfully own[ed] the property in fee simple" and that he had "the right to mortgage" the property to Wachovia. (R. p. 176). Given Dr. Coffey's creditworthiness and long history as a

customer, Wachovia did not verify the legal title of Dr. Coffey's residence before approving and closing the home equity loan to Dr. Coffey, and Wachovia thus did not require Mrs. Coffey to sign the mortgage. (R. pp. 162-78.) The home equity line of credit allowed Dr. and Mrs. Coffey to deduct the interest paid on the sailboat loan on their federal and state income tax returns.

The sailboat was titled to A & M Partners, Inc., a Delaware corporation established by Dr. Coffey, whose only asset was the sailboat. Dr. and Mrs. Coffey were the only officers and stockholders of the corporation. (R. pp. 267-72, 378-80, 483-84, 490-91.) Mrs. Coffey testified the boat was available for her and her husband or other family members to use and enjoy. (R. pp. 364-68.)

Dr. Coffey made regular payments on the Wachovia home equity loan from July 2001 until he died on March 21, 2005, with funds drawn on a personal checking account jointly held by himself and Mrs. Coffey. (R. pp. 249-66, 386-88, 493-94.) Dr. and Mrs. Coffey claimed a deduction for interest paid on the Wachovia home equity loan on their joint federal tax returns in 2001, 2002, 2004, and 2005. (R. pp. 273-77, 380-86.)

After Dr. Coffey's death, Mrs. Coffey made regular payments on the home equity loan until December 2005 (about nine months),³ using the couple's joint checking account. (R. pp. 243-48.) In or about September 2005, Mrs. Coffey found a "scrap of paper" while going through Dr. Coffey's records that said "Wachovia boat loan." She then realized there must be a loan or mortgage on the sailboat, although she thought it must be a "small mortgage." Mrs. Coffey wrote "boat loan" or "boat" on the memo line of her payment checks to Wachovia on three occasions from September to November 2005. (R. pp. 243-48, 372-73, 388-396, 408-11.)

³ As discussed below, Mrs. Coffey sold the boat in January 2006, and never made any further payments on the Wachovia loan, so the loan was current until the boat was sold.

Mrs. Coffey, acting as the personal representative of her husband's estate, listed the sailboat as a jointly owned asset to which she obtained sole title in the estate inventory filed in Beaufort County Probate Court.⁴ Dr. Coffey left nearly all his assets in a marital credit shelter trust to Mrs. Coffey, and his estate had no assets to pay any debts, including the subject loan to Wachovia. (R. pp. 180-88, 356-59, 484-87.)

In the fall of 2005, Mrs. Coffey decided to intensify her ongoing effort to sell the sailboat and, based on a friend's recommendation, contacted St. Barts Yachts to act as a broker in the sale. (R. pp. 400-02.) On September 28, 2005, Mrs. Coffey signed a "Yacht Brokerage Central Listing Agreement" with St. Barts Yachts to sell the sailboat. The sailboat was listed for sale for \$119,000. (R. pp. 278-87, 402.)

Mrs. Coffey's daughter, Maureen Coffey-Edri, helped her mother sell the yacht. Ms. Coffey-Edri informed St. Barts Yachts by email on December 22, 2005, that "[t]he boat loan information is: Wachovia Bank Acct. [xxxx-xxxx-xxxx]-1495 pay off \$125,643.30." (R. p. 302, 480-84, 498-501.)

Ron Stoddard, the St. Barts Yachts salesman, in turn, passed the boat loan information from Ms. Coffey-Edri on to the buyer's lender. St. Barts Yachts also prepared a draft "Seller's Disbursement Summary" showing a "Payoff with Wachovia Bank" of \$125,600, with a balance due from Mrs. Coffey of \$25,525. (R. pp. 304, 315.)

Mrs. Coffey testified that she asked Mr. Stoddard of St. Barts Yachts to check on the status of the loan and gave him the Wachovia home equity loan account number, and Mr. Stoddard told her there was no lien or mortgage on the sailboat. Mrs. Coffey took Mr.

⁴The inventory and appraisal of Dr. Coffey's estate was not signed by Mrs. Coffey until September 1, 2006—*after* she had sold the sailboat and ceased making monthly payments on the Wachovia loan, but the estate's inventory was listed as of the time of Dr. Coffey's death. (R. pp. 180-7.)

Stoddard's word for it; she never called Wachovia herself to ask about the home equity loan or the status of any boat loan. Mrs. Coffey testified she did not confer with Ms. Coffey-Edri or her son, who is a lawyer in Illinois, about the issue, although both had been helping her with various matters related to Dr. Coffey's estate and financial affairs. (R. pp. 407-13, 495-97.) Mrs. Coffey and Ms. Coffey-Edri testified they did not fully realize and understand that the entire proceeds of the loan to buy the sailboat came from the Wachovia home equity loan until June 2007, when they received affidavits and other documents gathered by Wachovia's counsel in this case that conclusively prove that Dr. Coffey used the entire loan proceeds to buy the sailboat. Mrs. Coffey and her daughter now fully admit this fact. (R. pp. 440-41, 455-63, 507-08, 515-18.)

Mrs. Coffey ultimately sold the sailboat to a Virginia couple for \$112,000, receiving \$100,075 after sale expenses were paid. The sale closed on January 5, 2006, but the "Seller's Disbursement Summary" did not mention the loan to Wachovia. (R. pp. 309-13, 316, 404-05.) Mrs. Coffey deposited the entire amount of the sale proceeds in her personal bank account, and that amount remains on deposit or otherwise invested in her personal accounts. (R. pp. 405-07, 424-25, 491-92.)

The net worth of Dr. Coffey and Mrs. Coffey in 2001, when they obtained an unrelated home mortgage loan on their residence, was more than \$1.2 million. (R. pp. 241, 397-98.) Their home at the time had an appraised value of \$2.1 million. (R. pp. 230-39, 242, 397-98.)

As of January 3, 2006, the due date of the first payment that Mrs. Coffey refused to pay on the Wachovia home equity loan, the balance due on the loan was \$126,256.58. (R. pp. 532-34.)

Procedural History and Rulings Below

Wachovia filed a motion for summary judgment on its third cause of action for unjust enrichment (R. pp. 31-45) and an amended motion for summary judgment on its fourth cause of action for equitable lien (R. pp. 46-54). Mrs. Coffey responded with her own motion for summary judgment. (R. pp. 97-121.) By an order dated June 23, 2008, the trial court granted Mrs. Coffey's motion for summary judgment and denied Wachovia's motions. (R. pp. 5-14.)

In granting Mrs. Coffey's motion for summary judgment on all of Wachovia's causes of action, the trial court ruled that although "no private right of action exists from the unauthorized practice of law, it can, however, be the basis for 'unclean hands'." (R. p. 13.) The trial court further held that "Wachovia does not . . . have clean hands and cannot now seek *equitable relief* arising out of those acts and their own failures in carrying out those acts." (*Id.*) (Emphasis added).

Wachovia appealed from the order of the trial court, and in its opinion, the Court of Appeals stated the issue on appeal as follows: "Is Wachovia barred from seeking *relief in the courts* due to its unauthorized practice of law in the loan transaction with Dr. Coffey?" *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 73, 698 S.E.2d 244, 247 (Ct. App. 2010) (emphasis added) (hereinafter cited as "*Coffey*"). The Court of Appeals answered this question in the affirmative and held not only that Wachovia's equitable claims were barred by the doctrine of unclean hands but that "Wachovia's legal causes of action are barred as well." *Id.* at 77, 698 S.E.2d at 248.

The facts of this case are distinctly different from the facts of *Matrix Fin. Servs. Corp. v. Frazer*, 2010 S.C. LEXIS 289 (S.C. Sup. Ct. Aug. 16, 2010). In *Matrix*, the lender, Matrix, had made a mortgage loan in 2001 and had "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.” *Id.* at *6. Matrix had thus done exactly what this Court had proscribed 14 years earlier in *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), which was to hire an independent title company to perform most of the functions constituting the practice of law normally associated with making and closing a mortgage loan.

In this case, the lender, Wachovia, did not hire a title company or any third party to do anything with respect to the loan to Dr. Coffey. Wachovia merely prepared the mortgage that was intended to secure a loan to which Wachovia was a party, and, along with Dr. Coffey, participated in closing the loan. *Matrix* is readily distinguishable because it involved a third party to the transaction who received payment for services constituting the unauthorized practice of law, and *Matrix* thus does not control this case.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT WACHOVIA WAS ON NOTICE THAT ITS CONDUCT CONSTITUTED THE UNAUTHORIZED PRACTICE OF LAW.

In affirming the trial court, the Court of Appeals stated, “As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney.” *Coffey*, 389 S.C. at 75, 698 S.E.2d at 247-248 (citing *State v. Buyers Serv. Co.*, 292 S.C. at 431-434, 357 S.E.2d at 18-19). This overstates the effect of the holding in *Buyers Service*.

Buyers Service held only that a commercial title company had unlawfully engaged in the unauthorized practice of law by performing, for a fee, various functions constituting the unauthorized practice of law in the course of closing real estate transactions to which the title company was not itself a party. Additionally, the loan at issue in *Buyers Service* was a purchase

money mortgage loan in which title was transferred from the seller to the purchaser. *Buyers Service*, 292 S.C. at 428, 357 S.E.2d at 16.

Following *Buyers Service*, this Court did not address whether a lender may lawfully prepare documents for a non-purchase money mortgage loan that does not involve the transfer of title until *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002), *withdrawn and reissued as Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), which was two years *after* the Wachovia loan to Dr. Coffey in 2001. Moreover, the opinion in *McMaster* addressed only a refinance transaction, and expressly limited itself to the facts of that case. *McMaster*, 355 S.C. at 311 n.2, 585 S.E.2d at 775 n.2. The issues of whether or not a lender could lawfully prepare documents for a home equity loan, the type of loan involved in this case, and whether an attorney was required to close a home equity loan was not settled until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), which was five years *after* Wachovia made the loan to Dr. Coffey. *See id.* at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added).

Prior to the decisions of this Court in *Doe v. McMaster* and *Doe v. Richardson*, it was by no means clear that a bank in South Carolina could not lawfully prepare a mortgage to secure a loan the bank intended to make or that an attorney was required to close any type of real estate-secured loan other than a purchase money mortgage loan. On the contrary, the courts of other states had held that banks and other corporations could lawfully prepare documents relating to

loans they made. See *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961); *Title Guaranty Co. v. Denver Bar Ass'n*, 312 P.2d 1011 (Colo. 1957).⁵

Similarly, members of the South Carolina Bar did not generally interpret *Buyers Service* as prohibiting banks from preparing mortgages for all types of loans secured by real estate that the banks intended to make as or requiring an attorney to close all types of loans secured by real estate. On the contrary, in 1989, two years after *Buyers Service* was decided, a prominent member of the South Carolina Bar who had served as the chairman of the Unauthorized Practice of Law Committee gave a written opinion to The South Carolina National Bank ("SCN"), which was later merged into Wachovia, that "the holdings in *Buyers Service* should be limited to situations wherein a party unrelated to the particular transaction provides closing services for a fee." (Opinion letter of Edward G. Menzie dated July 13, 1989.) The opinion concluded that it was permissible under South Carolina law for lay employees of the bank to complete a standard form mortgage prepared by attorneys for the bank, attach a copy of a legal description for the property to the mortgage, have the mortgage executed, and then record the mortgage in the public records. Wachovia, the corporate successor to SCN, followed substantially the same procedure in making the loan to Dr. Coffey.

⁵ In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961), the Arizona Supreme Court held, as this Court did in *Buyers Service*, that title insurance companies engaged in the unauthorized practice of law by preparing documents affecting the title to real property for their clients and customers. The Arizona Supreme Court was careful to note, however, that a person or corporation having an interest in real property could lawfully prepare documents and stated, "a person or corporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan." *Id.* at 12. A slightly earlier case, *Title Guaranty Co. v. Denver Bar Ass'n*, 312 P.2d 1011 (Colo. 1957), held that a title company that was in the business of lending its own money could lawfully prepare documents relating to loans that it made. According to the Colorado Supreme Court, "It is elementary that a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law." *Id.* at 1014.

The most public and direct expression of the collective opinions of attorneys in South Carolina concerning the status of the law after *Buyers Service* can be found in the proposed Rules Governing the Unauthorized Practice of Law that the South Carolina Bar submitted to this Court in 1991. The proposed rules were prepared by a special subcommittee of the Unauthorized Practice of Law Committee and, in the words of this Court, “represent[ed] the Committee’s collective wisdom accumulated during its thirteen years of existence.” *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

The proposed rules included the following rule:

UPR 7.3 Preparation of Legal Instruments

(A) A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except: . . .

(2) A regular employee may prepare legal instruments for use by his employer, other than in aid of his employer’s unauthorized practice of law, for which no separate charge shall be made. . . .

(4) *A lending institution may in the regular course of conducting its business prepare its own loan documents for which no separate charge shall be made.*

(Emphasis added.) In addition, another proposed rule stated, “Closings *involving the purchase and sale of real estate* should be conducted only under the supervision of attorneys.” UPR 7.4(A) (emphasis added). The proposed rules were silent with regards to closings not involving the purchase and sale of real estate.

The fact that the South Carolina Bar proposed the rules quoted above indicates that most members of the Bar did not believe that *Buyers Service* prohibited lenders from preparing mortgages to secure their loans. This Court ultimately declined to adopt the rules proposed by the Bar, and it did so because it concluded that “it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules” and “the better course is to decide what is and

what is not the unauthorized practice of law in the context of an actual case or controversy.” *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124. The Court did not comment on the merits of any of the proposed rules, and in particular, the Court did not express disapproval of the proposed rule that would have allowed a lending institution to prepare its own loan documents if no separate charge was made for the documents. The Court also did not disapprove the proposed rule that only closings involving the purchase and sale of real estate had to be conducted under the supervision of attorneys.

After this Court’s decision in *In re Unauthorized Practice of Law Rules*, Wachovia requested another independent written legal opinion concerning the preparation of legal descriptions for mortgages by Wachovia employees. The opinion concluded that “[w]e believe that the action taken in the Supreme Court order [in *In re Unauthorized Practice of Law Rules*] supports our conclusion as to the propriety of your conduct and that if the matter was presented to the South Carolina Supreme Court, you would be found not to be engaged in the unauthorized practice of law.” (Opinion letter of Edward G. Menzie dated March 16, 1994.) Wachovia subsequently obtained two more written legal opinions specifically addressing home equity loans supported primarily by a customer’s creditworthiness but that also involved a mortgage on the customer’s residence. Both opinions concluded that because no transfer of real property and no title opinion were involved, it would not be the unauthorized practice of law for Wachovia to prepare documents and conduct closings for its own home equity loans without the supervision of an attorney. (Opinion letter of Edward G. Menzie dated April 27, 1994; Opinion Letter of Edward G. Menzie dated May 21, 2001.)

Similarly, following the publication of this Court’s opinion in *In re Unauthorized Practice of Law Rules*, federal judges in the District of South Carolina and the Fourth Circuit

continued to believe that a lender could lawfully prepare loan documents and close certain mortgage loans in South Carolina. For example, in 1993 the Fourth Circuit Court of Appeals rendered a decision in a case arising in South Carolina demonstrating that neither the federal district judge nor the federal circuit judges who decided the case thought that lenders engaged in the unauthorized practice of law by closing their own mortgage loans. *White v. TRW Real Estate Loan Services, Inc.*, 1993 U.S. App. LEXIS 33456 at **2-5 (4th Cir. Dec. 22, 1993).

In that case, two lawyers sued TRW Real Estate Loan Services, Inc., alleging that TRW was engaged in the unauthorized practice of law by preparing and selling property reports consisting of summaries of information appearing in public real property records. The Honorable William B. Traxler, Jr., District Judge, granted summary judgment for TRW, and on appeal, the Fourth Circuit affirmed the trial court's decision, stating:

The purchasers of these property reports are typically lending institutions with underwriting guidelines which allow them to close certain mortgage loans without hiring an attorney. The loans are generally smaller loans used to refinance an existing loan or a second mortgage. . . .

. . .

[T]he [district] court found that the lending institutions purchasing the reports have made a business decision to spare the cost of an attorney and to finance a loan based on the public facts contained in the property reports.

[W]e agree with the reasoning of the district court and hold that under *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (S.C. 1987), TRW's activities do not constitute the unauthorized practice of law.

Id. Clearly implicit in this opinion is the assumption that a lender did not engage in the unauthorized practice of law by preparing its own mortgage document and closing its own mortgage loans.

The belief that a lender could lawfully prepare loan documents for its own use and close its own loans remained undisturbed until this Court rendered its opinion in *Doe v. Condon*, 351 S.C. 158, 568 S.E.2d 356 (2002). In that opinion, this Court stated for the first time that a lender

does not have a *pro se* right to prepare documents to which it is a party. *Id.* at 164, 568 S.E.2d at 359; *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003). This statement clearly constituted a change in the law as attorneys and lenders had previously understood it.

For example, the Petitioner in *Condon*, who was a practicing attorney and who was represented by another practicing attorney, argued as follows in his brief:

It is widely accepted that “a party to a legal document may select, prepare or draft that document without fear of liability for unauthorized practice”. *Perkins v. CTX Mort. Co.*, 969 P.2d 93, 96 (Wash. 1999). See also *Johnson v. Pistakee Highlands Community Ass’n*, 390 N.E.2d 640 (Ill. 1979) (holding that preparation of legal documents by a corporation on its own behalf did not constitute the unauthorized practice of law); *Washington State Bar Ass’n v. Great Western Union Fed. Sav. & Loan Ass’n*, 586 P.2d 870 (Wash. 1978) (holding that a corporation may select, prepare or draft legal documents to which it is a party); *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962) (holding that a corporation having a primary interest in a transaction may prepare documents necessary to furtherance and completion of transaction without engaging in unauthorized practice of law). This “*pro se* exception” is founded upon the belief that a corporation may desire to act on its own behalf with respect to its legal rights and obligations without the benefit of counsel.

It’s only when a corporation seeks to act on behalf of others in the legal arena that it potentially implicates the elusive concept of the “practice of law.” *Cf. In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); *State of South Carolina v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law); *In re Duncan*, 83 S.C. 186, 65 S.E. 210, 211 (1909) (practice of law involves “in general, all advice to clients”) (emphases added).

In the present case, the Lender is a party to the loan and is authorized to prepare the legal instruments necessarily involved in the completion of the loan transaction such as the note and mortgage.

(*Condon*, Brief of Petitioner filed Jan. 31, 2002, pp. 6-7.)

The Petitioner’s position in *Condon* also reflected the understanding of the lending industry at the time. The amicus brief filed by the American Financial Services Association contains the following arguments:

Buyers Service is not proper authority to rely upon to prohibit lenders from closing their own real estate transactions. . . . This case [*i.e.*, *Buyers Service*] never considered the propriety of a lender acting on its own behalf in real estate or non-real estate transactions. Many lenders in this State have relied on *Buyers Service* as very properly holding that *non-attorney third parties* cannot be employed to close real estate loans for lenders, particularly in a purchase-money loan transaction where the third party must assist in the transfer of title to the borrower.

This is not the same situation that exists when a consumer seeks a mortgage refinancing or home equity loan directly from a lender with no third party involvement. . . . Consequently, *Buyers Service* does not provide guidance to the Court and should not be relied upon as somehow elevating all real estate loan transactions to a level which automatically requires attorney involvement, irrespective of the parties involved and the complexity.

Buyers Service does not alter the traditional concept which exists in virtually all business transactions in the United States, namely that absent extraordinary circumstances, entities or individuals may participate directly in such business transactions without attorney involvement as long as the entity or person has a primary interest in the transaction and does not engage non-attorney third parties to provide legal services. *See State v. Pledger*, 127 S.E.2d 337, 339 (N.C. 1962).

(*Condon*, Amicus Brief by the American Financial Services Association pp. 3-4.)

In addition, the South Carolina Bankers Association intervened in *Condon* and filed a brief arguing:

The parties to a mortgage loan refinancing transaction, or any other non-purchase money mortgage loan transaction for that matter, should be free to consummate the transaction without being required to hire a lawyer, if they choose to do so, and, under such circumstances, their conduct should not be prohibited as the unauthorized practice of law but should be recognized as falling within the pro se exception to the prohibition on the unauthorized practice of law.

(*Condon*, Brief of Intervenor The South Carolina Bankers Association in Reply to the Briefs of Petitioner John Doe, etc. p. 2.) The brief of the Bankers Association further argued that in *Buyers Service*, “this Court sought to protect the *transferee’s* interest in obtaining good and marketable title to the real estate. In a mortgage refinancing transaction, a home equity loan or

line of credit, or other consumer loan secured by real estate, however, title to the property is not changing hands.” (*Id.* at 3-4, citation omitted.)

Even after the holding in *Condon/McMaster* in 2002 and 2003, the full scope of attorney involvement required for loans secured by real estate was not fully resolved until four years later in *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006), when this Court held for the first time that the disbursement of loan proceeds in conjunction with a credit-line transaction is the practice of law and must be conducted under the supervision of an attorney. In doing so, the Court again recognized that *Buyers Service* and *Condon/McMaster* had not yet fully resolved the issue of what constitutes the unauthorized practice of law with regards to certain real estate-secured loan transactions. See *Richardson*, 371 S.C. at 15, 636 S.E.2d at 867 (“[O]ur decision today is a new rule . . . Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law.”) (emphasis added); *Id.* (“In [*McMaster*], we *refined* the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in [*Buyers Service*].” (emphasis added)). It was thus not until *Richardson* that this Court ultimately concluded that an attorney was required to close all mortgage loan transactions, including loans for home-equity lines of credit. *Id.*

Given the widely prevailing and reasonable belief, prior to *Condon/McMaster* and *Richardson*, of the limited effect of this Court’s holding in *Buyers Service*, it was unfair and unreasonable for the Court of Appeals to hold that Wachovia should have known in 2001 that preparing a mortgage to secure a home-equity line of credit to Dr. Coffey and conducting the closing without an attorney constituted the unauthorized practice of law. The holdings of *Condon/McMaster* and *Richardson* should not be applied retroactively, especially when the

result of doing so is to impose a forfeiture on Wachovia for engaging in a practice that was legal in other states and that was generally and justifiably thought to be legal in this state at the time. See *Richardson*, 371 S.C. 14, 636 S.E.2d 866 (delaying for three months the effective date of a decision establishing a new rule defining conduct that constitutes the practice of law).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNAUTHORIZED PRACTICE OF LAW GIVES RISE TO A PRIVATE REMEDY.

In *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002), this Court held that there is no private right of action for the unauthorized practice of law, regardless of the theory on which a claim for unauthorized practice might be based. Implicit in the holding of *Linder* is the proposition that the unauthorized practice of law does not give rise to any private rights or remedies, regardless of the form in which the rights or remedies might be asserted.

Furthermore, cases decided in other jurisdictions have held that contracts and conveyances prepared by persons not licensed to practice law are not void. See, e.g., *Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904 (Ind. Ct. App. 1999) (holding that deeds that were the products of the unauthorized practice of law were not void); *Frank v. Moore*, 198 N.E.2d 82 (Ohio. Ct. App. 1963) (holding that the fact that a contract to purchase real property had been prepared by a person not licensed to practice law did not make the contract void); *Wyche v. Works*, 373 S.W.2d 558 (Tex. Ct. App. 1963) (holding that even if a contract for the purchase of land was prepared by a person not licensed to practice law, the validity of the contract would not be affected); *Gaylor v. Gaylor*, 275 S.W.2d 644 (Ark. 1955) (holding that deeds prepared by a title abstract company were not void). The holding of the Court of Appeals to the effect that Mrs. Coffey was entitled to assert the unauthorized practice of law as an affirmative defense to Wachovia's claims was thus at irreconcilable odds with the well-settled rule stated in *Linder* and cases decided in other jurisdictions.

The Court of Appeals cited *Linder* for the proposition that “Wachovia’s legal causes of action are barred as well” (*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248), but *Linder* held only that a public insurance-adjusting business was not entitled to compensation for rendering services that constituted the unauthorized practice of law. *Linder* did not hold that the unauthorized practice of law precluded the business from collecting compensation for other services rendered or that the unauthorized practice invalidated the contract between the business and its client. *Linder* thus does not support the Court of Appeals’ decision.

In this case, Wachovia has not sought compensation for any conduct constituting the unauthorized practice of law and instead has sought only to recover the money that it lent to Dr. Coffey. While *Linder* might bar Wachovia from collecting fees for deed and title work if it had charged them, as those fees could be construed as compensation for the unauthorized practice of law, the holding of *Linder* cannot and should not be interpreted, especially retroactively, to invalidate otherwise valid mortgage contracts securing loans. To do so imposes an unjustified forfeiture on lenders and awards an unearned and undeserved windfall to borrowers.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT MRS. COFFEY WAS ENTITLED TO ASSERT UNCLEAN HANDS AS A DEFENSE TO WACHOVIA’S CLAIMS.

“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.” *Ingram v. Kasey’s Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (citing *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)). “[P]rejudice to the defendant is a necessary element of the ‘unclean hands’ defense” *Wilson v. Landstrom*, 281 S.C. 260, 267, 315 S.E.2d 130, 134 (Ct. App. 1984). A defendant asserting the defense of unclean hands must thus prove (1) that the plaintiff acted unfairly in a matter that is the subject of the litigation, (2) to

the prejudice of the defendant. Both elements of the defense are missing in this case, and the Master erred in concluding that Wachovia was guilty of unclean hands.

Wachovia did not act unfairly in making the loan to Dr. Coffey. If anyone acted unfairly, it was Dr. Coffey, who represented that he could give Wachovia a mortgage lien on his home to secure the loan when in fact he had previously conveyed the home to his wife.⁶ After the loan was made, Dr. Coffey had what he wanted and expected to receive—the money to purchase a sailboat, which Dr. and Mrs. Coffey used with their family for approximately four years; but Wachovia did not have what it wanted and expected to receive—a valid mortgage lien on Dr. Coffey's home. Moreover, Mrs. Coffey has *benefited from* Wachovia's conduct. If Dr. Coffey had not borrowed the funds to purchase the boat, then he would have presumably used the couple's savings or other assets. In this instance, Mrs. Coffey got the full benefit of Wachovia's loan, *and* tax deductions for the interest paid, *and* full title to the boat, *and* the proceeds from selling it, *all* without having to repay Wachovia.

Furthermore, before a party to litigation can be found guilty of unclean hands, it must be proven that the party had actual notice, and not just constructive notice, that its conduct was improper. *See Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005) (holding that where parties had only constructive notice rather than actual notice of restrictive covenants, their violation of the restrictive covenants did not constitute unclean hands). As previously discussed, Wachovia was not on notice when it made the loan to Dr. Coffey that preparing a mortgage to secure the a home equity loan or closing that type of loan constituted the unauthorized practice of law. Wachovia relied on the advice of outside legal counsel and the

⁶ An unsecured loan most likely would have carried a higher rate of interest and the interest payments on a loan not secured by the borrower's principal residence would not have been deductible on Dr. Coffey's federal and state income tax returns.

prevailing understanding of the law at the time, and Wachovia thus did not act unfairly merely by preparing the mortgage and having it executed.

Contrary to the opinion of the Court of Appeals, Mrs. Coffey was not prejudiced by Wachovia's preparation of the mortgage her husband signed. The recording of the mortgage had no effect on Mrs. Coffey's title to the property described in the mortgage because Mrs. Coffey, rather than Dr. Coffey, was the record owner of the property when Dr. Coffey executed the mortgage. Consequently, the mortgage was not in the chain of title and did not affect Mrs. Coffey's title to the property. *See Liberty Loan Corp. v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (holding that a mortgage from a former owner that was not properly recorded until after the former owner no longer owned the mortgaged property was not in the chain of title and did not constitute a lien against the property).

Mrs. Coffey was also not prejudiced by having to defend Wachovia's claims against her because being required to defend claims does not constitute legal prejudice. For example, "[a] party opposing [a] motion for voluntary nonsuit without prejudice must show prejudice (i.e., 'legal' prejudice) to successfully defeat the motion. That prejudice is not merely the possibility of defending another suit." *Walker v. Jones*, 269 S.C. 19, 21, 235 S.E.2d 810, 810-811 (1977) (internal citations omitted). Similarly, a defendant does not suffer legal prejudice as the result of an amendment to a complaint even though the amendment will require the defendant to file additional pleadings, engage in additional discovery, and incur additional costs. *Forrester v. Smith & Steele Bldrs., Inc.*, 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988).

Moreover, Mrs. Coffey was not entitled to assert the defense of unclean hands because she was not a party to the loan transaction on which she based the defense. "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). To avoid this limitation, the Court of Appeals asserted, “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,” and cited *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987), to support the assertion. *Coffey*, 389 S.C at 76, 698 S.E.2d at 248.

In so stating, the Court of Appeals misconstrued *Buyers Service* because *Buyers Service* did not address or decide the issue of who is prejudiced by the unauthorized practice of law. Instead, *Buyers Service* merely explained that the prohibition on the unauthorized practice of law exists not to protect the legal profession but instead to protect the public. A similar statement could be made with respect to most licensing and regulatory schemes. *Buyers Service* does not support the conclusion that each and every member of the public is a person prejudiced by unauthorized practice of law occurring in a private transaction involving only two parties. Indeed, to extend the right to assert remedies beyond the parties to a transaction would raise serious issues of standing.

Mrs. Coffey was also not entitled to assert the doctrine of unclean hands for the additional reason that she did not plead the doctrine as an affirmative defense. Rule 8(c), SCRPC, requires party pleading defenses to set forth affirmatively any “matter constituting an avoidance or affirmative defense,” and Mrs. Coffey implicitly admitted in the brief she filed with the Court of Appeals that she did not plead “unclean hands” in her Answer. (Brief of Respondent pp. 9-10.) Consequently, it was not necessary for Wachovia to include the Answer in the Record on Appeal.

The Court of Appeals held that the issue of whether Mrs. Coffey had waived the defense of unclean hands was not preserved for appeal because the Master did not address the issue when

he ruled that Wachovia had unclean hands and Wachovia failed to file a motion to alter or amend pursuant to Rule 59(e), SCRCP. In a memorandum filed with the circuit court, however, Wachovia expressly asserted that “Defendants are barred from raising the affirmative defense of unclean hands because they failed to raise it in their Answer, Counterclaims and Affirmative Defenses filed August 15, 2006.” (R. p. 77.) Although the Master did not specifically address Mrs. Coffey’s failure to plead the unclean hands defense in his order, the Master did grant judgment for Mrs. Coffey on this defense, thus implicitly ruling on the issue. A Rule 59(e) motion is not necessary to preserve an issue for appeal when the trial court has implicitly ruled on the issue. *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (holding that an appellant did not need to file a Rule 59(e) motion where the trial court “implicitly denied” the appellant’s claims by adopting a particular analysis proposed by the other side); *Pryor v. Northwest Apts., Ltd.*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App. 1996) (holding that where a tenant’s pleadings clearly asserted that the Residential Landlord Tenant Act (the “RLTA”) was applicable to a case and imposed on a landlord a particular duty to warn of dangerous conditions, and where the trial court found that a landlord had no duty to warn of such conditions on the property, there was no need for a tenant to file a Rule 59(e) motion as to whether the RLTA applied because the court had “implicitly ruled on and rejected [the tenant’s] argument”).

Finally, the decision of the Court of Appeals had the effect of imposing a forfeiture on Wachovia, which is contrary to principles of equity. “Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.” *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) (quoting *Bangert v. Lumber Co.*, 169 N.C. 628, 630, 86 S.E. 516, 517 (1915)). In this case, both the Court of Appeals and the

Master expressed reservations about the conduct of Mrs. Coffey, and the Master acknowledged that “there is some perception of unfairness to Wachovia.” (R. p. 12.) Despite these reservations, both the Court of Appeals and the Master permitted Mrs. Coffey to invoke an equitable principle—the clean hands doctrine—to achieve a clearly inequitable result—a forfeiture imposed on Wachovia and an unearned windfall to Mrs. Coffey. The Court of Appeals and the Master should not have permitted such a gross misuse of an equitable doctrine, and thus the holding of the Court of Appeals should be reversed or applied prospectively only.

IV. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE HOLDING OF THE COURT OF APPEALS IN A PRIOR CASE TO THE EFFECT THAT A TRIAL COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER THE UNAUTHORIZED PRACTICE OF LAW HAS OCCURRED IN ANY GIVEN CASE.

The Court of Appeals and the trial court held that Wachovia had unclean hands because “Wachovia's employees processed the home equity loan to Dr. Coffey without the supervision of an attorney.” (*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248; R. pp. 12-13.) The Court of Appeals had previously ruled, however, in *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), that “[o]nly our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law.” *Id.* at 124-125, 634 S.E.2d at 8-9. The Court of Appeals then proceeded to hold in *Hambrick* that a circuit court lacks jurisdiction to determine whether a party engaged in the unauthorized practice of law. *Id.* at 125, 634 S.E.2d at 9.

The Court of Appeals further held in *Hambrick* that the fact that “actions attributed to [a party] have already been deemed the unauthorized practice of law by prior case law” is of no consequence. *Id.* at 124, 634 S.E.2d at 8. According to *Hambrick*, the circuit court would still lack jurisdiction to determine whether the conduct in question constituted the unauthorized practice of law.

The trial judge stated, “While this Court recognizes that no private right of action exists from the unauthorized practice of law, it can, however, be the basis for ‘unclean hands,’ and I so find.” (R. p. 13.) The conclusion that Wachovia had unclean hands thus rests squarely on the trial court’s determination that Wachovia had engaged in the unauthorized practice of law, and the trial court simply did not have jurisdiction to make such a determination.

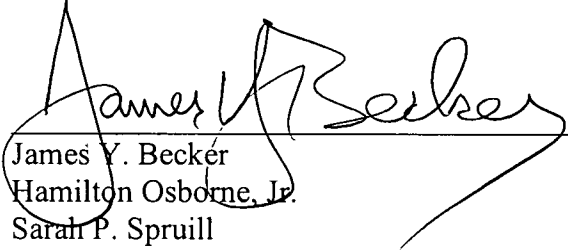
“The question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be waived or conferred by consent.” *Gnoc Corp. v. Estate of Rhyne*, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (citing *Petroleum Transp., Inc. v. Public Service Comm’n*, 255 S.C. 419, 179 S.E.2d 326 (1971)); see also *Normandy Corp. v. South Carolina Dep’t of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009) (“Issues involving subject matter jurisdiction may be raised at any time, including on appeal.”) (citing *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007)).

The holding of the Court of Appeals in this case cannot be reconciled with the holding of the Court of Appeals in *Hambrick*. The holding in *Coffey* should thus be rejected or applied prospectively only.

CONCLUSION

For the foregoing reasons, Wachovia thus respectfully submits that this Court should issue a writ of certiorari to review the decision of the Court of Appeals in this case and that the decision of the Court of Appeals should be reversed or applied prospectively only as explained herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker". The signature is written over a horizontal line that separates it from the printed text below.

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey

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November 5, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV - 5 2010

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Petition to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

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Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.

Charlotte Arain

Date mailed: November 5, 2010

The Supreme Court of South Carolina

Wachovia Bank, N.A., Petitioner,

v.

Ann T. Coffey and Bank of
America, N.A., Respondents.

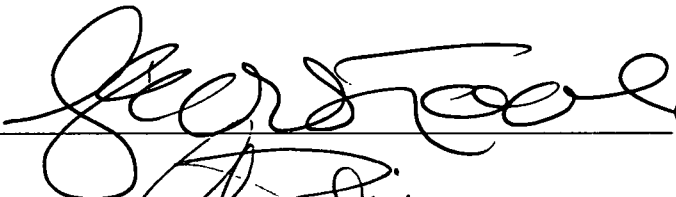
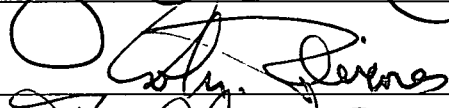
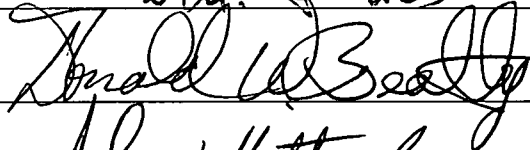
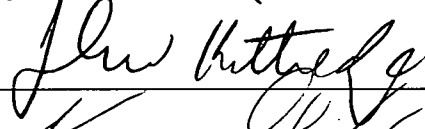
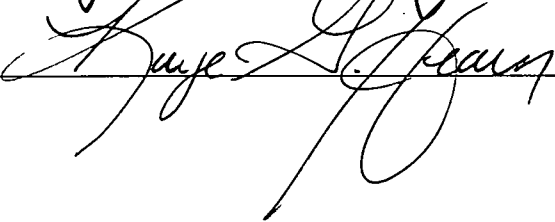
ORDER

Petitioner moves to include certain opinion letters in its petition for a writ of certiorari. Respondents oppose the motion and move to strike the entire petition for a writ of certiorari, which includes references to and arguments based on the opinion letters, or in the alternative, those portions of the petition that reference and make argument based on the opinion letters. Respondents also seek an extension of time in which to file their return to the petition for a writ of certiorari.

Petitioner's motion is denied. We grant respondents' motion to strike the petition for a writ of certiorari. Petitioner shall, within ten days of the date of this order, serve and file a petition for a writ of certiorari which does not make reference to documents or include arguments that were not presented to the lower courts, including the opinion letters. Rule 242(d),

SCACR. Respondents' return shall be due within thirty days after service of the new petition for a writ of certiorari. Rule 242(f), SCACR.

IT IS SO ORDERED.

 C.L.
 J.
 J.
 J.
 J.

Columbia, South Carolina

December 2, 2010

cc: James Y. Becker, Esquire
Hamilton Osborné, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

NOV 15 2010

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Petitioner,
~~Appellant,~~

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Appellant respectfully requests an extension of time to file its Return to Petition for Writ of Certiorari until a reasonable time after this Court rules on Appellant's Motion to Include Exhibits in Petition for Writ of Certiorari which is currently pending before the Court and Respondent's Motion to Strike Petition for Writ of Certiorari which is being filed simultaneously herewith. Respondent's Return to Petition for Writ of Certiorari is currently due December 5, 2010 however the two pending Motions could have a great impact on the scope and content of Respondent's Return.

Appellant has moved for allowance to include exhibits in its Petition for Writ of Certiorari that were not presented to either the Circuit or Appellate Courts and are therefore not a part of the Record of this case. Respondent has filed a Return to this Motion requesting the Court deny Appellant's request.

Also, Appellant has filed its Petition for Writ of Certiorari and Respondent has moved that the Petition be stricken due to it containing the above discussed exhibits and new arguments not presented to the courts below.

Accordingly, Respondent believes it to be prudent to postpone filing a Return until the Court rules on the above referenced Motions. Respondent states that consultation with opposing counsel would be futile.

Respectfully submitted this 12th day of November 2010.



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV 22 2010

S.C. Supreme Court

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

**PETITIONER'S RETURN TO RESPONDENT'S MOTION
TO STRIKE PETITION AND/OR PORTIONS OF
PETITION FOR WRIT OF CERTIORARI**

Petitioner Wachovia Bank, N.A. ("Wachovia") submits this Return to Respondent Coffey's Motion to Strike Petition and/or Portions of Petition for Writ of Certiorari.

Respondent Coffey seeks to strike Wachovia's Petition for a Writ of Certiorari in its entirety solely on the grounds that the Petition refers to certain information, including statistical data published by a federal agency, that is not included in the Record on Appeal. Coffey cites no authority to support its motion, and it is not likely that any such authority exists.

Coffey asserts that Wachovia's Petition "contains numerous materials that were not made a part of the record." To support this argument, Coffey points only to the opinions of counsel that are the subject of Wachovia's Motion to Include Exhibits, etc. and to a footnote in Wachovia's Petition that cites certain publications. On the basis of this very limited material,

Coffey seeks to have this Court disregard Wachovia's entire Petition, including portions of the Petition that are in no way dependent on the materials to which Coffey objects.

Coffey also asserts that "Wachovia seeks to introduce new evidence and arguments" and that "[w]ith limited exception, the entire content of the Petition was never raised at any stage prior to the filing of the Petition." Coffey fails, however, to identify even a single argument that Wachovia has not previously raised, and as Wachovia will demonstrate, each argument Wachovia has made in its Petition for a Writ of Certiorari appears earlier in the record of this case.

- In Part I of its Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that Wachovia was on notice that its conduct constituted the unauthorized practice of law. In Part III of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, "Wachovia was not on notice when it made the loan to Dr. Coffey that preparing a mortgage to secure the loan constituted the unauthorized practice of law." Wachovia made this argument in response to a statement in the opinion of the Court of Appeals, *Wachovia Bank, N.A. v. Coffey*, ___ S.C. ___, 698 S.E.2d 244, 2010 S.C. App. LEXIS 78, *9 (Ct. App. 2010) ("As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney."), so Wachovia had no prior occasion to make this argument.

- In Part II of its Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that the unauthorized practice of law gives rise to a private remedy. In Part II of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, "The unauthorized practice of law does not create private rights or remedies, and it does not render contracts or

conveyances invalid.” In its Brief to the Court of Appeals, Wachovia argued that “there is no private right of action for the unauthorized practice of law.” (Brief of Appellant p. 25.) Wachovia made the same argument in a memorandum filed with the trial court. (Record on Appeal p. 82.)

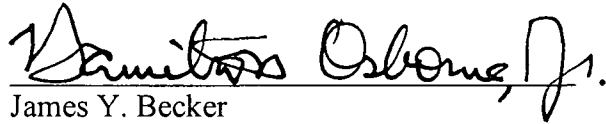
- In Part III of its Petition to this Court, Wachovia argues that the Court of Appeals erred in holding that Mrs. Coffey was entitled to assert unclean hands as a defense to Wachovia’s claims. In Part IV of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “Mrs. Coffey was not entitled to assert unclean hands as a defense to Wachovia’s claims.” In its Brief to the Court of Appeals, Wachovia argued, “The equitable doctrine of unclean hands has no application under the facts and circumstances of this case and does not prevent the award of equitable relief to Wachovia.” (Brief of Appellant p. 20.) Wachovia made the same argument in a memorandum filed with the trial court. (Record on Appeal pp. 77-81.)

- In Part IV of its Petition to this Court, Wachovia argues that the holding of the Court of Appeals in this case conflicts with the holding of the Court of Appeals in a prior case to the effect that a trial court does not have jurisdiction to determine whether the unauthorized practice of law has occurred in any given case. In Part I of its Petition for Rehearing filed with the Court of Appeals, Wachovia argued, “The circuit court lacked jurisdiction to determine whether Wachovia had engaged in the unauthorized practice of law.” Wachovia had not previously made this argument, but “[t]he question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be waived or conferred by consent.” *Gnoc Corp. v. Estate of Rhyne*, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (citing *Petroleum Transp., Inc. v. Public Service Comm’n*, 255 S.C. 419, 179 S.E.2d 326 (1971)); see also *Normandy Corp. v. South Carolina Dep’t of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009)

("Issues involving subject matter jurisdiction may be raised at any time, including on appeal.")
(citing *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007)).

Coffey's motion to strike Wachovia's Petition for a Writ of Certiorari is thus without merit and should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker". The signature is fluid and cursive, with a large initial "J" and "B".

James Y. Becker
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Mary M. Caskey
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Attorneys for Petitioner Wachovia Bank, N.A.

November 22, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV 22 2010

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I served Petitioner's Return to Respondent's Motion to Strike Petition, etc. on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
Alford & Wilkins, P.C.
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Steven R. Anderson, Esquire
Attorney at Law
P.O. Box 12188
Columbia, SC 29211-2188

Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.



Charlotte D. Ariail

Date mailed: November 22, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

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NOV 15 2010

S.C. Supreme Court

Wachovia Bank, N.A.,

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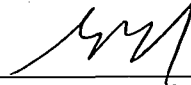
Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S MOTION TO STRIKE PETITION AND/OR
PORTIONS OF PETITION FOR WRIT OF CERTIORARI**

COMES NOW Respondent, Ann T. Coffey, moving to Strike Appellant's Petition for Writ of Certiorari and/or portions of Appellant's Petition for Writ of Certiorari based on the grounds that Appellant seeks to enter into the Record new exhibits, new arguments, and new statistical data never presented previously to either the Circuit Court or Appellate Court. This attempt to introduce new evidence and arguments is in clear violation of Rule 242(d)(1) SCACR and Rule 210(c) and (h) SCACR. Appellant freely admits that the exhibits were never presented in either the Circuit Court or Appellate Court. To allow Appellant to now, at this late stage of this action, enter new evidence and arguments, would be highly prejudicial to Respondent and completely contradict the South Carolina Appellate Court Rules.

Respondent Coffey respectfully requests the Court strike the whole Petition or in the alternative strike those portions of Appellant's Petition for Writ of Certiorari which refer to new information or exhibits or attempts to present a new argument to the Court.



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Attorney for Respondent

November 12, 2010
Hilton Head Island, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Petitioner
Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO ^{Petitioner's} APPELLANT'S
MOTION TO INCLUDE EXHIBITS IN PETITION FOR WRIT OF CERTIORARI AND
IN SUPPORT OF RESPONDENT'S MOTION STRIKE PETITION AND/OR PORTIONS OF
PETITION FOR WRIT OF CERTIORARI**

Respondent, Ann T. Coffey, has moved to Strike Wachovia's Petition for Writ of Certiorari because it contains numerous materials that were not made a part of the record before the Trial Court or reviewed by the Court of Appeals.¹ Wachovia seeks to introduce new evidence and arguments in violation of Rule 210(c), S. C. A. C. R., which, respectfully, this Court simply cannot consider.² Having

¹ Rule 210(c), S. C. A. C. R., is clear that the Record on Appeal is limited to those matters and things that were actually presented to the trial court. Rule 210(c), S. C. A. C. R., reads, in relevant part:

... The Record shall not, however, include matter which was not presented to the lower court or tribunal.

² See: Rule 210(h), S. C. A. C. R.:

(h) **Review Limited to Record on Appeal.** Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.

See also: *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997)

failed to develop the Record, Appellant now desires in the Courts below, Wachovia now seeks to create a wholly new Record on Appeal.³

On May 6, 2010, the Court of Appeals issued an opinion in the within action concluding that Wachovia Bank was barred from seeking equitable relief in the courts from Respondent Ann T. Coffey due to Wachovia's unauthorized practice of law in the underlying loan transaction. Wachovia moved for a rehearing which was subsequently denied. Wachovia then filed a Court a Petition for Writ of Certiorari and simultaneously filed a Motion to Include Exhibits Into Petition for Writ of Certiorari.⁴

Without waiting for this Court's ruling on its Motion, Wachovia included the exhibits and other data in its Petition, and made numerous arguments based on these exhibits, no part of which was ever argued to the Trial Court, or is included in the Record on Appeal for this case. With limited exception, the entire content of the Petition was never raised at any stage prior to the filing of the Petition. Thus not only should Petitioner's motion be denied, but also the Petition itself should be stricken.⁵

Wachovia seeks to introduce letters from Wachovia's former counsel, which were readily available to Wachovia at time of trial. Wachovia refers to these letters as a "supplemental authority". Leaving aside the improper procedural method by which Wachovia seeks to introduce this material, letters Wachovia's former counsel are not binding on this, or any, Court and are not "authority".⁶

³ Anne T. Coffey does not consent to Wachovia's effort to add new evidence to the Record on Appeal. In *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct.App.1986), our Court of Appeals held:

"However, where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record."

⁴ Wachovia's motion is nonsensical. Under Rules 210(c) and (h), S. C. A. C. R., this Court cannot consider any fact that is not in the Record on Appeal. Yet, Wachovia does not seek to add anything to the Record on Appeal. As is shown above in notes 2 and 3 above, the appellate court cannot consider facts that are not in the Record on Appeal.

⁵ Respondent has filed a motion to extend the time for response to the substance of the Petition until the Court rules on the Respondent's Motions to Strike the Petition and Exhibits. At this point it is unclear to Respondent what, if any, parts of the Petition will remain after the Court sifts through what appears to be a complete disregard for the procedural rules relating to supplementation of the record on appeal, and the rules governing when and how such materials may be included in the Petition before consent to supplement is given.

⁶ This description is a transparent effort to mis-characterize this material as "authority" such as a decision of this Court which can be cited in support of an argument, instead of evidence that Wachovia failed to get into the record before the Trial Court. The appellant has the burden of presenting a sufficient record for review. *Vespaziani v. McAlister*, 307 S.C.

Wachovia's Petition attaches great weight to these exhibits however, these exhibits were never presented to the lower or Appellate courts nor to the Respondent as part of any discovery response.⁷ Surprisingly, Wachovia claims that it had no knowledge of these exhibits until recently, even though they come from Wachovia's own files and as such should have been discoverable with minimal effort.

Wachovia also asserts new arguments and alleged facts which were not made previously and are not supported by the Record on Appeal. Specifically, Wachovia speculates, without any basis in the Record on Appeal, that "virtually every mortgage foreclosure action in South Carolina will become mired in disputes..." and includes a footnote citing several websites, bills, statistics and articles from September and October 2010. Obviously, these were not included in the arguments presented to the lower courts and not contained in the Record on Appeal. Appellant seeks to introduce this information to sway this Court's opinion by creating a doomsday scenario which is wholly unsupported in fact or law. No where does Appellant cite any relevant case law or statute to support these so called findings and accordingly such arguments should not be permitted.

Respondent, Anne T. Coffey, respectfully moves this Court to grant any or all of the following:

1. Strike Wachovia's entire Petition; and/or
2. Strike any evidence or data that does not appear in the Record on Appeal from Wachovia's Petition; and/or
3. Strike any argument founded on evidence or data that does not appear in the Record on Appeal from Wachovia's Petition; and,

411, 415 S.E.2d 427 (Ct. App. 1992). Wachovia has not pointed to any authority in the South Carolina Rules of Appellate Procedure or the jurisprudence of this State that permit a litigant to create a new record on appeal, and that is because there is none.

⁷ Wachovia asserts in its Motion to Include Exhibits in Petition for Writ of Certiorari that the opinions were never requested in discovery, as if Anne T. Coffey's failure to have requested an item that Wachovia neglected to introduce at trial somehow relieves Wachovia of its obligation to put things in the record that it might want an appellate court to review. Further, it is patently disingenuous to suggest that a request from Anne T. Coffey seeking production of legal opinions and advice given by Wachovia's lawyers would have been met with anything other than a denial based on the widely known and understood "attorney/client privilege."

4. Deny Wachovia's Petition in whole based on the above arguments.



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent

Hilton Head Island, South Carolina

This 12th Day of November, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV 19 2010

S.C. Supreme Court

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

**PETITIONER'S REPLY TO RESPONDENT'S RETURN
TO MOTION TO INCLUDE EXHIBITS TO THE
PETITION FOR WRIT OF CERTIORARI**

Petitioner Wachovia Bank, N.A. ("Wachovia") submits this Reply to Respondent Coffey's Return to Petitioner's Motion to Include Exhibits to the Petition for Writ of Certiorari.

To support her argument that Wachovia's motion should be denied, Respondent Coffey quotes and relies upon that portion of Rule 210(h), SCACR, stating that "the appellate court will not consider any fact which does not appear in the Record on Appeal." This partial quotation of Rule 210(h) is misleading because the Rule begins with an exception, "Except as provided by Rule 212," and Rule 212(b), SCACR, permits a party to supplement the Record on Appeal.

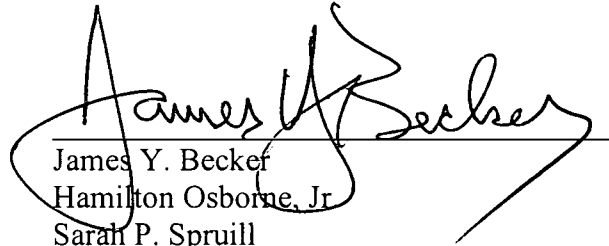
In this case, Wachovia should be allowed to supplement the record before the Court in order to respond to the following statement in the opinion of the Court of Appeals: "As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent

attorney and that the loan closing had to be supervised by an attorney.” *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). This statement misconstrues the state of the law prior to the events giving rise to this case, and it unfairly imposes on Wachovia notice of developments in the law that had not yet occurred. Wachovia should accordingly be allowed to demonstrate that when Petitioner made the loan involved in this case, Wachovia, relying on the advice of competent counsel, did not understand the law of South Carolina to prohibit a lender from preparing its own mortgage loan documents or to require that an attorney close the loan, especially when that loan was a home equity line of credit and not a purchase money mortgage loan involving the transfer of title to the real estate. It is within the discretion of this Court to consider evidence outside of the Record on Appeal, and this Court has done so in the past. *See Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 86-87, 484 S.E.2d 471, 472-73 (1997) (in attorney preference litigation, considering “a statement indicating [the borrower’s] preferences” which was included by the borrower as an appendix to her brief to the Supreme Court).

The record before the trial court in this case does not contain argument or evidence dealing with what lending institutions doing business in South Carolina knew or should have known when the loan involved in this action was made about participation by an independent attorney in preparing legal documents or closing the transaction for home equity loans. The Court of Appeals thus based its decision on its own retroactive assessment of the state of the law in 1987 without giving Petitioner prior notice or an opportunity to respond. Under these circumstances, it would be fundamentally unfair to prevent Wachovia from showing that it had sought advice of competent counsel and that the advice it received was diametrically opposed to the interpretation adopted by the Court of Appeals more than a decade later.

Petitioner thus requests that the Court permit it to include the opinion letters from Edward G. Menzie, Esq., of the Nexsen Pruet law firm, as supplemental authority in support of its Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'J' and a long, trailing flourish.

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey
Haynsworth Sinkler Boyd, P.A.
1201 Main St., 22nd Floor (29201-3226)
P.O. Box 11889 (29211-1889)
Columbia, S.C.
Tel: (803) 779-3080
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Email: jbecker@hsblawfirm.com

Attorneys for Petitioner Wachovia Bank, N.A.

November 19, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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The Honorable Marvin H. Dukes, III, Master-in-Equity

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Petitioner

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Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Petitioner's Reply to Respondent's Return to Motion to Include Exhibits to the Petition for Writ of Certiorari to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
Alford & Wilkins, P.C.
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Fax: (843) 842-8400
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Attorney at Law
P.O. Box 12188
Columbia, SC 29211-2188
(803) 252-2828
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Email: sraatlaw@bellsouth.net

Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.


Charlotte Ariail

Date mailed: November 19, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

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NOV 15 2010

Case No. 2006-CP-07-1655

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner,
Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S RETURN TO MOTION TO INCLUDE EXHIBITS INTO
THE PETITION FOR WRIT OF CERTIORARI**

COMES NOW Respondent, Ann T. Coffey, responding to Appellant's Motion to Include Exhibits to the Petition for Writ of Certiorari and moves this Court to deny Appellant's Motion on the following grounds.¹

Appellant's seeks to enter into the Record Exhibits that were never presented to either the Circuit Court or Appellate Court, in clear violation of Rule 242(d)(1) SCACR and Rule 210(c) and (h) SCACR. Appellant freely admits that these Exhibits were never presented in either the Circuit Court or Appellate Court. Appellant argues that the reason was that he was unaware of these exhibits until after the decision of the Court of Appeals, however, these exhibits are from his own client's files and counsel for Appellant should have been aware of their existence. To allow Appellant to now, at this late stage of

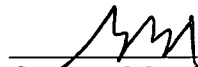
¹ Respondent has also filed a Memorandum in Opposition to Appellant's Motion to Include Exhibits and in Support of Respondent's Motion to Strike all or portions of Wachovia's petition.

this action, enter new evidence, would be highly prejudicial to Respondent and completely contradict the South Carolina Appellate Court Rules.

“Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, contrary to the dissent’s argument, this Court should not consider appellants’ previously unpresented evidence when deciding whether to grant the petition for rehearing” *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564, S.E. 2d 322 (2001).

“...the appellate court will not consider any fact which does not appear in the Record on Appeal.” SCACR 210(h)

Respondent Coffey respectfully requests the Court deny Appellant’s Motion to Include Exhibits to the Petition for Writ of Certiorari.



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent Coffey

November 12th, 2010
Hilton Head Island, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

**RESPONDENT'S MEMORANDUM IN OPPOSITION TO APPELLANT'S
MOTION TO INCLUDE EXHIBITS IN PETITION FOR WRIT OF CERTIORARI AND
IN SUPPORT OF RESPONDENT'S MOTION STRIKE PETITION AND/OR PORTIONS OF
PETITION FOR WRIT OF CERTIORARI**

Respondent, Ann T. Coffey, has moved to Strike Wachovia's Petition for Writ of Certiorari because it contains numerous materials that were not made a part of the record before the Trial Court or reviewed by the Court of Appeals.¹ Wachovia seeks to introduce new evidence and arguments in violation of Rule 210(c), S. C. A. C. R., which, respectfully, this Court simply cannot consider.² Having

¹ Rule 210(c), S. C. A. C. R., is clear that the Record on Appeal is limited to those matters and things that were actually presented to the trial court. Rule 210(c), S. C. A. C. R., reads, in relevant part:

... The Record shall not, however, include matter which was not presented to the lower court or tribunal.

² See: Rule 210(h), S. C. A. C. R.:

(h) Review Limited to Record on Appeal. Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.

See also: *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997)

failed to develop the Record, Appellant now desires in the Courts below, Wachovia now seeks to create a wholly new Record on Appeal.³

On May 6, 2010, the Court of Appeals issued an opinion in the within action concluding that Wachovia Bank was barred from seeking equitable relief in the courts from Respondent Ann T. Coffey due to Wachovia's unauthorized practice of law in the underlying loan transaction. Wachovia moved for a rehearing which was subsequently denied. Wachovia then filed a Court a Petition for Writ of Certiorari and simultaneously filed a Motion to Include Exhibits Into Petition for Writ of Certiorari.⁴

Without waiting for this Court's ruling on its Motion, Wachovia included the exhibits and other data in its Petition, and made numerous arguments based on these exhibits, no part of which was ever argued to the Trial Court, or is included in the Record on Appeal for this case. With limited exception, the entire content of the Petition was never raised at any stage prior to the filing of the Petition. Thus not only should Petitioner's motion be denied, but also the Petition itself should be stricken.⁵

Wachovia seeks to introduce letters from Wachovia's former counsel, which were readily available to Wachovia at time of trial. Wachovia refers to these letters as a "supplemental authority". Leaving aside the improper procedural method by which Wachovia seeks to introduce this material, letters Wachovia's former counsel are not binding on this, or any, Court and are not "authority".⁶

³ Anne T. Coffey does not consent to Wachovia's effort to add new evidence to the Record on Appeal. In *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct.App.1986), our Court of Appeals held:

"However, where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record."

⁴ Wachovia's motion is nonsensical. Under Rules 210(c) and (h), S. C. A. C. R., this Court cannot consider any fact that is not in the Record on Appeal. Yet, Wachovia does not seek to add anything to the Record on Appeal. As is shown above in notes 2 and 3 above, the appellate court cannot consider facts that are not in the Record on Appeal.

⁵ Respondent has filed a motion to extend the time for response to the substance of the Petition until the Court rules on the Respondent's Motions to Strike the Petition and Exhibits. At this point it is unclear to Respondent what, if any, parts of the Petition will remain after the Court sifts through what appears to be a complete disregard for the procedural rules relating to supplementation of the record on appeal, and the rules governing when and how such materials may be included in the Petition before consent to supplement is given.

⁶ This description is a transparent effort to mis-characterize this material as "authority" such as a decision of this Court which can be cited in support of an argument, instead of evidence that Wachovia failed to get into the record before the Trial Court. The appellant has the burden of presenting a sufficient record for review. *Vespaziani v. McAlister*, 307 S.C.

Wachovia's Petition attaches great weight to these exhibits however, these exhibits were never presented to the lower or Appellate courts nor to the Respondent as part of any discovery response.⁷ Surprisingly, Wachovia claims that it had no knowledge of these exhibits until recently, even though they come from Wachovia's own files and as such should have been discoverable with minimal effort.

Wachovia also asserts new arguments and alleged facts which were not made previously and are not supported by the Record on Appeal. Specifically, Wachovia speculates, without any basis in the Record on Appeal, that "virtually every mortgage foreclosure action in South Carolina will become mired in disputes..." and includes a footnote citing several websites, bills, statistics and articles from September and October 2010. Obviously, these were not included in the arguments presented to the lower courts and not contained in the Record on Appeal. Appellant seeks to introduce this information to sway this Court's opinion by creating a doomsday scenario which is wholly unsupported in fact or law. No where does Appellant cite any relevant case law or statute to support these so called findings and accordingly such arguments should not be permitted.

Respondent, Anne T. Coffey, respectfully moves this Court to grant any or all of the following:

1. Strike Wachovia's entire Petition; and/or
2. Strike any evidence or data that does not appear in the Record on Appeal from Wachovia's Petition; and/or
3. Strike any argument founded on evidence or data that does not appear in the Record on Appeal from Wachovia's Petition; and,

411, 415 S.E.2d 427 (Ct. App. 1992). Wachovia has not pointed to any authority in the South Carolina Rules of Appellate Procedure or the jurisprudence of this State that permit a litigant to create a new record on appeal, and that is because there is none.

⁷ Wachovia asserts in its Motion to Include Exhibits in Petition for Writ of Certiorari that the opinions were never requested in discovery, as if Anne T. Coffey's failure to have requested an item that Wachovia neglected to introduce at trial somehow relieves Wachovia of its obligation to put things in the record that it might want an appellate court to review. Further, it is patently disingenuous to suggest that a request from Anne T. Coffey seeking production of legal opinions and advice given by Wachovia's lawyers would have been met with anything other than a denial based on the widely known and understood "attorney/client privilege."

4. Deny Wachovia's Petition in whole based on the above arguments.



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent

Hilton Head Island, South Carolina

This 12th Day of November, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

NOV 15 2010

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

Wachovia Bank, N.A.,

Appellant,

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, Gregory M. Alford, Attorney for Respondent Ann T. Coffey, do hereby certify that on November 12, 2010, I served the following:

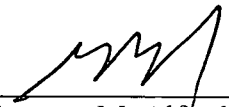
- 1) Respondent's Motion to Strike Petition and/or Portions of Petition for Writ of Certiorari;
- 2) Respondent's Return to Motion to Include Exhibits Into the Petition for Writ of Certiorari;
- 3) Respondent's Memorandum in Opposition to Appellant's Motion to Include Exhibits in Petition for Writ of Certiorari and in Support of Respondent's Motion to Strike Petition and/or Portions of Petition for Writ of Certiorari;
- 4) Respondent's Motion for Extension of Time to File Return to Petition for Writ of Certiorari

by depositing a copy of the document in the United States mail, with postage prepaid, at Hilton Head Island, South Carolina, addressed as follows:

James Y. Becker
R. David Proffitt
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

Steven R. Anderson
P.O. Box 12188
Columbia, SC 29211-2188

November 12, 2010



Gregory M. Alford
Alford, Wilkins & Coltrane, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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**MOTION TO INCLUDE EXHIBITS TO THE
PETITION FOR WRIT OF CERTIORARI**

Petitioner Wachovia Bank, N.A. ("Wachovia") moves this Court for permission to supplement the Petition for Writ of Certiorari, filed on November 5, 2010, by including the following documents as supplemental authority and Exhibits:

1. Opinion letter of Edward G. Menzie, dated July 13, 1989;
2. Opinion letter of Edward G. Menzie, dated March 16, 1989;
3. Opinion letter of Edward G. Menzie, dated April 27, 1994;
4. Opinion letter of Edward G. Menzie dated May 21, 2001.

Copies of the proposed exhibits and supplemental authority are attached hereto as Exhibits A thru D.

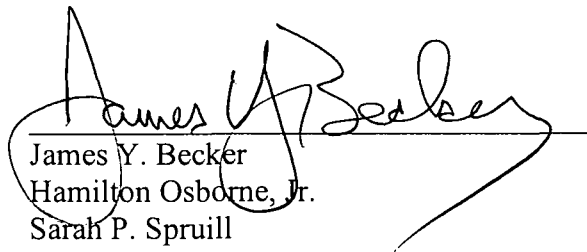
The legal opinions attached as Exhibits A through D to this Motion have not previously been produced in this action because they were not requested in discovery,

Check # 48587

were not considered by the trial court, and are not part of the Record on Appeal. Wachovia's in-house counsel in this matter and its outside counsel, James Y. Becker, Esq. and R. David Proffitt, Esq., were not made aware of these legal opinions until after the Court of Appeals' decision of May 6, 2010. This occurred when Mr. Becker spoke with Kathleen G. Smith, Esq., about the decision. Ms. Smith was formerly employed as in-house counsel to Wachovia, but left employment with Wachovia in 2002. Ms. Smith, on behalf of Wachovia, engaged Mr. Menzie to provide the legal opinions.

These opinions offer valuable information and supporting authority concerning the South Carolina Bar's and the lending industry's interpretation of the unauthorized practice of law at the time the loan that is the subject of this case was made by Wachovia. Wachovia thus requests that these legal opinions be allowed as supplemental authority to be considered in conjunction with the Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James Y. Becker", is written over a horizontal line. The signature is stylized with a large, sweeping "B" and a long, curved tail that extends to the right.

James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey

Haynsworth Sinkler Boyd, P.A.
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Attorneys for Petitioner Wachovia Bank,
N.A.

November 5, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

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Petitioner

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Motion to Include Exhibits to Petition for Writ of Certiorari to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
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P.O. Drawer 8008
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Fax: (843) 842-8400
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Fax: (803) 254-1935
Email: sraatlaw@bellsouth.net

Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.



Charlotte Ariail

Date mailed: November 5, 2010

EXHIBIT A

NEXSEN PRUET JACOBS & POLLARD

ATTORNEYS AND COUNSELORS AT LAW

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COLUMBIA, SOUTH CAROLINA 29202

(803) 771-8900

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ROBERT M. EARLE
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WILLIAM A. POLLARD
GLENN BOWERS
MARK L. BENDER
JAMES W. ORR
SUSAN BATTEN LIPSCOMB
PAUL A. DOMINICK
G. MARCUS KNIGHT
JOHN A. SOWARDS
SUSAN P. MCWILLIAMS
R. KENT PORTH

VALENTINE H. STIEGLITZ
RUSSELL T. INFINGER
W. DIXON ROBERTSON III
ROBERT C. BYRD
RUSSELL T. BURKE
FRED L. KINGSMORE, JR.
WILLIAM S. MCMASTER*
MARY GORDON BAKER
DAVID B. SUMMER, JR.
ASHLEY B. ABEL
DEAN A. EICHELBERGER
SHERRI A. LYDON
ASHLEY STEELE HINES
MARCUS A. MANOS
JANET C. BROOKS
JAMES H. LUCAS
CHRISTOPHER R.M. RICHMOND
MATTHEW S. MOORE III
NANCY L. BROCK†

* ADMITTED ONLY IN TEXAS

† ADMITTED ONLY IN OKLAHOMA

PAUL A. COOPER
1889-1958

FRANK B. GARY
1900-1971

C. ALVIN BROWN
1940-1978

TELECOPIER (803) 253-8277

OF COUNSEL
HARRY J. HAYNSWORTH
ROBERT D. COBLE

July 13, 1989

The South Carolina National Bank
1401 Main Street
Columbia, South Carolina 29201

RE: Permissibility of Obtaining Mortgage Liens Without
the Assistance of Attorneys

Gentlemen:

We understand that The South Carolina National Bank ("SCN") desires to make automobile loans to its customers secured not only by the subject vehicle but the equity in the customer's residence. In this regard, we have been asked whether it is permissible for lay employees of SCN to:

1. Fill in the blanks of a standard form mortgage prepared by attorneys for SCN which designates SCN as the mortgagee;

2. Attach a photostated copy of the deed to the real property being mortgaged to provide a legal description and derivation of the mortgaged premises;

3. Attend to the execution of such mortgage; and

4. Record the mortgage in the public land records.

In this regard, we have reviewed the form of mortgage (the "Mortgage") attached hereto as Exhibit A and understand that such Mortgage will be utilized for the loan program in question. In rendering our opinion, we specifically note that (i) no transfer of title to any real property is involved; (ii) there will be no title opinion or title insurance obtained; and (iii) there will be no separate legal description prepared.

The South Carolina National Bank
 July 13, 1989
 Page 2

In In re Duncan, 83 S.C. 186, 65 S.E. 210 (1909), the Supreme Court held that the practice of law includes "... conveyancing, the preparation of legal instruments of all kinds, and in general, all advice to clients, and all action for them in matters connected with the law." Id. at 189, 65 S.E. at 211. In the same opinion the court favorably quoted the following definition given by the Supreme Court of the United States: "Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country." Id. In The South Carolina Medical Malpractice Joint Underwriting Association v. Richard W. Froelich, 277 S.E.2d 306 (1989), the Supreme Court once again reiterated the definition of the practice of law contained in In re Duncan and specifically noted that the defendant had "taken action on behalf of his clients which was connected with the practice of law." Froelich, 377 at 307. (Emphasis added.) A common and key element in both of these definitions is that the practice of law involves acting on behalf of another party. Indeed, the Duncan court went so far as to state that the "conclusive fact is that Duncan advised Nita Saunders, and acted for her, as his client...." Id. (Emphasis added.)

Recently, in the case of State v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) the South Carolina Supreme Court held that when the defendant, Buyers Service Company, Inc. ("Buyers Service") completed mortgage instruments, prepared title abstracts, conducted real estate closings, and recorded instruments in the public records, it engaged in the unauthorized practice of law. However, Buyers Service was clearly holding itself out to the public as a provider of closing services where it had no interest in the transaction. Therefore, we believe that the holdings in Buyers Service should be limited to situations wherein a party unrelated to the particular transaction provides closing services for a fee.

While we have found no authority in South Carolina expressly upholding the practice of a lending institution obtaining a mortgage without the assistance of an attorney, there is relevant authority in other jurisdictions. One of the clearest statements comes from Title Guaranty Company v. Denver Bar Association, 312 P.2d 1011 (Colo. 1957) which states that "[i]t is elementary that a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law." Id. at 1014. Similarly, in State Bar of Arizona v. Arizona Land and Title Co., 366 P.2d 1 (1961), the Supreme Court of Arizona stated that a "[c]orporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan." Id. at 4.

The South Carolina National Bank
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There are, of course, certain limitations on the power of an entity such as SCN to act on its own behalf in legal matters. For example, South Carolina law prohibits a lay employee from appearing in judicial proceedings on behalf of its employer. State ex. rel. Daniel v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939). The Wells court reasoned that a corporation, as an entity, has a legal existence separate and apart from all employees and that an appearance in a judicial proceeding by even the highest official of the corporation involves legal representation of another. Unfortunately, portions of the Wells opinion refer to "legal matters," a term which could be construed to involve more than representation in judicial proceedings. Therefore, it is possible that if SCN does elect to prepare the Mortgages and close the subject loans without the assistance of an attorney, these practices might be challenged as the unauthorized practice of law. In the event of such a challenge, we cannot give assurance that a court would not extend the principle of Wells and bar SCN's practices. However, we believe that the better view is that Wells should be limited to its facts and not be applied so as to prohibit lay employees of SCN from undertaking ministerial acts related to obtaining a mortgage lien.

While there is broad language in Buyers Service to the effect that an attorney should always be involved in a mortgage loan closing, a careful reading of this discussion reveals that the court is not primarily concerned with the closing procedure itself. Indeed, the opinion seems to admit that the mere formalities of the closing, without more, do not impinge upon the practice of law. Rather, the court's concern is that questions regarding the legal import of a document might crop up tempting the person conducting the closing to offer legal advice "rather than risk losing a fee for his or her employer." Buyers Service, 357 S.E.2d at 19. Therefore, even though SCN is a party to the loan transaction and not bound by the Buyers Service holding, SCN should follow a clearly articulated policy of not providing any legal advice and not taking any action which may be construed as providing legal representation to the borrowers. In this regard, we recommend that SCN do the following:

A. Not charge any fee for preparing the Mortgage or other loan documents.

B. Direct all SCN personnel to refrain from making any comments that may be construed as providing legal advice, although directing the borrower's attention to the express language of the documents is permissible.

C. Utilize the form of disclosure attached hereto as Exhibit B in connection with each loan transaction.

The South Carolina National Bank
July 13, 1989
Page 4

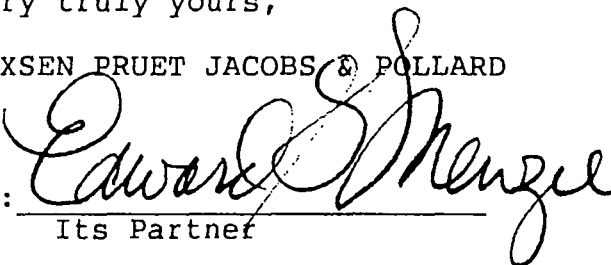
Based upon the foregoing and assuming that our recommendations are followed, we are of the opinion that it is permissible under South Carolina law for SCN to undertake the activities listed in paragraph 1 of this letter without the assistance of an attorney.

This opinion is prepared expressly for the benefit of The South Carolina National Bank and may not be relied upon by any other party without the express written consent of Nexsen Pruet Jacobs & Pollard. In rendering this opinion, we have addressed only the unauthorized practice of law issue and have not passed upon other laws applicable to the subject loan program, including (without limitation) truth-in-lending requirements and income tax aspects.

Very truly yours,

NEXSEN PRUET JACOBS & POLLARD

By:


Its Partner

EGM:pb

EXHIBIT A
(form of mortgage)

State of South Carolina)

County of _____)

MORTGAGE

Words Used In This Document

- (A) **Mortgage** — This document, which is dated _____, 19____, will be called the "Mortgage".
- (B) **Mortgagor** — _____ will sometimes be called "Mortgagor" and sometimes simply "I", "Me", "my", "mine", "myself", and "us" refer to the Mortgagor.
Mortgagor's residence address is _____
- (C) **Lender** — The South Carolina National Bank will be called "Lender" and sometimes simply "you". "Your" and "yours" refer to Lender. Lender is a national banking association which was formed and which exists under the laws of the United States of America.
Lender's address is _____
- (D) **Note** — The note, note agreement, or loan agreement signed by _____ and dated _____, 19____, will be called the "Note". The Note shows that I have promised to pay Lender _____ Dollars (\$ _____) plus finance charges or interest at the rate agreed to in the Note which I have promised to pay in full by _____.
- ☐ If this box is checked, finance charges or interest under the Note may be deferred, accrued, or capitalized.
- (E) **Property** — The property that is described below in the section entitled "Description Of The Property" will be called the "Property".

My Transfer To You Of Rights In The Property

On this date, because you loaned me the money for which I gave you the Note, I mortgage, grant and convey the Property to you, your successors and assigns, subject to the terms of this Mortgage. This means that by signing this Mortgage, I am giving you those rights that are stated in this Mortgage and also those rights that the law gives to lenders who hold mortgages on real property. I am giving you these rights to protect you from possible losses that might result if I fail to:

- (A) Pay all the amounts that I owe you as stated in the Note and any future advances made under Paragraph 17 of this Mortgage.
- (B) Pay, with interest or finance charges, any amounts that you spend under this Mortgage to protect the value of the Property and your rights in the Property.
- (C) Keep all of my other promises and agreements under the Note and/or this Mortgage.

This Mortgage secures any renewals, extensions, refinancings, and/or modifications of the Note and any substitutions for the Note.

Description Of The Property

- (A) The Property which I mortgage, grant, and convey to you, your successors and assigns, is located in _____ County and has the following legal description:

All that certain piece, parcel or tract of land, together with all improvements thereon, described in the deed by which I obtained title, a copy of which is attached to this Mortgage as Exhibit A.

The Property also includes the following:

- (B) All buildings and other improvements that are located on the property described in paragraph (A) of this section;
- (C) All rights in other property I have as owner of the property described in paragraph (A) of this section. These rights are known as "easements, rights and appurtenances attached to the property";
- (D) All rents or royalties from the property described in paragraph (A) of this section;
- (E) All mineral, oil and gas rights and profits, water, water rights and water stock that are part of the property described in paragraph (A) of this section;
- (F) All rights that I have in the land which lies in the streets or roads in front of, or next to, the property described in paragraph (A) of this section;
- (G) All fixtures that are now or in the future will be on the property described in paragraphs (A) and (B) of this section, and, to the extent allowed by law, all replacements of and additions to those fixtures;

- (H) All of the rights and property described in paragraphs (B) through (F) of this section that I acquire in the future; and
- (I) All replacements of and/or additions to the property described in paragraphs (B) through (F) and paragraph (H) of this section.

You, your successors and assigns, are to have and to hold the Property, subject to the terms of this Mortgage.

My Right To Mortgage The Property And My Obligation To Defend Ownership Of The Property

I promise that except for the "exceptions" listed in any title insurance policy which insures your rights in the Property and the "exceptions" listed below:

- (A) I lawfully own the Property in fee simple;
- (B) I have the right to mortgage, grant and convey the Property to you, your successors and assigns;
- (C) There are no outstanding liens, claims or charges against the Property, and
- (D) There are no present violations of any restrictions which apply to the Property.

Exceptions: _____

I give a general warranty of title to you. This means that I will be fully responsible for any losses which you suffer because someone other than myself has some of the rights in the Property which I promise that I have. I promise that I will defend the title to the Property against any and all claims of such rights.

Promises

I promise and I agree with Lender as follows:

1. Compliance With Condominium Or Planned Unit Development Documents

If the Property is a unit in a condominium project or a planned unit development, I will fulfill all of my obligations under the declaration, by-laws, regulations, and other documents that create or govern the condominium project or planned unit development, and I will not take any action or consent to any action which would adversely affect your rights as the holder of this Mortgage without your prior written consent.

2. My Obligation To Pay Charges And Assessments And To Satisfy Claims Against The Property

I will pay all taxes, assessments, fines, and any other charges that may be imposed on the Property. I will do this by making payments, when they are due, directly to the persons entitled to them. (In this Mortgage, the word "person" means any person, organization, governmental authority, or other party.) If you request me to do so, I will give you a receipt which shows that I paid such taxes, assessments, fines and charges.

3. My Obligation To Obtain And To Keep Hazard Insurance On The Property

I will obtain hazard insurance to cover all buildings and other improvements that now are or in the future will be located on the Property. The insurance must cover loss or damage caused by fire, hazards normally covered by "extended coverage" hazard insurance policies, and other hazards for which you require coverage. The insurance must be in the amounts and for the periods of time required by you.

I may choose the insurance company, but my choice is subject to your approval. You may not refuse to approve my choice unless the refusal is reasonable. All of the insurance policies and renewals of those policies must include what is known as a "standard mortgage clause" to protect you. The form of all policies and the form of all renewals must be acceptable to you. You will have the right to hold the policies and renewals.

I will pay the premiums on the insurance policies by paying the insurance company directly when the premium payments are due. If you require, I will promptly give you all receipts of paid premiums and all renewal notices that I receive.

If there is a loss or damage to the Property, I will promptly notify the insurance company and you. If I do not promptly prove to the insurance company that the loss or damage occurred, then you may do so.

The amount paid by the insurance company is called "proceeds". I agree that you can use the proceeds either to repair or to restore the damaged Property or to reduce the amount that I owe to you under the Note and this Mortgage.

If any proceeds are used to reduce the amount which I owe to you under the Note and this Mortgage, that use will not delay the due date or change the amount of any of my payments under the Note.

4. My Obligation To Maintain The Property And To Comply With Restrictions

I will keep the Property in good repair. I will not destroy, damage or substantially change the Property, and I will not allow the Property to deteriorate. I will comply with any applicable restrictions which govern the Property.

5. Your Right To Take Action To Protect The Property

If I fail to pay all necessary taxes, insurance premiums, assessments, fines, and other charges in connection with the Property, you may pay them for me. If you do, I will repay you for these amounts including a finance charge or interest at the rate agreed to in the Note. Any such amounts which you pay for me can be added to the debt secured by this Mortgage.

Although you may take action under this Paragraph 5, you do not have to do so.

6. Your Rights To Inspect The Property

You, and others authorized by you, may enter on and inspect the Property at any reasonable times.

7. Condemnation Of The Property

I give you the right to any money paid me which may be necessary to repay the amount I owe you, if any government agency or anyone else authorized by law takes the Property or any part of it.

If any such money is used to reduce the amount which I owe you under the Note and this Mortgage, that use will not delay the due date or change the amount of any of my payments under the Note.

8. Continuation Of My Obligations

You may allow a person who takes over my rights and obligations to delay or to change the amount of the payments due under the Note. Even if you do this, however, that person and I will both still be fully obligated under the Note and under this Mortgage unless the condition stated in Paragraph 14 below has been met.

You may allow those delays or changes for a person who takes over my rights and obligations, even if you are requested not to do so. You will not be required to bring a lawsuit against such a person for not fulfilling obligations under the Note or under this Mortgage, even if you are requested to do so.

9. Continuation Of Your Rights

Even if you do not exercise or enforce any right of yours under this Mortgage or under the law, you will still have all of those rights and may exercise and enforce them in the future.

10. Your Ability To Enforce More Than One Of Your Rights

Each of your rights under the Note and this Mortgage is separate. You may exercise and enforce one or more of those rights, as well as any of your other rights under the law, one at a time or all at once.

11. Obligations Of Mine And Of Persons Taking Over My Rights Or Obligations; Agreements Concerning Captions; Construction

Subject to the terms of Paragraph 14 below, any person who takes over my rights or obligations under this Mortgage will have all of my rights and will be obligated to keep all of my promises and agreements made in this Mortgage. Similarly, any person who takes over your rights or obligations under this Mortgage will have all of your rights and will be obligated to keep all of your agreements made in this Mortgage.

If more than one person signs this Mortgage as Mortgagor, each of us is fully obligated to keep all of Mortgagor's promises and obligations contained in this Mortgage. You may enforce your rights under this Mortgage against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under the Note and under this Mortgage. However, if one of us does not sign the Note, then: (a) that person is signing this Mortgage only to give that person's rights in the Property to you under the terms of this Mortgage; and (b) that person is not personally obligated to make payments or to act under the Note.

The caption and titles of this Mortgage are for convenience only. They may not be used to interpret or to define the terms of this Mortgage.

Any terms defined in this Mortgage include the masculine, feminine, and neuter genders and the singular and plural.

12. Agreements About Giving Notices Required Under This Mortgage

Any notice that must be given to me under this Mortgage will be given by delivering it or by mailing it addressed to me at the address designated by me as my residence address stated in Paragraph (B) of the section above entitled "Words Used In This Document". A notice will be delivered or mailed to me at a different address if I give you a notice of my different address. Any notice that must be given to you under this Mortgage will be given by mailing it to your address stated in Paragraph (C). A notice will be mailed to you at a different address if you give me a notice of the different address. A notice required by this Mortgage is given when it is mailed or when it is delivered according to the requirements of this Paragraph 12.

13. Law That Governs This Mortgage

South Carolina law and any applicable Federal law govern this Mortgage. If any term of this Mortgage or of the Note conflicts with the law, all other terms of this Mortgage and of the Note will still remain in effect if they can be given effect without the conflicting term. This means that any terms of this Mortgage and of the Note which conflict with the law can be separated from the remaining terms, and the remaining terms will still be enforced.

14. Agreements About Lender's Rights If Mortgagor Transfers The Property Without Lender's Prior Written Consent ("Due-On-Sale")

If I sell or transfer all or part of the Property or any rights in the Property without your prior written consent, I will still be fully obligated under the Note and under this Mortgage, and you may, at your option, declare all unpaid amounts secured by this Mortgage immediately due and payable and require me to pay the entire unpaid balance of what I owe you under the Note and this Mortgage. However, you will not exercise this option if prohibited by law. Notwithstanding any sale or transfer, I will continue to be obligated under the Note and this Mortgage unless you release me from my obligations in writing.

15. Foreclosure

If (a) I fail to pay the Note by the final due date or you require immediate payment of the unpaid balance of the Note because an event listed in the Note has occurred or I have sold or transferred the Property or any rights in it without your prior written consent, (b) the prospect of my performance under the terms of this Mortgage is significantly impaired, or (c) you reasonably believe that your ability to realize on the Property is significantly impaired, then you can exercise any rights which the law gives you, including foreclosing this Mortgage, and you can purchase the Property at a foreclosure sale if you are the highest bidder.

I agree that if a suit is brought to collect what I owe you or to foreclose this Mortgage, I will be liable for reasonable expenses incurred by you in realizing on the Property, and for reasonable attorney's fees not in excess of fifteen percent (15%) of the unpaid debt, and that these expenses will be secured by this Mortgage. If the proceeds of the foreclosure sale are not enough to pay what I owe you under the Note and this Mortgage and the expenses involved in a suit to collect what I owe you and/or to foreclose this Mortgage, then I will be personally liable for the difference.

16. Receiver Of Rents

If you start an action to collect the debt secured by this Mortgage or to foreclose this Mortgage, then you have the right to have a receiver appointed of the rents and profits of the Property. This receiver will apply any rents or profits collected first toward any costs or expenses incurred in connection with the appointment of the receiver, next to any costs or expenses incurred in the execution of duties as receiver, and finally to the payment of the debt secured by this Mortgage.

17. Future Advances

Upon my request, you, at your option, prior to discharge of this Mortgage, may make future advances to me which will be secured by this Mortgage (known as "future advances"). Any such future advances, together with interest or finance charges on these future advances, will be secured by this Mortgage if I execute a note or loan agreement which says that the future advances are secured by this Mortgage. The maximum principal amount which this Mortgage can secure, not including any amounts you advance under Paragraph 5 of this Mortgage, is the amount stated in Paragraph (D) titled "Note" in the section titled "Words Used In This Document" plus US \$ _____.

18. Your Obligation To Discharge This Mortgage When The Note And Mortgage Are Paid In Full

When you have been paid all amounts due under the Note and under any notes or loan agreements for future advances and under this Mortgage, you will discharge this Mortgage. I will not be required to pay you for this discharge, but I will pay all costs of recording the discharge in the proper official records.

19. Note Terms Made A Part Of Mortgage

The terms of the Note and any other notes or loan agreements for future advances are made a part of this Mortgage.

20. Changing This Mortgage

This Mortgage may be changed only if you and I both give our written consent.

21. Waiver Of Homestead

To the extent allowed by law, I waive all right of homestead exemption in the Property.

By signing this Mortgage, I agree to all of the above.

Witnesses:

(Seal)

(Seal)

State of South Carolina

)

Probate

County of _____

)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named _____ sign, seal, and as (his) (her) (their) (its) act and deed, deliver the within written Mortgage and that (s)he with the other witness named above witnessed the execution thereof.

Sworn to before me this _____

day of _____ 19 _____

Notary Public for South Carolina

My Commission Expires: _____

State of South Carolina

)

Probate

County of _____

)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named _____ sign, seal, and as (his) (her) (their) (its) act and deed, deliver the within written Mortgage and that (s)he with the other witness named above witnessed the execution thereof.

Sworn to before me this _____

day of _____ 19 _____

Notary Public for South Carolina

My Commission Expires: _____

EXHIBIT B

(form of disclosure)



Part I. BORROWER'S PREFERENCE OF LEGAL COUNSEL AND INSURANCE AGENT — SCN Special Program

I (We) the undersigned applicant(s) have been told by representatives of The South Carolina National Bank ("Bank") about my (our) right to choose the legal counsel and insurance agent for purposes of this loan. I (We) understand that I (we) have this right and the following are my (our) preferences.

A. Right to Choose Legal Counsel to Represent Borrower in All Matters Relating to the Loan Closing

1. I (We) understand that I (we) have the right to choose my (our) own attorney to represent me (us) in all matters relating to the closing, and that I (we) will be responsible for paying my (our) attorney an agreed upon fee.
2. Having been informed by the Bank of the right to choose my (our) own attorney at my (our) own expense and the option to have no attorney representing me (us) in this transaction, my (our) preference is (check one):

☐ My (Our) own attorney at my (our) expense.

Attorney's Name and Address

or

☐ No attorney. I (We) understand that SCN will close the loan and cannot and will not give legal advice relating to the mortgage, tax deductibility of interest, or any other matters, *or otherwise provide legal representation to me (us).*

Applicant's Signature

Date

Applicant's Signature

Date

B. Right to Choose Insurance Agent to Furnish Required Insurance.

My (Our) preference is _____
Insurance Agent's Name and Address

I (We) understand that the Bank may require insurance from a company acceptable to it.

Applicant's Signature

Date

Applicant's Signature

Date

EXHIBIT B

March 16, 1994

Reply to Columbia

The South Carolina National Bank

1401 Main Street - Suite 506
Columbia, South Carolina 29226

Re: Opinion of July 13, 1989 Concerning Permissibility of Obtaining Mortgage Liens
Without the Assistance of Attorneys

Gentlemen:

This letter is intended to serve as an update to the above referenced opinion and to comment on the preparation of legal descriptions for mortgages.

First, with regard to the current status of the law in South Carolina, there have been no appellate or lower court decisions of which we are aware since Buyers Service dealing with the issue of the preparation of loan documents. The South Carolina Bar Unauthorized Practice Committee considered the propriety of such a practice by financial institutions when it submitted to the South Carolina Supreme Court a set of proposed rules governing the unauthorized practice of law. Proposed UPL Rule 7.3 entitled "Preparation of Legal Instruments" reads in part as follows:

- (a) A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except:

...

- (4) a lending institution may in the regular course of conducting its business prepare its own loan documents for which no separate charge shall be made.

Proposed UPL Rule 7.4 entitled "Real Estate Closings" requires that closings be supervised by attorneys, but the closings referred to in this rule involve the purchase and sale of real estate and not mere loan closings.

Unfortunately, an order was issued on September 21, 1992 (In Re Unauthorized Practice of Law Rules Proposed By the South Carolina Bar, __ S.C. __, 422 S.E.2d 123 (1992)) rejecting adoption of the proposed rules and stating: "[W]e are convinced that the better course is to

decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." 422 S.E.2d at 124.

The Supreme Court went on to liberalize the concept of unauthorized practice of law by authorizing the following:

1. Businesses may be represented by a non-lawyer officer, agent or employee, including attorneys licensed in other jurisdictions, in civil magistrate court proceedings.
2. State agencies may, by regulation, authorize persons not licensed to practice in South Carolina, including lay persons, certified public accounts and attorneys licensed in other jurisdictions, to appear and represent clients before the agencies.
3. Certified public accountants are entitled to render professional assistance, including compensated representation before agencies and probate court, that is within their professional expertise and qualifications.

In addition to the foregoing, the Supreme Court recognized that other situations will arise which will require a determination as to whether the conduct at issue involves the unauthorized practice of law, and urged any interested individual who becomes aware of such conduct to bring a declaratory judgment action in the Supreme Court's original jurisdiction to determine the validity of the conduct.

We believe that the action taken in the Supreme Court order supports our conclusion as to the propriety of your conduct and that if the matter was presented to the South Carolina Supreme Court, you would be found not to be engaged in the unauthorized practice of law.

We understand that difficulties have arisen in certain counties involving the utilization of a copy of the mortgagor's deed as Exhibit A to your mortgage. We do not believe it would be considered the unauthorized practice of law for you to prepare a separate Exhibit A utilizing a copy of deed provided by the mortgagor and completing the necessary derivation information. We express this opinion based upon the fact that there is no special legal expertise or training required to copy the property description directly from the mortgagor's deed (which presumably will be done easily by retyping the property description or simply photocopying only the relevant portions of the deed). In addition, since a derivation only requires the name of the grantor on the deed and the recording date of that deed, there is no legal expertise needed to complete the same. We suggest an instruction sheet in the form attached hereto be provided to all persons who will be preparing exhibits.

We trust we have appropriately responded to your letter of November 22, 1993. This opinion is prepared expressly for the benefit of The South Carolina National Bank and may not be relied upon by any other party without the express written consent of Nexsen Pruet Jacobs & Pollard. In rendering this opinion, we have addressed only the unauthorized practice of law issue and have not passed upon the laws applicable to the subject loan program, including (without limitation) truth and lending requirements and income tax aspects. We must also point out that our opinion is not a guarantee of the outcome of the matter upon which we have opined, but merely represents our best judgment as to the likely outcome if we were called upon to present the matter in question to the South Carolina Supreme Court.

Very truly yours,

NEXSEN PRUET JACOBS & POLLARD

By: _____
Its Partner

EGM/cf

Instructions for Preparation of "Exhibit A - Description of The Property"

1. Obtain a photostatic copy of recorded deed (title to real estate) for your Borrower's residence.
2. The person who transferred the property to your Borrower is the "Grantor" and there will be recording information on the deed indicating the date of filing and the book and page number in the RMC or Clerk of Court's office where the deed has been filed.
3. Locate the property description in the deed (the actual words used to describe the boundaries of the real property which constitutes your Borrower's residence).
4. Have the entire property description retyped or photostatically copied onto a plain sheet of white paper.
5. Place a heading on this sheet that reads: "Exhibit A - Description of The Property".
6. After the property description, insert the following:

Derivation:

Grantor: _____

Date deed filed of record: _____, 19__

Book Number _____ Page _____.

7. Insert the Grantor's name from the deed (not the Borrower's name) in the first blank; locate the date of filing which has been stamped on the deed by the RMC or Clerk of Court and insert it in the second blank; and insert the book and page number which are stamped on the first page in the third and fourth blanks.

8. Go to the "Description of The Property" section of the mortgage and be certain that the reference to Exhibit A reads as follows:

All that certain piece, parcel or tract of land, together with improvements, described in Exhibit A attached hereto.

#

EXHIBIT C

April 27, 1994

Reply to Columbia

The South Carolina National Bank
1401 Main Street - Suite 506
Columbia, South Carolina 29226

Re: Permissibility of Obtaining Mortgage Liens Without the Assistance of Attorneys

Gentlemen:

This letter is intended to expand upon the opinions rendered in our letter of July 13, 1989, as updated by our letter of March 16, 1994. We understand that in addition to your automobile loan program, you are considering a special home equity loan program which is supported principally by the creditworthiness of your customers, but also involves the placing of a mortgage on the customer's residence. This loan program will be similar to your automobile loan program in that there will be no transfers of real property, no title opinion or title insurance obtained and possibly no separate legal description prepared.

It is our opinion that your proposed home equity loan program will be treated in a similar fashion to your automobile loan program and so long as the recommendations set forth in our July 13, 1989 and March 16, 1994 letters are followed, you will not be engaged in the unauthorized practice of law if you obtain mortgage liens for this program without the assistance of an attorney.

We trust we have appropriately responded to your request with respect to the special home equity loan program. This opinion is prepared expressly for the benefit of The South Carolina National Bank and may not be relied upon by any other party without the express written consent of Nexsen Pruet Jacobs & Pollard. In rendering this opinion, we have addressed only the unauthorized practice of law issue and have not passed upon the laws applicable to the subject loan program, including (without limitation) truth and lending requirements and income tax aspects. We must also point out that our opinion is not a guarantee of the outcome of the matter upon which we have opined, but merely represents our best judgment as to the likely outcome if we were called upon to present the matter in question to the South Carolina Supreme Court.

Very truly yours,

NEXSEN PRUET JACOBS & POLLARD

By: _____
Its Partner

EXHIBIT D

May 21, 2001

Wachovia Bank, N.A.
Palmetto Center
1426 Main Street
Columbia, South Carolina 29226

RE: Permissibility of Obtaining Mortgage Liens Without the Assistance of Attorneys

Ladies and Gentlemen:

This letter is in response to a request made by Kathleen G. Smith, Counsel, dated April 24, 2001 and is intended to serve as an update to the opinions rendered in our letter of July 13, 1989, as updated by our letters of March 16, 1994 and April 27, 1994. We understand that The South Carolina National Bank has merged into Wachovia Bank, N.A. ("Wachovia") which has central documentation areas that prepare closing documents for home equity lines of credit and home equity loans. Wachovia is utilizing its bankers to close certain consumer purpose mortgage transactions below a certain dollar threshold and business purpose transactions for small businesses, but closing transactions above the dollar threshold in a more traditional manner that involves attorneys providing the title work, obtaining title insurance, preparing the mortgages, and closing the transactions. As has previously been the case, these transactions do not involve the transfer of title, title work, title insurance, or any charges for the closing.

Based upon the foregoing, including the information contained in Ms. Smith's letter of April 24, 2001, it is our opinion that your home equity loan programs and other loan programs previously reviewed will be not treated as the unauthorized practice of law so long as the recommendations set forth in our July 13, 1989, March 16, 1994 and April 27, 1994 letters are followed. This opinion is limited to situations in which Wachovia employees handle all document preparation and recording and assumes that there is no third party service provider participating in any such loan transaction.

We are aware that on December 19, 1997 the South Carolina Attorney General sent a letter (copy attached) to numerous financial institutions advising them of the requirements of the Buyers Service case. We understand this letter was sent primarily in response to complaints regarding the practice of many out-of-state financial institutions that were utilizing the services of third party service providers to close real estate loans of all types. In any event, we understand that many in-state financial institutions contacted the Attorney General about closing loans without any third-party involvement and to our knowledge, no action of any nature has been taken against any local financial institutions who continue to close their own loans. Consequently, we do not believe that the Attorney General's letter should be interpreted as being applicable to loan closings handled in the manner referenced in this letter.

As was mentioned in Ms. Smith's April 24, 2001 letter, Circuit Judge James C. Williams, Jr. recently issued an order in Tilley v. Pacesetter Corp., C/A No. 95-CP-06-232 (2nd Cir. Mar. 12, 2001). The Circuit Court held that, although the practice of law issue was moot, if it had been viable, it would have granted Pacesetter's motion to dismiss. First, the court noted that there is no private right of action under S.C. Code Ann. § 40-5-320, which prohibits a corporation from practicing law, because this statute is criminal in nature. Second, the court distinguished the Buyers Service decision because that case involved a third party to a transaction between two (2) other parties that prepared documents affecting real property titles and handled real estate closings. In Tilley, only Pacesetter and its clients were involved in the transactions, and it was acting on behalf of itself, not as another party's agent. The court found this distinction important and found that even if Pacesetter's activities constituted the practice of law, those activities were not "unauthorized" because Pacesetter was acting in a pro se capacity. As supporting authority, the court went on to describe cases that we have previously discussed in some of our earlier opinions.

Another recent case that has addressed the issue found that mortgage lenders were engaged in the practice of law by preparing legal documents for real estate transactions, but such actions were authorized. In Perkins v. CTX Mortgage Co., 969 P.2d 93 (Wash. 1999), class action mortgagors sued a mortgagee alleging that the mortgagee had engaged in the unauthorized practice of law by allowing its employees to select and complete preprinted forms that had been prepared by the mortgagee's attorneys. The mortgagee also charged a \$250.00 "document preparation" fee that was not assessed with regard to any particular document, but was only charged to "offset the overhead associated with the preparation of the extensive documentation necessary to process and complete loan transactions." Id. at 94. While the court recognized that the selection and preparation of legal instruments implicate the practice of law, it granted summary judgment in favor of the mortgagee because this activity is authorized under the pro se exception. Id. at 95. The Perkins court made it clear that charging a fee was not determinative, but rather, the nature of the services rendered in regard to the public interest was paramount. The court strongly focused on public interest protection, as does South Carolina. However, it recognized the "logistical and financial burden on the public that would result from imposing lawyers on every stage of real estate conveyancing." Id. at 99.

We trust we have appropriately responded to your request with respect to the home equity programs. This opinion is prepared expressly for the benefit of Wachovia Bank, N.A. and may not be relied upon by any other party without the express written consent of Nexsen Pruet Jacobs & Pollard. In rendering this opinion, we have addressed only the unauthorized practice of law issue and have not passed upon the laws applicable to the subject loan program, including (without limitation) truth and lending requirements and income tax aspects. We must also point out that our opinion is not a guarantee of the outcome of the matter upon which we have opined, but merely represents our best judgment as to the likely outcome if we were called upon to present the matter in question to the South Carolina Supreme Court.

Very truly yours,

NEXSEN PRUET JACOBS & POLLARD, LLC

By: _____
Its Member

EGM/tjs

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
POST OFFICE BOX 11889 (29211-1889)
COLUMBIA, SOUTH CAROLINA
TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

HAMILTON OSBORNE, JR.
DIRECT DIAL NUMBER 803.540.7855
EMAIL hosborne@hsblawfirm.com

November 22, 2010

RECEIVED

NOV 22 2010

S.C. Supreme Court

BY MESSENGER

Ms. Linda Allen
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina

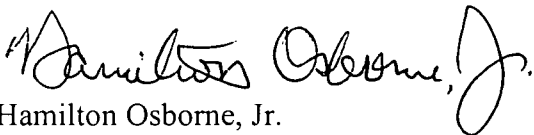
Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

Dear Ms. Allen:

Enclosed are the original and seven copies of Petitioner's Return to Respondent's Motion to Strike Petition, etc. A Proof of Service evidencing service of the Return on Respondents is also enclosed.

Please file the original and six copies of the enclosed Return, and stamp the date of filing on the seventh copy. Then return the seventh copy to the messenger bearing this letter

Sincerely,


Hamilton Osborne, Jr.

HOjr:ca
Enclosure

cc: Gregory M. Alford, Esquire
Steven R. Anderson, Esquire

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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WEBSITE www.hsblawfirm.com

JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

November 19, 2010

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

RECEIVED

NOV 19 2010

S.C. Supreme Court

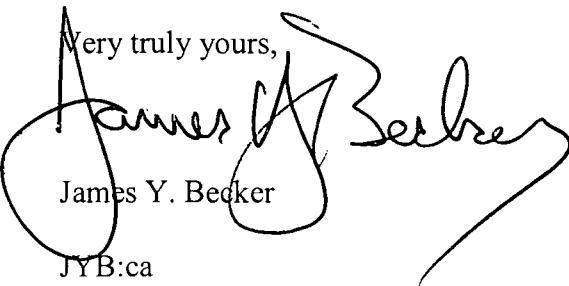
Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
Supreme Court Case Tracking No. 2010-174086
HSB File No. 04723.2261

Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter. Enclosed for filing are an original and seven (7) copies of Petitioner's Reply to Respondent's Return to Motion to Include Exhibits to the Petition for Writ of Certiorari. I would appreciate your filing the original and six (6) copies of the Reply and return a file stamped copy to the bearer of this letter.

With kind regards, I am

Very truly yours,



James Y. Becker

JYB:ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

ALFORD, WILKINS & COLTRANE, P.C.

Attorneys at Law

18 Executive Park Road, Building 1
P.O. Drawer 8008
Hilton Head Island, SC 29938-8008
Telephone (843) 842-5500
Facsimile (843) 842-8400
www.alfordandwilkins.com

AMANDA C. DuBOSE- PARALEGAL
EMAIL: AMANDA@ALFORDANDWILKINS.COM

(NOT FOR CONFIDENTIAL COMMUNICATIONS)

GREGORY M. ALFORD*
JOHN W. WILKINS
CURTIS L. COLTRANE*
MITCHELL J. THORESON
*Also member Georgia Bar
*Also member of Virginia Bar

RECEIVED
RECEIVED
pm NOV 13 2010
NOV 15 2010

November 12, 2010

S.C. Supreme Court
Via U.S. MAIL

The Honorable Daniel E. Shearhouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED
pm 11-12-10
NOV 15 2010

S.C. Supreme Court

Re: Wachovia v. Ann T. Coffey et al.
Trial Court Case No. 2006-CP-07-1655

Dear Mr. Shearhouse:

Please find enclosed an original and seven (7) copies of the following:

- 1) Respondent's Motion to Strike Petition and/or Portions of Petition for Writ of Certiorari;
- 2) Respondent's Return to Motion to Include Exhibits into the Petition for Writ of Certiorari;
- 3) Respondent's Memorandum in Opposition to Appellant's Motion to Include Exhibits in Petition for Writ of Certiorari and in Support of Respondent's Motion to Strike Petition and/or Portions of Petition for Writ of Certiorari;
- 4) Respondent's Motion for Extension of Time to File Return to Petition for Writ of Certiorari.
- 5) Proof of Service

Please file these documents as appropriate and return a clocked copy to this office in the enclosed self addressed stamped envelope. Please allow me to thank you for your assistance and

check
#15585
\$50.00

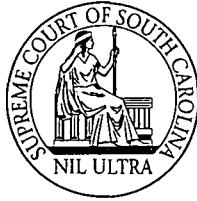
attention to this matter. If you have any questions or comments please do not hesitate to call me.
With best regards, I am,

Sincerely,
ALFORD, WILKINS & COLTRANE, P.C.


Amanda C. DuBose
Paralegal

Enclosures

Cc: James Y. Becker
R. David Proffitt
Steven R. Anderson



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 8, 2010

James Y. Becker, Esquire
Hamilton Osborne, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211

Re: Wachovia Bank v. Coffey, Ann T., et al.

Dear Counsel:

The following Order has been endorsed on your Motion to Exceed Page Limitations in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Brenda F. Shealy
Chief Deputy Clerk

November 8, 2010.”

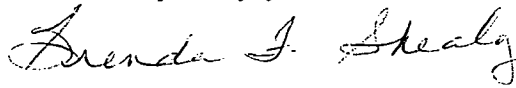
By copy of this letter, we are advising all interested parties of the action by the Court.

Wachovia Bank v. Coffey, Ann T., et al.

Page Two

November 8, 2010

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Shealy".

CHIEF DEPUTY CLERK

DES/lda

cc: Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV - 5 2010

S.C. Supreme Court

Wachovia Bank, N.A., ... Petitioner,

v.

Ann T. Coffey and Bank of America, N.A., ... Respondents.

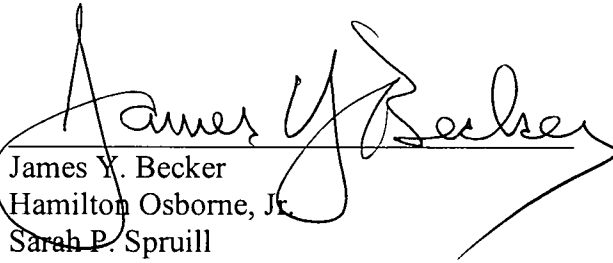
MOTION TO EXCEED PAGE LIMITATIONS

Petitioner Wachovia Bank, N.A. ("Wachovia") moves this Court for permission to exceed the 25-page limitation for a Petition for Writ of Certiorari set forth in Rule 242(c)(4), SCACR. Specifically, Wachovia moves to exceed the page limit by one-third (1/3) of a page to allow for the signature block of the attorneys submitting the Petition on behalf of Wachovia.

[signature on following page]

*check # 48576
8250*

Respectfully submitted,



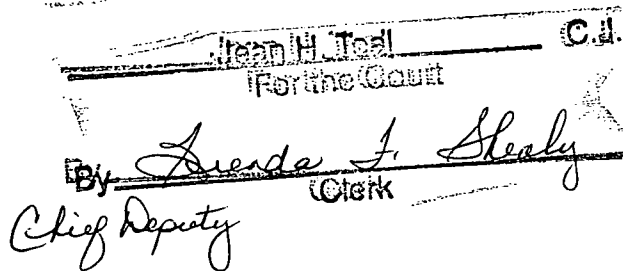
James Y. Becker
Hamilton Osborne, Jr.
Sarah P. Spruill
Mary M. Caskey

Haynsworth Sinkler Boyd, P.A.
1201 Main St., 22nd Floor (29201-3226)
P.O. Box 11889 (29211-1889)
Columbia, S.C.
Tel: (803) 779-3080
Fax: (803) 765-1243
Email: jbecker@hsblawfirm.com
hosborne@hsblawfirm.com
sspruill@hsblawfirm.com
mcaskey@hsblawfirm.com

Attorneys for Petitioner Wachovia Bank,
N.A.

November 5, 2010

Granted.


Jean H. Todd C.J.
For the Court
By Brenda J. Shealy
Clerk
Chief Deputy

November 8, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Case No. 2006-CP-07-1655

RECEIVED

NOV - 5 2010

S.C. Supreme Court

Wachovia Bank, N.A.,

Petitioner

v.

Ann T. Coffey and Bank of America, N.A.

Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., certify that I caused the foregoing Motion to Exceed Page Limitations to be served on Respondents on the date set forth below by mailing copies by first-class mail, postage prepaid, to their respective attorneys, whose names and addresses are as follows:

Gregory M. Alford, Esquire
Alford & Wilkins, P.C.
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
Fax: (843) 842-8400
Email: gregg@alfordandwilkins.com

Steven R. Anderson, Esquire
Attorney at Law
P.O. Box 12188
Columbia, SC 29211-2188
(803) 252-2828
Fax: (803) 254-1935
Email: sraatlaw@bellsouth.net

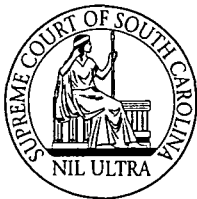
Attorney for Ann T. Coffey

Attorney for Bank of America, N.A.



Charlotte Ariail

Date mailed: November 5, 2010



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 8, 2010

James Y. Becker, Esquire
Hamilton Osborne, Jr., Esquire
Sarah P. Spruill, Esquire
Mary M. Caskey, Esquire
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211

Re: Wachovia Bank v. Coffey, Ann T., et al.
Case Tracking No. 2010-174086

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

Wachovia Bank v. Coffey, Ann T., et al.
Page Two
November 8, 2010

DES/lda

Enclosure

cc: Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire
The Honorable Tanya Gee

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

November 5, 2010

BY HAND DELIVERY

RECEIVED

NOV - 5 2010

S.C. Supreme Court

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
HSB File No. 04723.2261

Dear Ms. Allen:

This firm represents the Petitioner Wachovia Bank, N.A. in the above matter. Enclosed for filing are an original and seven (7) copies of the following:

- Petitioner's Motion to Exceed Page Limitations;
- Petitioner's Motion to Include Exhibits to the Petition for Writ of Certiorari; and
- Petition for a Writ of Certiorari.

I have also enclosed one bound and one unbound copy of the Appendix to Petition for Writ of Certiorari, Volumes I and II.

Also enclosed are the following checks:

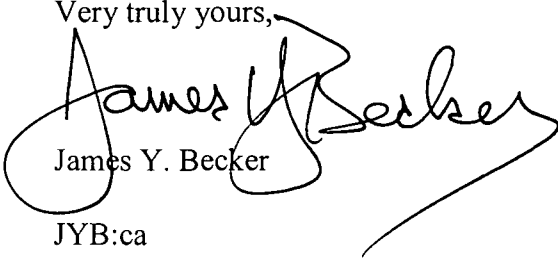
- \$25.00 check for the filing fee of the Motion to Include Exhibits to the Petition for Writ of Certiorari;
- The \$25.00 check for the filing fee for the Motion to Exceed Page Limitations was left with the Court on November 4, 2010; and
- \$100.00 check for the filing fee for the Petition for a Writ of Certiorari.

The Honorable Tanya A. Gee
November 5, 2010
Page 2

I would appreciate your filing the original and six (6) copies of the two Motions and Petition and two (2) copies of the Appendix and returning file stamped copies of each to the bearer of this letter.

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "James Y. Becker". The signature is fluid and cursive, with a large loop at the end. It is positioned above the printed name "James Y. Becker".

James Y. Becker

JYB:ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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COLUMBIA, SOUTH CAROLINA
TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

November 4, 2010

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

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NOV - 4 2010

S.C. Supreme Court

Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
HSB File No. 04723.2261

Dear Ms. Allen:

This firm represents the Appellant Wachovia Bank, N.A. in the above matter. Enclosed for filing are an original and seven (7) copies of the following:

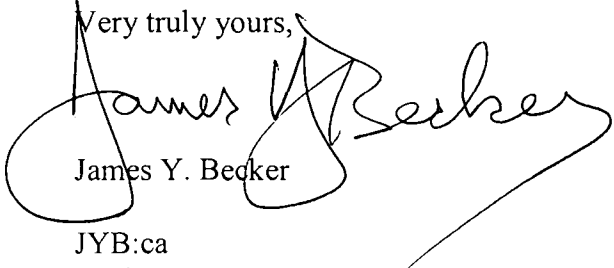
- Motion to Exceed Page Limitations; and
- Petition for a Writ of Certiorari.

I have also enclosed one bound and one unbound copy of the Appendix to Petition for Writ of Certiorari, Volumes I and II.

Also enclosed is this firm's check in the amount of \$25.00 to cover the filing fee for the Motion. I would appreciate your filing the original and six (6) copies of the Motion and Petition and two (2) copies of each Appendix and returning file stamped copies of each to the bearer of this letter.

With kind regards, I am

Very truly yours,


James Y. Becker

JYB:ca

Enclosure

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

The Supreme Court of South Carolina

Wachovia Bank, N.A.,

Petitioner,

v.

Ann T. Coffey and Bank of
American, N.A.,

Respondents.

The Honorable Marvin Dukes
Beaufort County
Trial Court Case No. 2006-CP-07-1655

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until November 19, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

Shirley A. Shealy
Clerk
Chief Deputy

Columbia, South Carolina

October 11, 2010

cc: James Y. Becker, Esquire
Gregory Milam Alford, Esquire
Steven R. Anderson, Esquire
The Honorable Tanya Gee

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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COLUMBIA, SOUTH CAROLINA
TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

EMILY H. FARR
DIRECT DIAL NUMBER 803.540.7705
EMAIL efarr@hsblawfirm.com

October 8, 2010

RECEIVED

OCT - 8 2010

S.C. SUPREME COURT

BY HAND DELIVERY

South Carolina Supreme Court
Attn: Linda Allen
1231 Gervais Street
Columbia, SC 29201

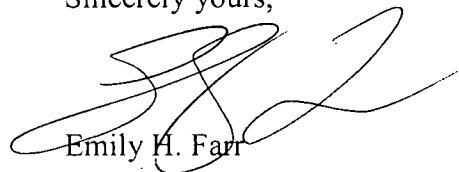
Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
HSB File No. 04723.2261

Dear Ms. Allen:

This firm represents the Appellant Wachovia Bank, N.A. in the above matter. The Petition for a Writ of Certiorari of Wachovia Bank, N.A. is currently due on October 20, 2010. Pursuant to Rule 263(b), SCACR, we respectfully request a 30 day extension of time in which to file the Petition, making it due on November 19, 2010. Counsel for the Respondent has graciously consented to this request.

I am enclosing a check for the filing fee in the amount of \$25.00. Please note service on the Respondent by copy of this letter. In the meantime, we ask that the current deadline for filing the Petition be stayed pending resolution of this request.

Sincerely yours,



Emily H. Farr

EHF/ca

Enclosures

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

COLUMBIA

CHARLESTON

FLORENCE

GREENVILLE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
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TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

JAMES Y. BECKER
DIRECT DIAL NUMBER 803.540.7706
EMAIL jbecker@hsblawfirm.com

October 5, 2010

BY HAND DELIVERY

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Wachovia Bank, N.A. v. Ann T. Coffey and Bank of America, N.A.*
Case No. 2006-CP-07-1655
HSB File No. 04723.2261

Dear Ms. Gee:

This firm represents the Appellant Wachovia Bank, N.A. in the above matter. The Petition for a Writ of Certiorari of Wachovia Bank, N.A. is currently due on October 20, 2010. Pursuant to Rule 263(b), SCACR, we respectfully request a 30 day extension of time in which to file the Petition, making it due on November 19, 2010. Counsel for the Respondent has graciously consented to this request.

I am enclosing a check for the filing fee in the amount of \$25.00. Please note service on the Respondent by copy of this letter. In the meantime, we ask that the current deadline for filing the Petition be stayed pending resolution of this request.

With kind regards, I am

Very truly yours,

James Y. Becker

JYB:ca

Enclosure

cc: Gregory M. Alford, Esq.
Steven R. Anderson, Esq.

RECEIVED

OCT 05 2010

SC Court of Appeals

RECEIVED

OCT - 8 2010

S.C. SUPREME COURT

check # 48276

picked up by:

