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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Mikell Scarborough
Charleston County Master in Equity

Unpublished Opinion No. 2017-UP-344
Submitted April 3, 2017 – Filed August 9, 2017
Petition for Rehearing Denied November 17, 2017

Brent E. Bentrim .... Petitioner

v.

Wells Fargo Bank, N.A. .... Respondent

Appellate Case Nos. 2014-002590 & 2015-000396

PETITION FOR WRIT OF *CERTIORARI*

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals.

QUESTIONS FOR REVIEW

Did the Court of Appeals vary the essential rules and terminology of the UCC to establish Wells Fargo is a holder and holder in due course? In other words, does proof of a merger, without more, establish holder and holder in due course under the UCC?

Did the Court of Appeals err in affirming the grant of summary judgment on consumer protection and fair debt collections?

STATEMENT OF THE CASE

This complaint was brought by the Plaintiff in part to enforce the terms of his loan. Wells Fargo, time and again, has characterized Bentrim as unwilling to pay when it is undisputed that its predecessor in interest refused (after an admitted accounting error) [App. pp. 498-499] to accept payments tendered from December 2008 through January 2010 [App. pp 500-501 & 789].

Wells Fargo's defense and counterclaim all stem from the same admitted incorrect failure to cure as well as it being "*the present owner and holder of the note, although it is lost.*" [App. pp. 1190-1191]. Bentrim asserts the accuracy of the demands by Wachovia, to include amounts due and its right to enforce his note and mortgage, are not supported by any documentary evidence, and therefore unfair and deceptive acts. Wells Fargo's regulator and our Attorney General agreed.

On April 13, 2011, The Office of the Comptroller of the Currency ("OCC"), filed Cease and Desist Order 2011-051 against Wells Fargo Bank, N.A. ("Wells Fargo") after conducting an examination of its real estate foreclosure processes in late 2010. "The primary objective of each

review was to evaluate the adequacy of controls and governance over *servicers*' foreclosure processes and assess *servicers*' authority to foreclose." [App. pp. 1186-1115]. In simpler parlance, the Defendant was found to have lacked requisite proof through business records and documents to establish default and prove its right to enforce a note and mortgage, a common theme herein.

Bentrim's suit asserts these practices, which Wells Fargo has admitted to include Wachovia's 2009 foreclosure action against him [App. pp. 1204-1208], are unfair and deceptive in violation of South Carolina law. The following March, Wells Fargo admits Wachovia's foreclosure processes were a "subversion of [South Carolina's] legal processes" and "sustained violations of [its] laws," to include Bentrim's enumerated allegations [App. pp. 1116-1124].

In January 2013, Wells Fargo finally produced the Note, unindorsed still payable to First Union National Bank [App. pp. 1020-1021]. It cannot account for its whereabouts in the admitting the loss of possession was at some unknown time and cause since March 2002 [App. pp. 1191].

The Master in Charleston County determined in May 2014 that Wells Fargo was the holder and holder in due course, or otherwise entitled to enforce under S.C. Code Ann. § 36-3-301 [App. pp. 7]. He provided no legal conclusions nor facts in his order. After Bentrim timely asked for reconsideration and appealed, the Master then reversed, based on an in camera review of records of a sale and transfer, that Bentrim's UDTP causes of actions should move forward.

The Court of Appeals claims to have "affirmed" the Master in Charleston concluding that "Wells Fargo is the holder and holder in due course of Bentrim's Note because, by operation of 12 U.S.C. § 215a(e) (2014), Wells Fargo succeeded to First Union's status as holder and holder in due course." Clearly, First Union's status in March 2002 cannot possibly prove possession of a note thereafter nor insulate Wells Fargo's for it and Wachovia's bad acts.

ARGUMENT

This Petition is based on Rule 242(b)(3) of the South Carolina Appellate Court Rules, which says that certiorari is appropriate "where the decision of the Court of Appeals is in conflict with s prior decision of the Supreme Court."

THE LOST NOTE AFFADIVIT

Wells Fargo has admitted in the National Mortgage settlement that it is not a holder in due course of instruments like the Bentrim note. [App. pp. 1056-1088, 1089 -1162]. But even assuming that this admission is not binding on Wells Fargo, the Lost Note Affidavit [R. pp. 1163-1171] establishes as a matter of law that Wells Fargo was neither the holder or holder in due course when: Bentrim filed his complaint; when it answered the complaint; and when it filed its amended complaint and counterclaim.

There can be no dispute that Wells Fargo amended its answer and initiated its counterclaim stating it *"is the present owner and holder of the Note, even though it is lost."* [App. pp. 1190-1191]. Bentrim therefore rightly denied Wells Fargo was the holder because "[a] holder is defined as one in possession of an instrument drawn, issued or indorsed to the party or to its order and *one cannot be a holder without possession* (emphasis added)." *Rex Smith Propane, Inc. v. National Bank of Commerce*, 372 F. Supp. 499 (N.D. Tx. 1974).

Possession is critical to a finding whether an entity is the holder. S.C. Code Ann. §§ 36-3-201; 37-1-201(37); *see Bank of New York v. Romero*, 330 P.3d 1 (N.M. 2014) ("A payee is always a holder as long as it has possession."); *Wells Fargo Bank v. Ostiguy*, 8 N.Y.S.3d 669 (N.Y. App. Div. 2015).

"It might be added that a person claiming to be the owner of a lost instrument is not a "holder" since he is not in possession of the paper. He has no rights as a holder." *Haupt v. Coldwell*, 500 S.W. 2d. 563 (Tx. Ct. App. 1973).

Absent possession, Wells Fargo was not the note's holder and therefore, it cannot be the holder in due course. "Obviously only a holder can be a holder in due course. To be a holder, a person must have "possession of ... an instrument ... drawn, issued or indorsed to him or to his order or to bearer or in blank." *United States v. Kellerman*, 729 F. 2d 281 (4th Cir. 1984).

By virtue of 2008 Act No. 204, Section 4.A, which provides as follows: "This act applies to a transaction occurring on or after the effective date [July 1, 2008] of this act. This act does not apply to a transaction or event, or obligation or duty arising out of or associated with a transaction or event, before the effective date of this act," S.C. Code Ann. § 36-3-804 (2002) provides the exclusive method to identify whether Wachovia or Wells Fargo had rights.

The South Carolina Reporter's Comments to to S.C. Code Ann. § 36-3-804 (2002) state "this section provides a statutory method whereby an owner of a lost negotiable instrument may recover against the party liable thereon." The Official Comments add "[t]he plaintiff who claims to be the owner of such an instrument is not a holder as the term is defined in this Act, since he is not in possession of the paper and he does not have the holder's prima facie right to recover under [Section 3-307] on the burden of establishing signatures. He must establish the terms of the instrument and ownership and must account for its absence."

A party is not allowed to claim "it is the holder, althought the note is lost" because, once lost, the person "does not have the holder's prima facie right to recover under the section on the burden of establishing signatures." Instead "[h]e must prove his case" by "establish[ing] the terms

of the instrument and his ownership, and must account for its absence." *Genger v. Sharon*, 910 F. Supp. 2d 656 (S.D.N.Y. 2012).

So, having lost the Note – and being in unable to account for its whereabouts – Wells Fargo was required to show that Wachovia *owned* the Note after November 29, 2006 and it *owned* the Note prior to bringing its counterclaim. It did neither. It was error for the Court to allow this.

The sale shows <u>who</u> had enforcement rights to a Note when possession was lost. The Court found there was a sale but claimed it was unimportant. (Opinion at * 4). Having lost the note – and being unable to account for its whereabouts – Wells Fargo cannot claim it had enforcement rights at the time of Bentrim's suit, or at the time of their counterclaim. *See* former S.C. Code. Ann. § 36-3-804. The Nation Bank Act [12 U.S.C. § 215a(e)] is only applicable if Wachovia possessed and owned the Note after November 29, 2006.

Having found a sale and Wells Fargo's own admission that no vault records are available to prove it had possession thereafter, the Note's owner was vested with enforcement rights. Lacking possession, the sale is of critical importance. Under former S.C. Code Ann. § 36-3-804[1], enforcement rights were vested with its owner, not Wachovia, once lost.

REACQUISITION

When Wells Fargo finally produced the Note in late January 2013, that production did not relieve it from "the principle that a foreclosing plaintiff must establish entitlement to enforce the note at the time the action was commenced has been recognized in several other jurisdictions. *See, e.g., U.S. Bank, N.A. v. Ugrin*, 91 A.3d 924, 930 (2014) ("Generally, in order to have standing to

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[1] "The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms." While, as this Court notes, certain portions of the Code are updated for clarity, some, to include Section 3-804 have been changed in their entirety

bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property."); *McLean v. JP Morgan Chase Bank Nat. Ass'n,* 79 So.3d 170, 173 (Fla. Dist. Ct. App. 2012) ("A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose."); *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P.3d 1046, 1052 (N.M. 2016) (holding that "standing must be established as of the time of filing suit in mortgage foreclosure cases"); *U.S. Bank, N.A. v. Collymore*, 890 N.Y.S.2d 578, 580 (NY 2009) (noting that "the plaintiff must prove its standing in order to be entitled to relief" and that, "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced"); *Bank of N.Y. Mellon v. Grund,* 27 N.E.3d 555, 559 (Ohio Ct. App. 2015) (noting that, in a mortgage foreclosure action, the mortgage lender must establish an interest in the promissory note or the mortgage "as of the filing of the complaint"); *Deutsche Bank Nat. Trust v. Brumbaugh*, 270 P.3d 151, 154 (Okla. 2012) ("Being a person entitled to enforce the note is an essential requirement to initiate a foreclosure lawsuit. In the present case, there is a question of fact as to when Appellee became a holder, and thus, a person entitled to enforce the note. Therefore, summary judgment is not appropriate."); *U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087, 1092 (Vt. 2011) (affirming the circuit court's granting of summary judgment for the homeowner where the bank could not prove it was the holder of the note).

In analyzing the exact same circumstances where "[t]he note came to light years after [Plaintiff] filed its complaint" the New Mexico Appellate Court determined "it is clear that proof of the mergers, without more, cannot establish [Plaintiff's] status as holder at the time of the filing of the complaint." *PNC Mortgage v. Romero*, 377 P. 3d 461 (N.M. Ct. App. 2016).

The requirement that PNC Mortgage establish its *status of holder* is required by the New Mexico Court of Appeals – as well as for Wells Fargo in both New York Appellate decisions cited by our Appellate Court –because the facts in each case demonstrate the notes were at some point indorsed in blank. Each Court rejected any notion that a party can establish it is the "holder" of a negotiable instrument through a copy and affidavits that fail to "definitely establish" possession at the commencement of the action.

The *Ostiguy* decision was clear "plaintiff has the right to enforce the note *as its lawful holder* so long as it can prove that it physically possessed the note at the time the action was commenced" because "[h]older status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff (see UCC 1-201 [former (20)]." *Wells Fargo Bank v. Ostiguy*, 8 N.Y.S.3d 669, 671 (N.Y. App. Div. 2015). The Appellate Court cites the same law in South Carolina and then curiously ignores it.

In fact, *In Re North Carolina Deed of Trust*, 719 S.E 2d 207 (N.C. Ct. App. 2011), on which the Court of Appeals also relies, was to determine if "[a]t the time this foreclosure proceeding was commenced" was so entitled to enforce the instrument.

"Section 3-208 contemplates the factual situation where a prior holder reacquires an order instrument." South Carolina Reporter's Comment to S.C. Code Ann. § 36-3-208 (2002). The provision does not indicate the return of the note retroactively establishes rights in the interim. The Court of Appeals did find a sale, and "[t]here is nothing in the section suggesting that a reacquiring party should be able to divest a rightful owner of title to the instrument.[2] Under the

[2] "[T]he 'reacquisition' contemplated by Code § 3-208 is the result of the voluntary act of the person who is then the holder or possessor of the instrument. The reason for giving the provision this interpretation is that any situation other than a voluntary return or reacquisition of the instrument is so commercially rare that it should be ignored."

terms of that other provision in Article 3, reacquisition of an instrument can also result in the discharge of all parties." William H Lawrence, *Commercial Paper and Check Collection* (Butterworth Legal Pub. July 1990). Therefore, Wells Fargo is required to prove a transfer or otherwise Absent possession Wachovia Bank, NA f/k/a First Union National Bank was no longer its "holder," but instead its "former holder." Therefore, when the note was purported "returned" it was "reacquired."[3]

MASTER'S ORDER

Unique to this case at hand is the Master in Equity found, without citing any finding of facts or conclusions of law, that Wells Fargo was the note holder and holder in due course or otherwise entitled to enforce under S.C. Code Ann § 36-3-301. Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56..." *Woodson v. DLI Properties. LLC*, 406 S.C. 517, 537, 753 S.E.2d 428, 433 (2014).

However, the Court of Appeals was required to apply the same standard as the trial court under Rule 56(c), SCRCP as well as address "every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220(b), SCACR. *Id.; see also In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 471 S.E. 2d 456 (2013).

Schoonmaker v. Merch Nat Bank, 81 Misc. 2d 967 (NY County Court 1975) citing Anderson, Uniform Commercial Code (vol 2, p 808).

[3] "[w]here an instrument *is returned* to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well."

THE APPELLATE DECISION

Instead of following the comprehensive provisions set forth under the UCC, the Court of Appeals instead determined that because First Union was a holder and holder in due course, 12 U.S.C.§ 215a(e), not Wachovia's servicing and custodial records, establishes Wachovia Bank was in possession and a holder in due course some 7 years later.

Following this thought process, it further extended holder and holder in due course status to Wells Fargo although it admits, absent the note it cannot actually determine "competent, substantial evidence... that the bank acquired ownership of the note and mortgage through the merger." *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So.3d 1222, 1223 (Fla. 2d DCA 2014).

12 U.S.C. § 215a(e)

Bentrim agreed with Wells Fargo that there is no issue of federal preemption, which should have end any further inquiry into the matter. The Court, however, found that 12 U.S.C. § 215a(e) preempted U.C.C. Article 3. This is an error.

"Courts should not lightly infer preemption." *City of Casey v. Norfolk Southern*, 391 S.C. 395, 409, 688 S.E.2d 136, 144 (2011). In fact, it is one of the two touchstones of preemption jurisprudence "that courts should begin with a presumption against preemption." *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012). In applying the US Constitution's Supremacy Clause, courts "start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress. *Weston v. Kim's Dollar Store*, 385 S.C. 520, 526, 684 S.E.2d 769, 772 (Ct. App. 2009) *affirmed as modified* 399 S.C. 303, 731 S.E.2d 864 (2012). "In the interest of avoiding unintended encroachment on the authority of the states, however, a court interpreting a federal statute

pertaining to a subject traditionally governed by state law will be reluctant to find preemption; thus, preemption will not lie unless it is the clear and manifest purpose of Congress. *Quigley v. Rider*, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003).

Turning to the National Bank Act itself, we see that Congress specifically states that only state consumer protection codes are preempted, and only to the extent they do not meet the test articulated in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996); 12 U.S.C.§ 25b. Consequently, there is no evidence of preemptive purpose in the National Bank Act. *See Quigley*, 357 S.C. at 483, 593 S.E.2d at 479 (holding that evidence of preemptive purpose is sought in the text and structure of the statute at issue). Limited preemption by the National Bank Act is consistent with long-standing authority. *See* Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 Chap. L. Rev. 171 (2011). Moreover, there is nothing explicit or implicit in the National Bank Act which would indicate Congress's intent to occupy the field of negotiable instruments, nor that there is anything in UCC Article 3 would conflict with the purposes of the Act – and compliance with both statutes is not impossible. *Cf. State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 525 S.E.2d 872 (2000) (declining to find federal statute nullified state anti-gambling statutes since compliance with both was possible); *see also* OCC Interpretive Letter # 1005 in which the OCC agrees that federal banking laws do not preempt the Uniform Commercial Code.

PLAIN LANGUAGE ARGUMENT

"Where language is unambiguous, the Court's inquiry is over, and the statue must be applied according to its plain meaning." *Jennings v. Jennings*, 401 S.C. 15, 736, S.E.2d 651 (2012). Examining the specific provision, as it has not materially been altered since 1933 when the

provision upon which the Court of Appeals relies was added, rejects "that the 1933 amendment was intended to do anything other than to preserve to the consolidated corporation previously existing rights of the state bank constituents, including those rights it exercised under fiduciary appointments of state courts." *Fidelity-Baltimore National Bank v. United States,* 328 F. 2d 953 (4th Cir. 1964). More succinctly "language is intended solely to preserve to a receiving association any previously existing rights of an individual merging bank." *Rickey v. Boden*, 421 A. 2d 539 (R.I. 1980).

The Court of Appeals cites the language contained therein and curiously ignores the plain language of the final sentence: 'the receiving association . . . shall hold . . . all rights of property . . . in the same manner and to the same extent as such rights . . . were held . . . by any one of the merging banks . . . ***at the time of the merger***. . . ." (emphasis added).

The Court of Appeals cites *In re N.C. Deed of Trust*, 719 SE 2d 207, 201 (N.C. Ct. App. 2011) to support its contention that "Wells Fargo is the holder and holder in due course of Bentrim's Note, because – by operation of 12 U.S.C. § 215a(e) – Wells Fargo succeeded to First Union's status as holder and holder in due course." Bentrim is clearly arguing because Wells Fargo raised the issue in its lost note affidavit, there is no proof Wachovia Bank was in possession or owned the note as alleged.

DISPLACEMENT & ABSURD RESULTS

"Only where the UCC is incomplete does the common law provide applicable rules." *Hitachi Elec. Devices (USA), Inc. v. Platinum Techns., Inc.,* 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005). The UCC defines and establishes how to identify a holder and holder in due course and "by virtue of merger" alone is therefore displaced.

"The statutory language must be constructed in light of the intended purpose of the statute [citation omitted]. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).

The absurd nature of this finding is that Wells Fargo has admitted the only records to support its assertion that it could enforce Bentrim's note is the fact it merged with Wachovia, and that once known as First Union National Bank. Because "the time and manner of the loss is some unknown time from the date of receipt," [App. pp. 1163-1171] the "bank attempting to recover on a lost promissory note could not do so because the bank failed to prove who lost the note and when it was lost, offered no proof of anyone's right to enforce the note when it was lost, and produced no evidence of ownership of the note." *Steinberger v. McVey*, 318 P.3d 419 (Ariz. Ct. App., 1st Div. 2014).

"Proof of the mergers, without more, cannot establish PNC Mortgage's status as holder at the time of the filing of the complaint." *PNC Mortgage v. Romero*, 377 P. 3d 461 (N.M. Ct. App. 2016)). It is therefore axiomatic, if the merger had not occurred, Wachovia could not establish such rights.

Because Well Fargo provided a Lost Note Affidavit, it should be required to provide "[c]ompetent, substantial evidence... that the bank acquired ownership of the note and mortgage" through the merger." *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So.3d 1222, 1223 (Fla. 2d DCA 2014). As it neither owned nor can determine how or when possession was lost, it has failed to prove that it "acquired all of [the absorbed entity's] assets, including [the] note and mortgage, by virtue of the merger." *Fiorito v. JP Morgan Chase Bank, Nat'l Ass'n,* 174 So.3d 519, 521 (Fla. 4th DCA 2015).

SUMMARY JUDGMENT

This was a case decided on summary judgment. It is a bedrock principle of summary judgment procedure in this State that the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 53-54, 656 S.E.2d 20, 29 (2008). Under *Hancock v. Mid–South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), "the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment." Moreover, any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts. *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 79-80, 735 S.E.2d 650, 658 (2012). Based on this standard, Bentrim has shown more than enough facts, and inferences from the facts, to withstand summary judgement.

FAIR DEBT COLLECTION PRACTICES ACT

The Court finds Wells Fargo claims its status as an 'original creditor' precludes it from liability under 15 U.S.C. § 1692. However, Bentrim asserts that Wells Fargo designed, complied and furnished deceptive forms to collect and foreclose to include loan servicing history, pleadings and counterfeit notes. *Id.* at § 812(a). If proven, regardless of whether they are not a debt collector, a Defendant is liable under the Act to the same extent. *Id.* at §§ 812(b), 813.

Further, Courts have repeatedly found that mortgage foreclosure is separate from loan servicing and therefore under the purview of 15 U.S.C. § 1692: "While the Seventh Circuit has not considered this exact issue, however, so far all courts of appeals have held that 'mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a `debt collector' must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he `regularly'

performs this function.'" *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013); *see also Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (rejecting argument that a debt ceased to be a debt under the FDCPA once foreclosure proceedings were commenced and holding that defendant attorney's "actions surrounding the foreclosure proceeding were attempts to collect that debt"); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (subjecting attorney defendant to general requirements of FDCPA in action involving foreclosure, explaining that "a party who satisfies § 1692a(6)'s general definition of a `debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests"); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012) (holding that non-judicial foreclosure actions fell within the general definition of debt collection under the FDCPA: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e."); *Cf. Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (finding attorney defendants' actions of filing suit to enforce a lien on plaintiff's property fell within the general definition of debt collection)."

Specifically, Bentrim alleges that the Respondent and counsel all acted as debt collectors and conspired under 15 U.S.C. § 1692j to make it appear Wachovia and Wells Fargo was the true creditor by claiming to be the Note holder and owner since 2006.

CONSUMER PROTECTION S.C. CODE § 37-5-108

The Court found that Bentrim consolidated a portion of his existing home equity line (a consumer loan as defined under S.C. Code Ann. § 37-3-104) into the refinance, therefore it is a consumer credit transaction subject to S.C. Code Ann. § 37-5-108. Section 37-5-108 applies to a consumer credit transaction (see S.C. Code Ann. § 37-5-108(1)). "Consumer credit transaction" means a consumer credit sale (Section 37-2-104) **or consumer loan (Section 37-3-104) or a**

refinancing or consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701). S.C. Code Ann. § 37-1-301(11)(emphasis added).

Further, as outlined Wells Fargo in both its 2007 and specifically in its 2009 complaint plead the Note was not a first mortgage and therefore not eligible for loss mitigation. Further, the Court cannot change the terms of the Note expressly waiving for collateral 10 Nicholson Street while used as a primary dwelling.

Wachovia's own servicing records show evidence of these problems. [App. pp. 1098-1101, 1108-1114]. Moreover, since the Court found that Wachovia had sold the Bentrim loan to TMS Service Corp. on November 29, 2006 (Opinion at ** 2, 4), Wachovia was aware of a claim from TMS Service Corp. because Wachovia had warranted such a claim in the Participation Agreement, on November 29, 2006. Finally, by signing the Participation Agreement, on November 29, 2006, Wachovia had notice under § 36-1-201 that it had given up all rights to the Note. If Wachovia could not be a holder in due course, then neither could Wells Fargo.

CONCLUSION

The typical garden variety "Note Holder" appeal is not generally predicated with the party asserting it is a "holder" while simultaneously claiming "loss of possession" in a Lost Note Affidavit. Nor does it typically involve the Court of Appeals asserting the inapplicability of the Uniform Commercial Code to settle the conflict.

The issue Bentrim raises is after all "a fundamental precept of the law to expect a foreclosing party to actually be in possession of its claimed interest in the note…" *Deutsche Bank Nat'l Trust Co. v Matthews*, 273 P.3d 43,47 (Okla. 2012).

However, what is most troubling is the sheer disregard for the welfare of homeowners and consumers across South Carolina. By finding Wells Fargo a holder in due course, the Court of

Appeals has determined the largest multi-state settlement since the Tobacco Settlement in 1998 brought by in concert with our Attorney General is invalid.

Its opinion stands in direct opposition of the settlement terms and South Carolina law as explained by AAG Johanna C. Valenzuela Letter to the Federal District Court:

> "Section 39-5-140(c) specifically states [a]ny permanent injunction, judgment or order of the court brought under Section 39-5-140 that the respondent used or employed a method, act or practice declared unlawful by Section 36-5-20." [App. pp. 644-645].

According to the South Carolina Attorney General, "under the law, the Attorney General's actions pursuant to Section 39-5-50 may actually be used as evidence to prove a private party's claim against the same defendant [Wells Fargo] pursuant to Section 39-5-140(c)." [App. pp. 644-645].

Respectfully submitted,

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December 18, 2017
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 2 1 2017
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Mikell Scarborough
Charleston County Master in Equity

Unpublished Opinion No. 2017-UP-344
Submitted April 3, 2017 – Filed August 9, 2017
Petition for Rehearing Denied November 17, 2017

Brent E. Bentrim .... Petitioner

v.

Wells Fargo Bank, N.A. .... Respondent

Appellate Case Nos. 2014-002590 & 2015-000396

CERTIFICATE OF SERVICE

The undersigned attorney for Appellant hereby certifies that a true copy of the ***Petition for Writ of Certiorari*** in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 18th day of December, 2017, to the following:

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December 18, 2017