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Into the Matrix: The Future of the Unauthorized Practice of Law in Real Estate Closings following Matrix Financial Services Corp. v. Frazer

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INTO THE MATRIX: THE FUTURE OF THE UNAUTHORIZED PRACTICE OF LAW IN REAL ESTATE CLOSINGS FOLLOWING *MATRIX FINANCIAL SERVICES CORP. V. FRAZER*

I. INTRODUCTION

In the first quarter of 2011, South Carolina ranked thirteenth in the country for residential mortgage delinquencies, and fifteenth for foreclosures.[1] The increase in foreclosures is an epidemic that has been sweeping the entire country for the past several years. Many more people are struggling to pay their mortgages and often flirt with foreclosure.[2] In the third quarter of 2011 alone, foreclosure filings in the nation totaled 610,337.[3] While there are some signs that foreclosure filings decreased in the past year, foreclosures will continue to be prevalent in our current economy.[4] However, imagine a situation in which a person is able to stop paying a mortgage and the lender is precluded from taking back the property or requiring the person to pay any more money? A new South Carolina Supreme Court opinion might make this hypothetical a reality for some future borrowers if lenders do not follow South Carolina law when preparing and conducting the borrowers' real estate closings.[5]

On August 8, 2011, the South Carolina Supreme Court issued an opinion in *Matrix Financial Services Corp. v. Frazer*, holding that a lender is barred from pursuing any equitable remedies against a borrower if the lender engaged in the unauthorized practice of law in the closing process.[6] In South Carolina, foreclosure is an equitable remedy;[7] therefore, this holding means that foreclosing on a borrower's home will not be an available option to lenders who fail to act in accordance with the opinion.[8]

This Note examines the potential implications that the South Carolina Supreme Court's decision in *Matrix* will have on borrowers and lenders involved in real estate closings in South Carolina.[9] In particular, this Note focuses on *Matrix* as it pertains to the unauthorized practice of law. Part II of this Note addresses the unauthorized practice of law generally, and then explores how the doctrine was previously applied in the context of real estate closings. Consideration of the court's prior opinions concerning the unauthorized practice

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1. David Slade, *Mortgage Delinquency Rates in S.C. Improve*, POST & COURIER (May 20, 2011), http://www.postandcourier.com/news/2011/may/20/mortgage-delinquency-rates-in-sc-improve/.

2. *See id.*

3. Aaron Smith, *Foreclosures Continue to Plague Housing Market*, CNNMONEY (Oct. 13, 2011, 5:41 AM), http://money.cnn.com/2011/10/13/real_estate/foreclosure/index.htm.

4. *See id.*

5. *See* Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 139–40, 714 S.E.2d 532, 534–35 (2011) (footnote omitted).

6. *Id.*

7. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) (citing Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964)).

8. *See Matrix*, 394 S.C. at 140, 714 S.E.2d at 535 (applying its ruling "to all filing dates after the issuance of this opinion").

9. The *Matrix* opinion is broken down into two sections. The first section deals with equitable subrogation and the second deals with the unauthorized practice of law in real estate closings. *Id.* at 137–38, 714 S.E.2d at 533–35.

of law and real estate closings is important because it provides a roadmap for understanding how the court arrived at its decision in *Matrix*. Part III provides a factual overview and in-depth analysis of *Matrix*, and examines the court's reasoning behind its decision. Part IV discusses the impact of *Matrix* on South Carolina law. This Part also looks at the parties affected by *Matrix*, and how those parties will respond to it. Finally, Part V concludes with the assertion that, while the South Carolina Supreme Court's holding in *Matrix* might seem strict, it was a foreseeable step toward the court's goal of protecting the public from the harms that are likely to arise from the unauthorized practice of law in real estate closings.

II. BACKGROUND

In order to fully comprehend how the South Carolina Supreme Court arrived at its decision in *Matrix*, it is important to have a clear understanding of the unauthorized practice of law. In particular, it is necessary to explore how the South Carolina Supreme Court determines whether an activity qualifies as the unauthorized practice of law and how the court has previously applied this analysis to real estate closings. This Part briefly discusses what constitutes the unauthorized practice of law and gives an overview of the evolution of court decisions regarding the unauthorized practice of law in real estate closings.

A. Origins of the South Carolina Supreme Court's Power to Regulate the Unauthorized Practice of Law

The South Carolina Supreme Court, by power vested in it by the South Carolina Constitution, governs the practice of law.[10] Moreover, the South Carolina Supreme Court reserves the sole power to determine what conduct constitutes the practice of law.[11] In order to lawfully engage in the practice of law on behalf of another individual or entity, a person must be admitted to the South Carolina Bar.[12] By engaging in conduct deemed to be the practice of law without being admitted to the bar, a person commits the unauthorized practice of law, which is statutorily codified as a felony and can result in a fine of up to $5,000, up to five years imprisonment, or both, upon conviction.[13]

South Carolina does not have a set of rules or a code section that defines what activities constitute the practice of law, rather, the South Carolina Supreme Court decides, case-by-case, what conduct is considered the practice of law.[14] Once the South Carolina Supreme Court decides that certain conduct is

10. *See* S.C. CONST. art. V, § 4; *see also* S.C. CODE ANN. § 40-5-10 (2011).
11. *See* S.C. CODE ANN. § 40-5-310 (2011).
12. *Id.*
13. *Id.*
14. *See In re* Unauthorized Practice of Law Rules Proposed by S.C. Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

practicing law, a precedent is created allowing lower courts to find an unlicensed party engaging in such conduct guilty of the unauthorized practice of law.[15] In 1991, the South Carolina Bar submitted to the South Carolina Supreme Court a set of proposed rules to govern what activities constitute the unauthorized practice of law.[16] The purpose of the rules was to provide a resource to non-attorney professionals so they would not accidentally perform actions or provide services that would constitute practicing law.[17] However, the court rejected the rules on the basis that the better practice "is to decide what is and what is not the unauthorized practice of law" by looking at actual cases individually.[18]

B. Unauthorized Practice of Law in Real Estate Closings

Much of the case law concerning the unauthorized practice of law in real estate closings in South Carolina has been decided in the last twenty-five years. The starting point for any discussion on the unauthorized practice of law in real estate closings is *State v. Buyers Service, Inc.*[19] In *Buyers Service*, the South Carolina Supreme Court held that preparing any instrument involved in a real estate sales transaction and conducting real estate and mortgage closings is the practice of law, and when performed by a layperson or an attorney employed by a lender, this conduct constitutes the unauthorized practice of law.[20] The court also held that, in certain situations, the examination of title to real property and recording instruments, "when this step takes place as part of a real estate transfer," must be performed under the supervision of a South Carolina licensed attorney.[21]

Buyers Service involved a commercial title company that helped homeowners purchase residential real estate.[22] The company, Buyers Service, prepared and recorded closing documents and conducted closings.[23] The court determined that those activities are within the definition of the practice of law, given its holding in *In re Duncan*,[24] which states 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 taken for them in matters connected with the law."[25] According to the court in *Buyers Service*, an attorney must be present at a closing to protect "the public from the potentially severe economic and

15. *See id.* at 307, 422 S.E.2d at 125.
16. *Id.* at 305, 422 S.E.2d at 124.
17. *Id.*
18. *Id.*
19. 292 S.C. 426, 357 S.E.2d 15 (1987).
20. *Id.* at 431–33, 434, 357 S.E.2d at 18–19.
21. *Id.* at 432–33, 434, 357 S.E.2d at 18–19.
22. *Id.* at 428, 357 S.E.2d at 16.
23. *Id.* at 427–28, 357 S.E.2d at 16–17.
24. 83 S.C. 186, 65 S.E. 210 (1909).
25. *Buyers Serv.*, 292 S.C. at 430, 357 S.E.2d at 17 (quoting *In re* Duncan, 83 S.C. at 189, 65 S.E. at 211) (internal quotation marks omitted).

emotional consequences which may flow from erroneous advice given by persons untrained in the law."[26] The court made clear that the reason behind its holding was not to ensure business for attorneys.[27] Moreover, although Buyers Service retained an attorney to review closing documents, the court held that this was not sufficient to keep Buyers Service's actions from being the unauthorized practice of law.[28] Through the attorney's employment relationship with Buyers Service, the attorney would likely represent the employer's interests more effectively than the borrower's interests.[29] The court reasoned that the nature of real estate transactions creates an inherent conflict of interest, thus making it difficult for lawyers "to maintain a proper professional posture toward each party."[30] The court recognized that the buyer and seller in a real estate transaction have different interests and that the adverse interests make it difficult for an attorney to represent both parties equally.[31] Therefore, Buyers Service could not meet the attorney requirement with a staff attorney, but needed an independent attorney to represent both parties' interests.[32]

Buyers Service lays the foundation for the court's holding in *Matrix*. However, several other cases decided before *Matrix* expound which activities in a real estate closing must be supervised by a licensed attorney. In 2003, in *Doe v. McMaster*,[33] the South Carolina Supreme Court held that the same principles outlined in *Buyers Service* apply to refinancing an existing mortgage from the same lender.[34] The *Doe* court stated that a "[l]ender may prepare [loan] documents," but only if "an independent attorney reviews and corrects . . . the documents" in case there are any errors.[35] In another 2003 case, the court held that an attorney must be physically present during a real estate closing, and not just available by phone.[36] The South Carolina Supreme Court, in a later case, added that the "disbursement of funds in the context of a residential real estate loan closing" requires attorney supervision.[37]

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26. *Id.* at 431, 357 S.E.2d at 18.
27. *See id.*
28. *Id.*
29. *See id.* at 431–32, 357 S.E.2d at 18 (citing State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1, 13 (1961), *supplemented on denial of reh'g*, 371 P.2d 1020 (1962)).
30. *Id.* at 432, 357 S.E.2d at 18 (citing *Ariz. Land Title*, 366 P.2d at 13).
31. *See id.*
32. *See id.* Furthermore, an attorney working as an employee of a loan closing agency might be construed as a violation of South Carolina's prohibition on the practice of law by a corporation. *Id.* (citing S.C. CODE ANN. § 40-5-320 (2011); *Ariz. Land Title*, 371 P.2d at 13–14).
33. 355 S.C. 306, 585 S.E.2d 773 (2003).
34. *Id.* at 312, 585 S.E.2d at 776.
35. *Id.* at 314, 585 S.E.2d at 777.
36. *In re* Lester, 353 S.C. 246, 247, 578 S.E.2d 7, 7 (2003).
37. Doe Law Firm v. Richardson, 371 S.C. 14, 18, 636 S.E.2d 866, 868 (2006).

C. *Unclean Hands in Unauthorized Practice of Law*

While the South Carolina Supreme Court's opinion in *Matrix* reflects the unauthorized practice of law principles set forth in *Buyers Service* and its progeny, it was the South Carolina Court of Appeals' decision in *Wachovia Bank, N.A. v. Coffey*[38] that influenced the South Carolina Supreme Court to deny equitable remedies to those who engage in the unauthorized practice of law.[39] In *Coffey*, the court of appeals held that a lender was not entitled to equitable or legal remedies because there was no attorney present at the closing of the loan in question.[40] In this case, Dr. Coffey, after being diagnosed with terminal cancer, took out a home equity line of credit in order to purchase a boat.[41] While the line of credit was taken against the home of the Coffey family, the title to the home was solely in Dr. Coffey's wife's name.[42] Thus, Dr. Coffey had no right to create an encumbrance on the property.[43] It was also discovered that the lender, Wachovia, did not have a lawyer present at the closing for the line of credit.[44] The combination of these failures to follow the law proved to be lethal to Wachovia's rights. The court, applying the doctrine of unclean hands, barred Wachovia from obtaining any equitable remedies, including foreclosure on the boat purchased with the line of credit.[45]

Unclean hands is an equitable doctrine that "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."[46] The court defined "clean hands" as meaning that a party has "a clean record with respect to the transaction with the defendants themselves and not with respect to others."[47] The South Carolina Court of Appeals held that Wachovia had unclean hands because it engaged in the unauthorized practice of law when it did not employ an attorney to carry out the closing, and the unauthorized practice of law is prejudicial to the public at large.[48] This characterization of the unauthorized practice of law as being highly prejudicial was based on the South Carolina Supreme Court's decision in *Buyers Service*.[49]

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38. 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).
39. *See, e.g., id.* at 247–48, 698 S.E.2d at 75–76.
40. *Id.*
41. *Id.* at 71–72, 698 S.E.2d at 246.
42. *Id.* at 71, 698 S.E.2d at 246.
43. *See id.* at 71, 72, 698 S.E.2d at 246.
44. *Id.* at 76, 698 S.E.2d at 248.
45. *Id.*
46. *Id.* at 75, 698 S.E.2d at 247 (quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998)) (internal quotation marks omitted).
47. *Id.* (quoting Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943)) (internal quotation marks omitted).
48. *Id.* at 76, 698 S.E.2d at 248.
49. *Id.* (quoting State v. Buyers Serv., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

In addition to denying Wachovia equitable relief, the court held that Wachovia's legal causes of action were barred as well.[50] That holding was based on the South Carolina Supreme Court's decision in *Linder v. Insurance Claims Consultants, Inc.*,[51] which denied an insurance adjuster compensation for the value of his work that was attributed to the unauthorized practice of law.[52] The *Coffey* court also cited to South Carolina precedent for the proposition that a person cannot acquire a right of action by committing an unlawful act, and "one who participates in an unlawful act cannot recover damages for the consequence of that act."[53] In *Coffey*, the South Carolina Court of Appeals relieved the borrower of any obligation to pay the lender.[54]

III. *MATRIX FINANCIAL SERVICES CORP. V. FRAZER*

This Part examines the facts and legal issues presented in the *Matrix* case.[55] It analyzes the reasoning behind the South Carolina Supreme Court's decision, which creates a bright line rule for the unauthorized practice of law in real estate closings.

A. Factual and Procedural Overview

In January 2001, the Frazers bought a home in Greenville County, financed by a mortgage that was assigned to Matrix Financial Services later that year.[56] In September of that same year, the Frazers and Matrix began the process of refinancing the mortgage.[57] A title search was conducted in September 2001, and the refinance loan was closed in November 2001, "but the new mortgage was not recorded until April 3, 2002."[58]

In the time between the title search and the recording of the mortgage, Matthew Kundinger, the appellant, received a judgment in California against the Frazers, and filed the judgment in Greenville County.[59] During that same interim, the Frazers filed bankruptcy, and Matrix brought an action to foreclose on the refinance mortgage.[60] When filing for foreclosure, Matrix named

50. *Id.*

51. 348 S.C. 477, 560 S.E.2d 612 (2002).

52. *See id.* at 497, 560 S.E.2d at 623; *see also Coffey*, 389 S.C. at 76, 698 S.E.2d at 248 (citing *Linder*, 348 S.C. at 483, 496, 560 S.E.2d at 616, 622).

53. *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248 (quoting Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276, 437 S.E.2d 168, 170 (Ct. App. 1993)).

54. *See id.* at 77, 698 S.E.2d at 248.

55. The discussion in this Part is limited to the majority opinion in *Matrix*. The concurring and dissenting opinions will be addressed in the next Part, which discusses the effects of *Matrix*. *See infra* Part IV.

56. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 136, 714 S.E.2d 532, 533 (2011).

57. *Id.*

58. *Id.*

59. *See id.* at 135, 136, 714 S.E.2d at 532, 533.

60. *See id.* at 136, 714 S.E.2d at 533.

Kundinger as a defendant because of the judgment he entered against the Frazers.[61] Kundinger filed a counterclaim against Matrix, alleging that his judgment had priority over the refinance mortgage because his judgment was recorded first.[62] Matrix responded by requesting that "the refinance mortgage [be] equitably subrogated to the [position] of the January 2001 mortgage."[63] The master-in-equity granted Matrix the right of equitable subrogation.[64]

Subsequently, the appellant appealed the master-in-equity's order, and the appeal made its way to the South Carolina Supreme Court.[65] The South Carolina Supreme Court originally issued an opinion in the case on August 16, 2010.[66] However, on August 8, 2011, that original opinion was withdrawn and a superseding opinion was issued based on a rehearing of the case.[67]

B. Issues

The South Carolina Supreme Court's majority opinion in *Matrix* discussed two issues. The first was whether the master-in-equity made a mistake in granting Matrix equitable subrogation to the refinance mortgage, which gave it priority over the appellant's judgment.[68] The second—and more important issue for the purposes of this Note—was whether the unclean hands doctrine prevented Matrix from receiving any equitable remedy.[69]

C. Reasoning

The South Carolina Supreme Court held that Matrix was not entitled to equitable subrogation because Matrix did not meet the requirements for equitable subrogation.[70] The court, then, held that, even if Matrix had met the requirements of equitable subrogation, Matrix would not have been able to receive that remedy because they engaged in the unauthorized practice of law.[71]

In reaching its decision that equitable remedies would be unavailable to Matrix because of the company's unauthorized practice of law, the South Carolina Supreme Court took the South Carolina Court of Appeals' reasoning in

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61. *See id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See id.*
66. Matrix Fin. Servs. Corp. v. Frazer, No. 26859, 2010 WL 3219472 (S.C. Aug. 16, 2010), *withdrawn & superseded on reh'g by Matrix*, 394 S.C. 134, 714 S.E.2d 532 (2011).
67. *See Matrix*, 394 S.C. at 136, 714 S.E.2d at 533.
68. *Id.*
69. *Id.*
70. *See id.* at 137, 138, 714 S.E.2d at 533, 534. The court held that equitable subrogation is not a remedy that a lender, refinancing its own debt, is entitled to. *Id.* (citing Dedes v. Strickland, 307 S.C. 155, 159, 414 S.E.2d 134, 136 (1992); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6 cmt. e (1997)).
71. *Id.* at 138, 714 S.E.2d at 534.

Wachovia v. Coffey a step further.[72] Like the court of appeals' decision in *Coffey*, the South Carolina Supreme Court determined that the closing in *Matrix* was tainted by the unauthorized practice of law.[73] Matrix hired a third party company, not an attorney, to close the refinance loan, perform the title search, and prepare the closing documents.[74] Because the third party was not a licensed attorney, Matrix committed the unauthorized practice of law in carrying out the closing.[75] The court reiterated the *Coffey* opinion, noting that the unauthorized practice of law is prejudicial not only to the parties involved in the instant transaction, but also to the public at large.[76] The court also echoed its reasoning from *Buyers Services*, noting that the determination that activities related to loan closings constitute the practice of law is for the protection of the public and to prevent the public from severe economic and emotional consequences that can result from mistakes of those not licensed to practice law.[77]

D. Rule

The South Carolina Supreme Court held that "a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law."[78] Further, the court held that its ruling applies "to all filing dates after the issuance of this opinion."[79]

IV. EFFECTS AND IMPACT OF *MATRIX* ON SOUTH CAROLINA

A. Does the Rule from Matrix *Follow* Coffey *and South Carolina Precedent?*

The supreme court's decision in *Matrix* ends in the same result as the court of appeals' decision in *Coffey*. However, the supreme court's application of the court of appeals' logic in *Coffey* to the factual scenario presented in *Matrix* results in a broader rule that will apply to all future mortgages in which a lender engaged in the unauthorized practice of law.

Unlike the facts in *Coffey*, in which the defendant asserting the unclean hands defense against the lender was the owner of the property that was being

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72. For a discussion of *Coffey* and the unclean hands doctrine, see *supra* Part II.C.

73. *Matrix*, 394 S.C. at 139, 714 S.E.2d at 534–35.

74. *See id.*

75. *Id.*

76. *Id.* at 139, 714 S.E.2d at 534 (quoting Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010)).

77. *Id.* (quoting *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248 (quoting State v. Buyers Serv. Co., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987))).

78. *Id.* at 140, 714 S.E.2d at 535. The court stated that lenders should not be surprised that the court is enforcing South Carolina's requirement for an attorney to supervise the activities related to a real estate loan closing. *Id.*

79. *Id.* Part IV.D, *infra*, discusses what filing date the court is referring to.

foreclosed upon,[80] *Matrix* involved a third party lienholder asserting the unclean hands defense against the lender.[81] This distinction is noteworthy given that "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."[82] While prejudice to the party asserting unclean hands was found in both *Matrix* and *Coffey*, the way the prejudice arose differs because of the different relationships between the parties. In *Coffey*, the prejudice to Mrs. Coffey was clear because the lender was trying to foreclose on her property to satisfy a home equity loan made to her husband, who was not an owner of the property.[83] Furthermore, Mrs. Coffey had no knowledge of her husband's actions.[84] In contrast, the prejudice to Kundinger, the lienholder in *Matrix*, is less clear than that to Mrs. Coffey because at the time he filed his judgment against the Frazers, he did not expect his lien to have first priority because he likely assumed he was a second position lienholder behind the original mortgage-holder.[85] However, the refinance loan is not substituted for the original mortgage, thus giving Kundinger priority.[86] Interestingly, the *Matrix* court did not even analyze the case using unclean hands. Rather, the *Matrix* court stated that unclean hands was not the appropriate basis to resolve the case.[87] The court focused solely on the fact that the lender had engaged in the unauthorized practice of law in determining whether the lender was able to receive equitable remedies.[88]

The *Coffey* court and the *Matrix* court each determined that the unauthorized practice of law in real estate closings has the potential to cause vast and severe damages to not only the parties to the transaction, but to the public at large.[89] The South Carolina Supreme Court, in *Matrix*, as well as the South Carolina Court of Appeals, in *Coffey*, intended their holdings to dissuade lenders, attorneys, and any other parties involved in a closing from engaging in, or permitting others to engage in, the unauthorized practice of law.[90] The courts achieved this result by not allowing companies who engaged in the unauthorized practice of law to fully enforce the rights they acquired in an equitable proceeding.[91]

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80. *See Coffey*, 389 S.C. at 71, 74, 698 S.E.2d at 246, 247.

81. *See Matrix*, 394 S.C. at 136, 138, 714 S.E.2d at 533, 534.

82. *Coffey*, 389 S.C. at 75, 698 S.E.2d at 247 (quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998)) (internal quotation marks omitted).

83. *Id.* at 71, 72, 698 S.E.2d at 246.

84. *Id.* at 71, 698 S.E.2d at 246.

85. *See* Respondent's Petition for Rehearing at 6, Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) (No. 2005-CP-23-1346).

86. *See id.*

87. *Matrix*, 394 S.C. at 138, 714 S.E.2d at 534.

88. *See id.*

89. *Id.* at 139, 714 S.E.2d at 534 (quoting Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010)).

90. *See id.*

91. *See id.* at 140, 714 S.E.2d at 535; *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248.

In his dissenting opinion, Justice Pleicones argued that the majority in *Matrix* overly expanded the rule set forth in *Coffey*.[92] However, the *Matrix* majority did not expand the holding of *Coffey*; rather, it simply reaffirmed the court of appeals' belief that the unauthorized practice of law in a real estate closing is an act so egregious that it is prejudicial not only to the parties, but also to the public.[93] This characterization creates a deadly situation for a lender who commits the unauthorized practice of law in a loan closing. In essence, the rule in *Matrix* provides a perfect affirmative defense for someone whose real estate loan was not properly closed by an attorney, and it prevents a lender from asserting the right to an equitable remedy relating to the property or mortgage.

While some might view the court's ruling as a radical response to the problem,[94] *Matrix* is consistent with precedent. The unauthorized practice of law in real estate closings has plagued South Carolina ever since *Buyers Service* and real estate closings have always been taken very seriously in South Carolina.[95] Overall, the *Matrix* decision is a response to a persistent problem. The South Carolina Supreme Court is sending the message loud and clear that it will no longer tolerate anyone who engages in the unauthorized practice of law in real estate closings. It likely will be costly to those who do not heed this warning.

B. *Does* Matrix *Create a Private Right of Action for the Unauthorized Practice of Law?*

In his dissent, Justice Pleicones called attention to *Hambrick v. GMAC Mortgage Corporation*.[96] In *Hambrick*, the court held that a mortgagor has no private right of action against the mortgagee for the unauthorized practice of law.[97] Justice Pleicones seemed to fear that *Matrix* might be creating a private right of action against a mortgagee for engaging in the unauthorized practice of law.[98]

Despite the dissent's caution, nothing in the majority's opinion in *Matrix* suggests that one may assert a claim based on the unauthorized practice of law. Rather, *Matrix* states that "a lender may not enjoy the benefits of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law."[99] This statement makes it clear that the court is limiting lenders' rights to equitable remedies, not giving a mortgagor—or the

92. *See Matrix*, 394 S.C. at 143, 714 S.E.2d at 536 (Pleicones, J., dissenting).

93. *See id.* at 139, 714 S.E.2d at 534 (quoting *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248).

94. *Id.* at 142–43, 714 S.E.2d at 536 (Pleicones, J., dissenting).

95. *See, e.g.*, *In re* Johnson, 386 S.C. 550, 561, 689 S.E.2d 623, 629 (2010) (suspending lawyer for one year due to the lawyer's misconduct in several real estate transactions); *In re* Moore, 382 S.C. 610, 611–12, 613, 677 S.E.2d 598, 599 (2009) (same).

96. *See Matrix*, 394 S.C. at 143, 714 S.E.2d at 536 (Pleicones, J., dissenting) (citing Hambrick v. GMAC Mort. Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006)).

97. *See Hambrick*, 370 S.C. at 120, 125, 634 S.E.2d at 6, 9.

98. *See Matrix*, 394 S.C. at 143, 714 S.E.2d at 536 (Pleicones, J., dissenting).

99. *Id.* at 140, 714 S.E.2d at 535 (majority opinion).

lienholder in *Matrix*—the right to bring a cause of action for the unauthorized practice of law. The presence in a lawsuit of a lender who engaged in the unauthorized practice of law will act as a shield for a defendant, not as a sword to attack the lender. This is consistent with the holdings in both *Linder* and *Hambrick*—that the unauthorized practice of law does not create a private cause of action.[100]

In essence, the *Matrix* court sculpted an affirmative defense for any borrower against whom a lender asserts a claim for an equitable remedy if that lender engaged in the unauthorized practice of law with respect to any aspect of the borrower's closing. A defendant need only show that the lender engaged in the unauthorized practice of law in order to thwart the lender's claim for an equitable remedy. However, if lenders continue to unlawfully close loans in South Carolina, a logical next step in the court's battle against the unauthorized practice of law could be to allow borrowers to bring an action against a lender for engaging in such conduct. While the borrower may not be able to show any damages, the court may void the borrower's mortgage as a matter of public policy and, applying the *Matrix* reasoning, prevent the lender from recovering any of the amount loaned or foreclosing on the property.

C. *Ramifications of the Rule: What Does It Prevent and When Is It Applicable?*

1. *General Rule*

The rule in *Matrix* will result in a vast array of consequences for lenders, borrowers, and others in the real estate industry in South Carolina. However, it is important to look first at what remedies the court's decision prevents. Barring the lender's equitable remedies destroys all rights of the lender to foreclose on the property, thus rendering the mortgage worthless. Moreover, although the *Matrix* court does not discuss the effect of the unauthorized practice of law on a lender's legal remedies, assuming the South Carolina Supreme Court agrees with the view of the South Carolina Court of Appeals in *Coffey*, the note will be worthless too.[101]

When purchasing real estate in South Carolina with borrowed funds, a lender typically receives a promissory note and a mortgage on the subject property to secure the debt.[102] The mortgage gives the lender a lien against the mortgaged property while the borrower retains an ownership interest and rights

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100. *See* Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 497, 560 S.E.2d 612, 623 (2002); *Hambrick*, 370 S.C. at 120, 125, 634 S.E.2d at 6, 9.

101. *See* Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010) (holding that a person who engages in an illegal act is prohibited from recovering from a remedy at law that arises out of the illegal conduct).

102. *See* Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007).

in the property.[103] A lender may not bring any possessory action for the real estate if the borrower defaults, but instead, the lender must resort to foreclosure.[104] In South Carolina, foreclosure is an equitable remedy.[105] Therefore, *Matrix* prohibits foreclosure when the unauthorized practice of law has occurred. That prohibition results in the lender having no remedy to challenge the borrower's ownership of the property.

While foreclosure is the only way for a lender to obtain possession of a mortgaged property, a lender could ignore the mortgage and bring an action at law for the indebtedness under the promissory note.[106] The mortgage is merely a security interest for a money loan evidenced by the note.[107] A lender has the choice to pursue a foreclosure on the mortgage, an action at law based on the obligation in the note, or both.[108] A successful action at law for indebtedness grants a judgment in favor of the lender for the amount owed on the note.[109] *Matrix* does not discuss the effect that the unauthorized practice of law in real estate closings has on a lender's legal remedies, but the South Carolina Supreme Court would likely rely on the principles set forth in *Coffey* and hold that legal causes of action are barred as well. This is because of the principle that a person cannot acquire a right of action from his or her own unlawful conduct.[110] By adopting the principles from *Coffey*, the court would further strengthen its arsenal against the unauthorized practice of law.

Without legal or equitable causes of action, a lender would be unable to recover the property secured by the mortgage or the money loaned to the borrower for the purchase of the property. That results in a borrower having a right to property that the lender cannot foreclose on, or, as was the situation in *Matrix*, a secondary lienholder having a first priority lien on the property.[111] Though the holding in *Matrix* concerned the rights of a lienholder, not a borrower, the case would likely have come out the same way had the borrower been the defendant in this case.

By not allowing the lender to have any method of recourse against a borrower or lienholder, the court's rule in *Matrix* may effectively have the result of voiding a mortgage closed by means constituting the unauthorized practice of law. This would not be the first time that a mortgage was found to be void as a

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103. *See* S.C. CODE ANN. § 29-3-10 (2007).

104. *See id.*

105. *See* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) (citing Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964)).

106. *See* Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978).

107. *See Lever*, 374 S.C. at 33, 647 S.E.2d at 216.

108. *See id.*

109. *See Braun*, 270 S.C. at 340–41, 242 S.E.2d at 408.

110. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010).

111. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 136, 138, 714 S.E.2d 532, 533–34 (2011).

result of the unauthorized practice of law.[112] *Coffey* seems to, effectively, void the lender's interest because the defendant was not required to make any repayment, nor did the lender have any further means of recourse.[113] Additionally, Justice Kittredge's concurring opinion in *Matrix* explicitly states that the majority's holding voids a mortgage secured through the unauthorized practice of law.[114]

If *Matrix* does, in effect, void a mortgage secured through the unauthorized practice of law, the holding, seemingly, conflicts with the South Carolina Supreme Court's decision in *Linder*. However, *Matrix* and *Linder* are consistent in their treatment of the unauthorized practice of law. In *Linder*, the court refused to void a contract entered into between the plaintiffs and a public adjuster, who committed the unauthorized practice of law.[115] Instead of voiding the contract, the court held that the defendants were entitled to recover the amount arising from acts that did not constitute the unauthorized practice of law.[116]

Several factors distinguish *Linder* from *Matrix*. First, *Linder* is the first case in which the South Carolina Supreme Court addressed the unauthorized practice of law with respect to the business of public adjusting.[117] Meanwhile, *Matrix* concerns activities commonly known to be the unauthorized practice of law.[118] Second, and more importantly, in *Linder*, the contract itself was not the act that constituted the unauthorized practice of law,[119] whereas in *Matrix*, the unauthorized practice of law occurred in the preparation of the mortgage and loan note.[120] Applying the court's holding in *Linder* to *Matrix*, the lender would be unable to recover any amount because all of its rights arose from the mortgage and note, which were created by the unauthorized practice of law. While the end result in *Matrix* is consistent with *Linder*, the court in *Matrix* lays down a stricter rule to be applied in future cases that will prohibit any equitable remedy,[121] whereas *Linder* focuses more on the possibility of a legal remedy.[122]

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112. *See In re* Hall, 370 S.C. 496, 498, 636 S.E.2d 621, 622 (2006) (stating that a transaction where a borrower defaulted against a lender who had engaged in the unauthorized practice of law was found to be void by a master-in-equity).

113. *See Coffey*, 389 S.C. at 76, 698 S.E.2d at 248.

114. *Matrix*, 394 S.C. at 140, 714 S.E.2d at 535 (Kittredge, J., concurring).

115. Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 495–96, 560 S.E.2d 612, 622 (2002).

116. *Id.* at 496, 560 S.E.2d at 622.

117. *Id.* at 487, 560 S.E.2d at 618.

118. *See generally Matrix*, 394 S.C. at 139, 714 S.E.2d at 534–35; State v. Buyers Serv., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 17–19 (1987) (citations omitted) (listing acts that constitute the unauthorized practice of law).

119. *See Linder*, 348 S.C. at 495, 560 S.E.2d at 622.

120. *See Matrix*, 394 S.C. at 139, 714 S.E.2d at 534–35.

121. *See id.* at 140, 714 S.E.2d at 535.

122. *See Linder*, 348 S.C. at 496, 560 S.E.2d at 622.

2. *Exceptions to the Rule*

The unauthorized practice of law is the basis for the *Matrix* court's bright-line rule. However, a lender may be able to argue, in some situations, that it would be inequitable to apply the rule. In South Carolina, the decision to grant equitable relief or to apply an equitable defense is a "matter of discretion, not of right."[123] This discretion is to be guided by previous court decisions.[124] Additionally, the South Carolina Court of Appeals previously held that when the court is sitting in equity, it must balance the equities of both sides of the case and determine if relief should be granted.[125] Given a court's discretion in applying equitable remedies in a particular case, it is likely that a situation could arise where a lender could recover in equity even after it engaged in the unauthorized practice of law.

In the *Matrix* case, Matrix was the lender that created the note and mortgage that were the subject of the foreclosure action.[126] However, what happens where the lender or party trying to enforce the note or mortgage is not the lender who closed the loan, but rather, is an assignee of the note and mortgage? Section 5.4 of the Restatement of Property provides that when an obligation secured by a mortgage is transferred, the mortgage is also transferred; therefore, the new holder of the note would also hold the mortgage and be entitled to foreclose on the property in the case of default by the borrower.[127] In some situations a mortgagee may dissociate the obligation and the mortgage, but the Restatement states that such a result should only occur if there is evidence that both parties to the transfer intended such a result.[128] While the common law rule is that the mortgage follows the note, reliance solely upon this principle could lead to unpredictable results.[129] In a recent case before the Massachusetts Supreme Judicial Court, the court prevented a bank from foreclosing because it had not

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123. Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004); *see also* First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568–69, 511 S.E.2d 372, 379 (Ct. App. 1998) ("The decision to grant equitable relief is in the discretion of the trial judge." (citing Ingram v. Kasey's Assocs., 328 S.C. 399, 413 n.11, 493 S.E.2d 856, 864 n.11 (Ct. App. 1997), *rev'd*, 340 S.C. 98, 511 S.E.2d 587 (2000))).

124. *See* Metts v. Wenberg, 158 S.C. 411, 417, 155 S.E. 734, 736 (1930).

125. *See* Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755–56 (Ct. App. 2005) ("When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give.").

126. *Matrix*, 394 S.C. at 136, 714 S.E.2d at 533.

127. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 (1997).

128. *Id.* § 5.4 cmt. a.

129. *See* Deborah L. Thorne & Ethel Hong Badawi, *Does "The Mortgage Follow the Note"? Lessons Learned, Best Practices for Assignment of a Note and Mortgage*, AM. BANKR. INST. J., May 2011, at 54, 54–55; *see also* S.C. CODE ANN. § 36-9-203(g) (2003) (stating that an attachment of a security interest in right to payment for real property also attaches to the mortgage).

been assigned the mortgage.[130] Nevertheless, the holder of the note typically has the right to enforce the mortgage.[131]

In South Carolina, if the original lender closed the loan without the supervision of an attorney would the subsequent holder of the note and mortgage be barred from pursuing equitable and/or legal remedies because of the rule expounded in *Matrix*?[132] The court stated that Matrix would be precluded from "receiving a remedy because of *its* unauthorized practice of law."[133] This language suggests that since the new holder of the mortgage has not engaged in the unauthorized practice of law, he should be able to recover. However, the analysis does not stop here. Under South Carolina law, a borrower has the right to any bona fide defense against the assignee of a mortgage that he had against the original mortgagee prior to the notice of assignment.[134] This rule is also found in South Carolina's Uniform Commercial Code (UCC).[135] Thus, even though the assignee is not the one who engaged in the unauthorized practice of law, the assignee may still be susceptible to the *Matrix* rule and therefore, could be barred from asserting its rights.

The South Carolina Court of Appeals has held that article 3 of the UCC, which governs negotiable instruments, is applicable to a note that is secured by a mortgage.[136] Article 3 of the UCC provides protections for assignees of a negotiable interest if they are a holder in due course.[137] A holder in due course of a note is someone who takes it for: (1) value, in good faith; (2) without notice that the instrument is overdue or there is an uncured default; (3) without notice that it contains an unauthorized signature or has been altered; and 4) without notice of a claim for an offset of the borrower, or of any other claim of the note.[138] A holder in due course is protected against all defenses that the debtor had against the original lender except for those found in the statute.[139] In the hypothetical situation where an assignee is attempting to enforce a note, one could argue that if the assignee is a holder in due course and the *Matrix* rule does not fall into one of the statutory exceptions discussed below, then the assignee would be able to enforce the note even though the original lender would not have been able to do so.

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130. *See* U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 55, 84 (Mass. 2011); *see also* Thorne & Badawi, *supra* note 129, at 55, 84 (citing *Ibanez*, 941 N.E.2d at 55). In order to effectuate a result in which the assignee has both the mortgage and the note, it is always best to explicitly transfer both the mortgage and the note. *See* Thorne & Badawi, *supra* note 129, at 84.

131. *See* Thorne & Badawi, *supra* note 129, at 54.

132. For purposes of this discussion, assume that the assignee has been assigned the mortgage and the note.

133. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011) (emphasis added).

134. *See* Woodrow v. Frederick, 133 S.C. 431, 440, 131 S.E. 598, 601 (1926).

135. *See* S.C. CODE ANN. § 36-9-404(a) (2003).

136. Swindler v. Swindler, 355 S.C. 245, 250, 584 S.E.2d 438, 440 (Ct. App. 2003).

137. *See* S.C. CODE ANN. § 36-3-305 (Supp. 2008).

138. *See* § 36-3-302.

139. *See* § 36-3-305(b).

The problem with the above analysis is that the *Matrix* rule likely falls into an exception to the holder in due course doctrine. Section 36-3-305 would allow a borrower to assert a defense based on the "illegality of the transaction which, under other law, nullifies the obligation of the obligor."[140] In *Matrix*, the South Carolina Supreme Court held that a lender who engages in the unauthorized practice of law to close a mortgage and note is not entitled equitable remedies. One can extrapolate from the *Matrix* and *Coffey* decisions that the rule the court created was intended to nullify the obligation of the borrower to pay on the loan, evidenced by the lender's inability to bring an equitable foreclosure action or an action at law.[141]

A holder in due course defense is not likely to protect an assignee of a note from being subjected to the *Matrix* rule because the purpose of *Matrix* is to protect the public.[142] Nevertheless, assignees in that position should argue that they are holders in due course and argue that, in some situations, it would be inequitable for the *Matrix* rule to apply to them. This argument should especially be made in a situation in which a note changed hands many times, and possibly the originating lender does not even exist anymore. It would be unfair to deny relief to a lender who had no part in or notice of the conduct constituting the unauthorized practice of law. In those situations, it might be impossible for subsequent holders of a note to accurately determine if every step of the loan was lawfully closed.

Another situation in which it would be inequitable to prevent a lender from obtaining relief would arise if, in addition to the lender's unauthorized practice of law, the borrower committed fraud in the loan process. In that scenario, the borrower would have "unclean hands."[143] If the borrower and lender have both acted inequitably, illegally, or both, a court may proceed in several ways. One option is for the court to determine that both parties are equally guilty, and therefore, hold that neither is entitled to relief. However, even if the parties are found to be equally guilty, the court may still allow a party to obtain relief if that action would advance public policy.[144] Given that the motivation for the court's ruling in *Matrix* was the protection of the public,[145] it is possible that a court would hold that a lender is prohibited from recovering—even if the court determines that both parties are equally guilty. Alternatively, the court may

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140. § 36-3-305(a)(1).

141. *See supra* text accompanying notes 112–115.

142. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 139, 714 S.E.2d 532, 534 (2011) (quoting Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010)).

143. A federal district court in Illinois held that a borrower had unclean hands because the borrower intentionally falsified information on a loan application. Cunningham v. EquiCredit Corp. of Ill., 256 F. Supp. 2d 785, 797, 798 (N.D. Ill. 2003).

144. *See Ex parte* Nimmer, 212 S.C. 311, 320, 47 S.E.2d 716, 719 (1948). The court stated that if public policy is advanced, "the interest of the state transcends the personal rights and interests of either party to a wrong." *Id.*

145. *Matrix*, 394 S.C. at 139, 714 S.E.2d at 533 (quoting *Coffey*, 389 S.C. at 76, 698 S.E.2d at 248).

simply grant a remedy to the party who is deemed less guilty than the other.[146] South Carolina courts have an equitable power that allows them to promote fairness and grant remedies in light of all the relevant circumstances.[147] This power may allow a court to provide a lender relief if a borrower acts in a fraudulent way. However, this power will unlikely be used in that way.

The purpose of the court's decision in *Matrix* is to send a message to lenders that the unauthorized practice of law will always bar relief, and that the court will not consider mitigating facts if a lender engages in illegal conduct. In *Coffey*, the loan was obtained by Mr. Coffey, who was not an owner of the property that was mortgaged, which is fraudulent.[148] However, the court did not consider this factor in making its decision because its concern was for the public and not the lender.[149] If the court did find a borrower's fraud to be a mitigating factor, the court could order for the property to be sold with a portion of the sale proceeds going to the lender and a portion to the borrower. However, it is more likely that the court will leave the parties as they are, because that would further the purpose of *Matrix* by discouraging the unauthorized practice of law.

The South Carolina Supreme Court's decision in *Matrix* provides a clear guideline for lower courts to follow if a lender engaged in the unauthorized practice of law in the loan process. Lower courts are not likely to stray from the *Matrix* ruling because of the supreme court's vehement opposition to the unlawful practice of law in real estate closings.[150]

D. What Filing Date Is the Court Referring to?

The South Carolina Supreme Court left the question of which cases are subject to the rule from *Matrix* open for interpretation. The majority stated that its ruling applies "to all filing dates after the issuance of this opinion."[151] The

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146. Lyon v. Bargiol, 212 S.C. 266, 273, 47 S.E.2d 625, 629 (1948) (quoting 24 AM. JUR. *Fraudulent Conveyances* § 123 (1936)). The court in *Lyon* gives an example of this as being when the transferee induces the transferor to execute the conveyance by false representations. *Id.* (quoting *Fraudulent Conveyances*, *supra*).

147. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." (quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006)) (internal quotation marks omitted)).

148. *See* Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 71, 698 S.E.2d 244, 246 (Ct. App. 2010).

149. *See id.* at 76, 698 S.E.2d at 248 (citing State v. Buyers Serv., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

150. *See supra* Part II.B.

151. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). Interestingly, Justice Pleicones, in his dissenting opinion, pondered the same question in a footnote, stating that he is unsure what filing date the majority referred to. *See id.* at 143 n.6, 714 S.E.2d at 537 n.6 (Pleicones, J., dissenting).

opinion offers little guidance as to what "filing date" the court is referring to. Prior case law and South Carolina statutory language suggest that "filing date" could refer to the filing for an equitable remedy or the filing of a mortgage with the register of deeds.[152] The interpretation will be a highly litigated issue until the court provides further guidance because each interpretation has very different ramifications.

The filing date that the court refers to should be the date that a mortgage is filed or recorded. There are several reasons why that is the best interpretation of the *Matrix* opinion.[153] First, if the ruling is applied to filings of new foreclosure proceedings, the issuance of the opinion would invalidate many existing mortgages, and would cast doubt on many investments and securities owned by banks. While a borrower or subsequent lienholder could not bring an action against the lender for the unauthorized practice of law, a borrower who believes that an attorney was not present at the closing, or that the lender somehow engaged in the unauthorized practice of law, would have no incentive to continue paying an existing mortgage. The borrower could stop paying a preexisting mortgage, wait until the lender brought a foreclosure action, and defend against the action with proof that the lender engaged in the unauthorized practice of law. Additionally, if the *Matrix* rule is applied to mortgages entered into prior to the *Matrix* decision, it may cause an increase in title insurance costs—if not make title insurance impossible to get—because insurers will have no confidence in the title of property that previously was mortgaged.[154] If this ruling applies to preexisting mortgages, the amount of windfalls to borrowers and losses to banks will be far greater than if the decision only applies to new mortgages. If the decision applies only to future mortgages, banks would not have to worry about prior mortgages that were not closed properly.

The South Carolina Supreme Court's indication that its holding was to become effective immediately further supports the notion that the opinion applies only to future closings and mortgage filing dates.[155] By limiting its ruling to future closings, the court would give lenders the opportunity to bring their closing procedures within the confines of the law; the same approach that it

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152. *See* S.C. CODE ANN. § 29-3-345(B) (Supp. 2008) (using filing date to refer to the day the mortgage was recorded for recession of satisfaction purposes); *In re* Graab, 334 S.C. 633, 635–36, 515 S.E.2d 93, 94 (1999) (using filing date to refer to the date that a mortgage was filed with the register of mesne conveyances).

153. Matrix was not allowed equitable subrogation because the loan involved was a refinance, not because of its unauthorized practice of law. *Matrix*, 394 S.C. at 138, 714 S.E.2d at 534.

154. However, the policy reasons for a rule that applies *Matrix* to new mortgages would help alleviate this problem because lenders could provide documentation that the loan was closed with attorney supervision. *See generally* Rush Smith & Emma Dean, *South Carolina Supreme Court Holds that Closing a Loan Without a Lawyer's Supervision Constituted Unclean Hands, Barring the Lender from Seeking Equitable Relief*, NELSON MULLINS RILEY & SCARBOROUGH LLP, 4–5 (Aug. 18, 2011), http://www.nelsonmullins.com/DocumentDepot/Smith_Matrix_Commentary.pdf (discussing concerns arising from the original opinion in *Matrix*, that were also raised by Pleicones in his dissent, but not in the new majority opinion).

155. *See Matrix*, 394 S.C. at 140, 714 S.E.2d at 535.

took in *Doe Law Firm v. Richardson*.[156] In that case, the South Carolina Supreme Court held that disbursement of loan proceeds is an activity that constitutes the practice of law.[157] The court delayed the effective date of the opinion until several months after the issuance of the opinion to allow lenders to comply with the new ruling.[158]

On the other hand, *Matrix* does not deal with the question of whether a new activity constitutes the unauthorized practice of law.[159] Instead, the case concerns new consequences for activity already determined to be the unauthorized practice of law.[160] While the court gave lenders a few months to comply with the holding in *Doe Law Firm*, the court did not provide lenders as much time after *Matrix* because the decision does not require lenders to do anything new, but rather, warns lenders of the severe consequences of breaking the law in the future.[161] Applying the rule to closings after *Matrix* is the better result, as it puts everyone on the same footing and allows a fresh start so that going forward all lenders will know what to expect if they stray from the court's guidelines.

Furthermore, by applying the *Matrix* decision to mortgages and notes that were created prior to the decision, the court would effectively be applying its decision retroactively.[162] Historically, courts in South Carolina have not supported retroactive application of judicial decisions because they have the potential to cause "extensive mischief and injustice."[163]

Lastly, the language of Justice Kittredge's concurring opinion further supports the contention that the filing date mentioned in *Matrix* refers to the filing of mortgages.[164] Justice Kittredge stated, "Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its *prospective-only application*."[165] The only way for the majority's holding to be truly prospective is by applying the holding only to mortgages filed after the issuance of the opinion.

In conclusion, as a matter of providing security to lenders in their preexisting investments and for the court to achieve its intended effect of ensuring that

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156. 371 S.C. 14, 636 S.E.2d 866 (2006).

157. *Id.* at 18, 636 S.E.2d at 868.

158. *See id.*

159. *See Matrix*, 349 S.C. at 138–39, 714 S.E.2d at 534 (citing Doe v. McMaster, 355 S.C. 306, 314, 585 S.E.2d 773, 777 (2003); State v. Buyers Serv., Inc., 292 S.C. 426, 430–34, 357 S.E.2d 15, 17–19 (1987)).

160. *See id.* at 139–40, 714 S.E.2d at 534–35.

161. *See id.* at 140, 714 S.E.2d at 535.

162. The court is not acting retroactively in *Matrix* because it did not use the unauthorized practice of law doctrine as a reason to prevent the lender from receiving the benefit of the mortgage. *See id.*

163. Aiken v. Barkley, 29 S.C.L. (2 Speers) 747, 753 (Ct. App. 1844), *available at* 1844 WL 2674.

164. *See Matrix*, 394 S.C. at 140, 714 S.E.2d at 535 (Kittredge, J., concurring).

165. *Id.* (emphasis added).

lenders will no longer violate the law, South Carolina courts should interpret the filing date language in *Matrix* as creating a safe harbor for mortgages filed prior to the issuance of the court's decision in *Matrix*. This results in all lenders being on an equal footing going forward and not having the opinion be seen as retrospective.

E. Moving Forward: How Will Lenders Respond to Matrix*?*

In response to *Matrix*, the simple solution for lenders seems to be to follow the law. However, in addition to following the law, it is important for lenders to also make sure that they document their compliance with the law. The nation's five biggest home lenders have already lost $65.7 billion from faulty mortgages and foreclosure abuses since the start of 2007.[166] By not complying with *Matrix*, lenders in South Carolina will only further add to that total.[167]

1. Lenders Must Implement the Rule

The first step for lenders will be to make sure they have an independent South Carolina attorney who will prepare, supervise, or review documents or tasks depending on the particular activity per rules set out in South Carolina law.[168] For some lenders this system will already be in place, but for other lenders—especially out of state lenders that may not be aware of these requirements—this system will need to be implemented.[169]

Though a lender doing its due diligence can easily comply with South Carolina's requirements before lending in the state, such compliance will increase the cost of doing business in South Carolina. In his dissent, Justice Pleicones expresses fear that the court's decision will harm, rather than help, the public, because lenders will choose either not to do business in South Carolina, or increase fees to cover potential losses that might occur from not being able to recover on a loan in default.[170] However, even if closing a loan in South Carolina would cost less were an attorney not required to supervise the entire loan process, such a requirement should not be cost prohibitive to out of state

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166. Bloomberg News, *Mortgage, Foreclosure Crisis Cost Five Lenders $65 Billion*, TAMPA BAY TIMES (Sept. 17, 2011), *available at* http://www.tampabay.com/news/business/banking/mortgage-foreclosure-crisis-cost-five-lenders-65-billion/1192022.

167. For the third quarter of 2011, South Carolina had the fourth highest amount of mortgage fraud, at $108,978,654. *California Claims #1 Mortgage Fraud Ranking*, PRNEWSWIRE (Dec. 13, 2011), http://www.prnewswire.com/news-releases/california-claims-1-mortgage-fraud-ranking-135496288.html (citations omitted).

168. *See supra* Part II.B.

169. Some states do not require a lawyer to be present or to conduct a closing. *See, e.g.*, Countrywide Home Loans, Inc. v. Ky. Bar Ass'n, 113 S.W.3d 105, 107 (Ky. 2003) (allowing for a notary to conduct a closing unless a legal question arises during the closing, at which time the closing must be stopped until a lawyer can provide the necessary advice).

170. *Matrix*, 394 S.C. at 143 n.5, 714 S.E.2d at 536 n.5 (Pleicones, J., dissenting).

lenders. All lenders doing business in South Carolina must have an attorney supervise the closing process. While a lender based in South Carolina may be more familiar with the process and be able to find an attorney more easily, an out of state lender can likely find an attorney without much additional work and at a similar cost; therefore, all lenders doing business within South Carolina will bear similar costs. While the cost may be equal for all lenders, borrowers in South Carolina will have to bear the burden of a higher cost for closings than might result if an attorney's services were not required. The court weighed the cost of an attorney versus the severe economic and emotional consequences that may flow from erroneous advice by a non-attorney when it unanimously held that an attorney must supervise a loan closing.[171] The court likely sees the potential of increased fees as a small price to pay for the greatly increased protection that attorney supervision provides.[172]

Justice Pleicones's underlying concern seems to be that the majority's decision in *Matrix* is over inclusive and that it should apply only when a gross inequity has resulted from the unauthorized practice of law.[173] However, if the court had limited its decision to the nature of the inequity, *Matrix* would not serve its intended purpose, which is to make clear the South Carolina Supreme Court's desire to eradicate the unauthorized practice of law in real estate transactions.

In addition to complying with the law, lenders should document their compliance to reduce the risk of loss under *Matrix*. In light of the court's decision in *Matrix*, every answer responding to a complaint filed for foreclosure will almost certainly assert that the lender engaged in the unauthorized practice of law. In order to successfully assert the defense, the borrower will have to prove that an attorney did not supervise the loan closing. A lender that has diligently documented its compliance with South Carolina law will be best prepared to dispute the borrower's claim. One way some lenders protect themselves in commercial transactions is by using what is referred to as a "Letter of Understanding."[174] This sets forth at the beginning of a transaction what actions attorneys will be performing or supervising through each step of the

171. *See* State v. Buyers Serv., Inc., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987).

172. *See id.*

173. *See Matrix*, 394 S.C. at 143, 714 S.E.2d at 536–37 (Pleicones, J., dissenting). For example, a gross inequity to a defendant can easily be seen in *Coffey* because, if Wachovia had an attorney present at the closing, the attorney might have discovered that Dr. Coffey did not actually own the defendant's house he pledged as collateral, and could have prevented him from taking out the loan. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 71–72, 698 S.E.2d 244, 245–46 (Ct. App. 2010). On the other hand, Pleicones's fear revolves around a scenario where an attorney supervises the entire process but then the bank records the mortgage and, even though they may record it correctly, they would still fall under the rule in *Matrix*. *See Matrix*, 349 S.C. at 141–43, 714 S.E.2d at 535–37 (Pleicones, J., dissenting).

174. *See* Lanneau Wm. Lambert Jr. & T. Hudson Williams, *Speak to Your Supervisor: Protecting Lenders and Lawyers Under the Attorney Supervision Requirements for South Carolina Real Estate Closings*, S.C. LAW., Jan. 2011, at 15, 17.

closing and "is signed by the attorneys, representatives of the title company, the borrower, and the lender."[175] This is especially important if more than one attorney is involved in the process.[176] However, this document only acknowledges that the signing attorneys are going to supervise or perform tasks related to the closing.[177] It does not certify that the attorney has actually completed these tasks.[178] Some attorneys are resistant to signing such agreements, especially if they are only handling one aspect of the closing.[179] These attorneys may fear that by signing, they are assuming liability for the acts of other attorneys.[180] Multi-attorney closings likely arise more often in commercial transactions than in residential closings because commercial closings tend to be more complex and involve more parties. However, after *Matrix*, it will become necessary for lenders to find attorneys that will verify that they have performed such acts. By documenting attorney participation in the closing, the lender not only has assurance that the closing is proper, but it will provide assurance to an assignee or purchaser of the mortgage in the future. Potential future purchasers of mortgages will want to see that the loan was closed properly before purchasing a mortgage.

2. *Pursuing a Change in the Law*

Even while complying with *Matrix*, lenders will continue to lobby for South Carolina to eliminate the strict requirement for an attorney to be present and supervise all elements of a closing. Many states allow a notary, title insurance company, or even an employee of the lender to perform closings.[181] South Carolina is in the minority when it comes to requiring an attorney to be physically present at the closing.[182] Moreover, lenders have a major supporter for changing the attorney closing requirement: the federal government. The Federal Trade Commission and the Department of Justice Antitrust Division have lobbied several states to allow non-lawyers to be able to perform closings.[183] In a letter to the South Carolina Supreme Court, these two federal agencies voiced their support for the deregulation of attorney requirements in

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175. *Id.* at 17.

176. *See id.* at 18.

177. *Id.*

178. *Id.*

179. *See id.*

180. *Id.* For a discussion of the potential consequences for lawyers who improperly conduct closings, see *infra* text accompanying notes 199–202.

181. *See generally* JAMES ORLANDO, CONN. OFFICE OF LEGIS. RES., REQUIREMENT OF ATTORNEY PRESENCE AT REAL ESTATE CLOSING (DEC. 23, 2009), *available at* http://www.cga.ct.gov/2009/rpt/2009-R-0448.htm (listing different states' policies on whether an attorney is required at a real estate closing).

182. *See id.*

183. Margaret Onys Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 317–18 (2005).

real estate closings. [184] They reasoned that if non-lawyers are able to close loans then consumers' costs would be lower.[185] They believe that consumers should make the choice of whether to have attorney supervision, and suggest that lenders could be required to provide notice to borrowers of the risks of closing a loan without an attorney.[186] The agencies believe that consumers should be able to choose for themselves whether to pay for an attorney at a closing.[187] However, the agencies' lobbying has had little affect on the South Carolina Supreme Court. The court stated that state limitations on the unauthorized practice of law "are exempt from anti-trust liability under the Sherman Act's state action exception."[188]

A lender or mortgage servicer might bring an action in federal court trying to change South Carolina's requirement that an attorney be present at all real estate closings. In a recent federal case, a mortgage servicer challenged Massachusetts's definition of the practice of law.[189] The mortgage servicer argued that Massachusetts violated the Dormant Commerce Clause by including all activities related to a real estate conveyance in the definition of the practice of law.[190] The district court agreed with the mortgage servicer on the constitutional issue,[191] but the First Circuit Court of Appeals overturned the ruling because the Real Estate Bar Association is not a state actor.[192] While the case was unsuccessful, it suggests that non-lawyer parties prevented from performing closings in South Carolina may resort to similar types of actions in an attempt to change South Carolina's policies. Nevertheless, lenders will comply with current South Carolina closing requirements to protect themselves from the prospect of having no remedies as they continue to push for change.

While the South Carolina Supreme Court took a strong stand against the unauthorized practice of law in *Matrix*, two state legislators are taking steps to nullify the *Matrix* rule. On March 30, 2011, a bill was introduced in the South Carolina House of Representatives which proposed that the validity or enforceability of a mortgage will not be impaired if the unauthorized practice of law is committed "in conjunction with the negotiation, preparation, execution, or recording of a mortgage or mortgage modification."[193] In addition, the bill

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184. Letter from the U.S. Dep't of Justice & Fed. Trade Comm'n to Supreme Court of South Carolina, 1–2 (Apr. 15, 2008), *available at* www.ftc.gov/os/2008/04/v080010sc.pdf.

185. *Id.* at 4.

186. *Id.* at 6 (citing *In re* Opinion No. 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344, 1363–64 (N.J. 1995)).

187. *See id.* at 3.

188. Doe v. McMaster, 355 S.C. 306, 311 n.3, 585 S.E.2d 773, 775 n.3 (2003).

189. *See* Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs., 609 F. Supp. 2d 135, 137 (D. Mass. 2009), *rev'd in part, vacated in part*, 608 F.3d 110 (1st Cir. 2010).

190. *Id.* at 144.

191. *Id.* at 147.

192. *Real Estate Bar Ass'n for Mass., Inc.*, 608 F.3d at 114, 123. In South Carolina, a state actor is responsible for making these types of determinations. *See supra* Part II.A.

193. H.R. 3988, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), *available at* http://www.schouse.gov/sess119_2011-2012/bills/3988.htm. The proposed statute states:

specifically states that the unauthorized practice of law does not impair the right to foreclosure or restrict a mortgagee from "seek[ing] a legal or equitable remedy."[194] The bill contains a disclaimer which states that the proposed bill does not define or regulate the practice of law because those powers are vested in the supreme court by the state constitution.[195] If passed, this legislation will almost certainly be challenged on constitutional grounds because of its connection with the unauthorized practice of law. Currently, the house judiciary committee is reviewing the bill.[196] Mortgage bankers and lenders will support passing this bill as quickly as possible to relieve the potential for large liability,[197] but until enacted, lenders will have to proceed cautiously in order to protect themselves. Even if passed, the South Carolina Supreme Court's strong desire to protect the public interest may lead it to find other ways to deter lenders from engaging in the unauthorized practice of law, like by creating a private right of action.

In summary, as a result of *Matrix*, lenders have no choice but to close loans with attorney supervision. Otherwise, lenders are certain to face substantial losses. Furthermore, lenders will increase scrutiny of attorneys' procedures and methods of compliance with South Carolina law, and will demand detailed documentation showing that a loan was lawfully closed. Lenders will continue to support and promote the change of South Carolina's requirement of attorney supervision in the loan process, but the current members of the South Carolina Supreme Court are unlikely to budge on the issue. Lastly, while lenders are pushing the state legislature to alleviate the risk of substantial losses to lenders resulting from *Matrix*, until such legislative action is taken, lenders will tread carefully, requiring attorneys to supervise the loan processes and to closely document their involvement in loan closings.

> The commission of an act constituting the unauthorized practice of law in the course of or in conjunction with the negotiation, preparation, execution, or recording of a mortgage or mortgage modification shall not impair the validity or enforceability of the mortgage or mortgage modification, shall not impair the right of the mortgage holder to foreclose on or otherwise enforce a provision of the mortgage or modified mortgage, and shall not impair or restrict the right of a mortgagee to seek a legal or equitable remedy. Notwithstanding the limitation of remedies set forth in this section, nothing in this section is intended to or should be construed to alter, impair, or otherwise affect the power of the South Carolina Supreme Court to define and regulate the practice of law in this State.

Id.

194. *Id.*

195. *See id.*; *see also supra* text accompanying notes 10–18.

196. *See* H.R. 3988, *available at* http://www.schouse.gov/sess119_2011-2012/bills/3988.htm.

197. *See* Sharon Gunter Wilkinson, *South Carolina Legislative Update*, MORTGAGE BANKERS ASSOC. OF THE CAROLINAS, INC., THE BOTTOM LINE, 4, 5 (Aug. 2011), *available at* http://www.mbac.org/cms_bwm /uploads/125.pdf.

F. What Impact Does Matrix *Have on South Carolina Lawyers?*

While *Matrix*'s holding is primarily directed toward lenders, it affects attorneys as well. *Matrix* requires attorney involvement in loan closings in order to prevent lenders from engaging in the unauthorized practice of law. However, ironically, lawyers have played an equal part in the unauthorized practice of law problem in South Carolina real estate closings. The typical situation is one in which an attorney allows non-attorney staff to perform attorney functions, or an attorney assists other non-attorneys in the unauthorized practice of law.[198] As a result of *Matrix*, this practice will likely cease.

The South Carolina Supreme Court has dealt with many attorney disciplinary proceedings involving the unauthorized practice of law in real estate closings. These proceedings often result in public reprimand for the attorneys involved,[199] but in some cases, the court has suspended[200] or disbarred[201] the attorney for engaging or assisting another in the unauthorized practice of law in a real estate closing. Those proceedings serve as a warning that South Carolina

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198. *See, e.g.*, *In re* Spell, 355 S.C. 655, 656–57, 658, 587 S.E.2d 104, 104–05 (2003) (reprimanding an attorney for requesting the mortgage broker to relay the attorney's instructions to the client at a loan closing in which the attorney was absent); *In re* Lester, 353 S.C. 246, 247–48, 578 S.E.2d 7, 7–8 (2003) (reprimanding an attorney for allowing non-lawyer personnel to conduct real estate closings). In *In re Lester*, the South Carolina Supreme Court recognized a then "growing tendency" of attorneys allowing their non-attorney staff to perform functions reserved only for members of the bar. *In re Lester*, 353 S.C. at 248, 578 S.E.2d at 8.

199. *See, e.g.*, *In re* May, 372 S.C. 485, 486–87, 642 S.E.2d 734, 734–35 (2007) (reprimanding an attorney because he allowed his non-attorney assistant to handle a portion of a real estate closing); *In re* Robinson, 371 S.C. 501, 501–02, 503, 640 S.E.2d 460, 460–61 (2007) (reprimanding attorney because he did not prepare title abstracts and erroneously relied on the lender's representations regarding the title work and certified legal opinions without attempting to verify); *In re* Calhoun, 371 S.C. 403, 405, 407, 639 S.E.2d 679, 679, 680 (2007) (reprimanding an attorney because the attorney did not prepare the closing documents, perform the title exam, or record the mortgage, and was acting under the false assumption that a licensed South Carolina attorney had properly taken these actions); *In re* Boulware, 366 S.C. 561, 562–63, 567–68, 623 S.E.2d 652, 653–54, 655–57 (2005) (reprimanding an attorney because he did not confirm that all aspects of the real estate transaction were being handled by an attorney, as required); *In re* Edens, 344 S.C. 394, 394–95, 544 S.E.2d 627, 628 (2001) (reprimanding an attorney for failing to supervise client's real estate transactions and assisting in improper conduct).

200. *See, e.g.*, *In re* Schoer, 387 S.C. 604, 606–08, 693 S.E.2d 927, 927–28 (2010) (suspending an attorney for two years for closing approximately one hundred transactions on behalf of out-of-state entities, without making a sufficient effort to ensure that a South Carolina lawyer was performing, or supervising, the closing-related activities, and for routinely directing his non-lawyer assistant to conduct refinancing closings); *In re* Barrier, 375 S.C. 490, 492–93, 494, 654 S.E.2d 85, 85–86 (2007) (suspending an attorney because he conducted real estate closings while employed as a law clerk); *In re* Poff, 366 S.C. 542, 544–45, 623 S.E.2d 642, 643–44 (2005) (suspending an attorney from practicing law because he allowed a non-attorney staff member to supervise a closing).

201. *See, e.g.*, *In re* Lattimore, 361 S.C. 126, 128–29, 139, 604 S.E.2d 369, 370–71, 376 (2004) (finding disbarment was warranted because an attorney practiced law during a suspension, allowed non-lawyers to conduct closings and notarize signatures they had not witnessed, and engaged in other misconduct).

will not tolerate an attorney abetting in those activities. *Matrix* reiterates the South Carolina Supreme Court's message that protection of the public—and not the economic interest of attorneys—is the reason that an attorney is required to supervise loan closings.[202] In furtherance of this public policy, the court will continue to come down hard, if not harder, on attorneys who improperly supervise closings or assist in the unauthorized practice of law.

In addition to the disciplinary consequences of engaging or assisting in the unauthorized practice of law, *Matrix* also sends a message to attorneys' pockets. An attorney hired by a lender to supervise a real estate loan closing will prevent the lender from foreclosing on the real estate if the attorney does not properly close the loan.[203] Lenders who are unable to recover the loaned money or mortgaged property will almost certainly look to the attorney that supervised the closing process for relief, in the form of a malpractice suit.[204] In order to successfully bring a malpractice claim, a lender must have an attorney-client relationship with the attorney hired to complete the closing.[205] A lender will satisfy this requirement even though the closing attorney represented both the borrower and the lender in the closing.[206]

As a result, to avoid liability, attorneys should—and will—become more involved in the closing process, and should leave little to do by non-attorney staff. Attorneys will need to document their supervision of the loan closing, not only because lenders will likely require it, but also because documentation will help defend against malpractice claims.

Another way in which *Matrix* impacts attorneys is with respect to the process of certifying that attorneys have been involved in a closing. Lenders will likely want the closing attorney to certify closings as having been done correctly. Attorneys will likely be reluctant to do this initially, but in the future, due to *Matrix*, lenders will require it.[207] If one attorney will not certify, then the lender

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202. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 139, 714 S.E.2d 532, 534 (2011) (quoting Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 76, 698 S.E.2d 244, 248 (Ct. App. 2010)).

203. This would be the result, for example, if the attorney had a paralegal conduct the closing.

204. The four elements that must be proven in a legal malpractice case are: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. *See* Sims v. Hall, 357 S.C. 288, 295, 592 S.E.2d 315, 318–19 (Ct. App. 2003) (citing Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996); McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998)). While the attorney in this situation did not commit the illegal activity that caused the mortgage to be unenforceable, it is the lawyer's failure to properly do the tasks individually that resulted in the loss.

205. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (quoting Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996)).

206. *See McNair*, 330 S.C. at 344, 499 S.E.2d at 494. Alternative causes of action that a lender may assert include breach of fiduciary duty and breach of contract. *See, e.g.*, Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 135, 146, 697 S.E.2d 644, 649, 655 (Ct. App. 2010) (alleging malpractice, breach of fiduciary duty, and breach of contract; plaintiff recovering on breach of contract claim).

207. *See supra* text accompanying notes 174–180.

will find another attorney who will, and in today's tough economic times, the lender likely will not have to look hard. On the other hand, some attorneys may elect to stop handling smaller closings due to the additional time and potential liability unless fees are increased significantly.

South Carolina attorneys who continue to handle real estate closings will likely craft new measures to be taken at closings, whereby the attorneys certify that they have supervised the entire loan process at the time of the closing. However, several problems can arise from such a practice. First, as noted above, where more than one attorney is involved in the closing process, it is unlikely that any one of those attorneys would be willing to certify that the entire loan process was properly supervised because the one who certifies could be subject to a malpractice claim or disciplinary sanctions if the other attorneys failed to do what they were tasked to do.[208] At the very least, an attorney would be hesitant to do so. One way to contravene this unwillingness to certify, although cumbersome and time-consuming, would be to have each attorney involved sign an affidavit setting forth the actions that were personally taken and when they were taken, and then attach the affidavit to the certification. This practice will be the key to out-of-state loans, especially when parties may not be familiar with South Carolina law.

Another potential problem with obtaining a certification signed by the borrower and closing attorney at the closing is that the loan process is not complete at the real estate closing. Normally there are actions that take place after the closing, such as the final title update and recording of the loan instruments, that require attorney supervision as well. Those additional items will require a second certification, which could also contain an affidavit explaining how the documents were recorded.

Once an attorney has established a standard procedure for a residential or simple commercial closing, these documents will likely become forms, making it less time-consuming to produce certifications. In addition to the certification, a lawyer must explain, and document the explanation, the closing documents and the other steps of the closing that required attorney supervision to the borrower. This will prevent borrowers from later claiming that they misunderstood what they were signing, or that they were unaware that certain steps of the closing were supposed to be performed by an attorney. Attorneys will also need to make sure that they educate closing lenders about what actions during this process must be performed by attorneys, so that lenders do not take action that could later prevent loans from being enforced. Lawyers will need to work with lenders and borrowers to develop a process that both works with the lenders' requirements and complies with South Carolina law.

Additionally, the *Matrix* case will cause attorneys to take extra precautions when performing other tasks related to real estate. Already some attorneys who were hired to draft title opinions or enforceability opinions have incorporated a

208. *See* Lambert, Jr. & Williams, *supra* note 174, at 18.

Matrix disclaimer into their opinions.[209] A disclaimer will provide an attorney with protection from further or third party use of the opinions. This is especially important because an attorney will likely be unable to decipher whether the closing has complied with *Matrix* by looking at title and closing documents.

While South Carolina's requirement that an attorney be involved in the closing process was not intended to protect the economic interests of attorneys, its effect definitely ensures that attorneys have continued work in closing real estate transactions. South Carolina attorneys, for now, will support the supreme court's requirement that an attorney supervise the closing process because it provides them with a monopoly on the business. That incentive should also motivate attorneys to comply with *Matrix*, because failing to do so would not protect the interests of the public, and would thus undermine the South Carolina Supreme Court's justification for the requirement that attorneys supervise closings. In addition to supporting the court's position on the unauthorized practice of law in real estate closings, South Carolina real estate attorneys will likely oppose House Bill No. 3988. That bill would effectively revert the law to pre-*Coffey* time, which held lawyers accountable for the unauthorized practice of law, but lacked any enforcement mechanism against lenders who engaged in such conduct. However, as long as *Matrix* is the rule, lenders will take the law in South Carolina requiring attorney supervision of closing seriously, and this will increase business for attorneys.

V. CONCLUSION

In *Matrix*, the South Carolina Supreme Court drew the proverbial "line in the sand" for lenders engaging in the unauthorized practice of law in real estate closings. The court has been emphatic about requiring an attorney to supervise the loan process ever since its holding in *Buyers Service* in 1987. However, the court realized that some lenders have continued to disregard the law, and in order to successfully combat the problem, it took swift and strong action in *Matrix*. As a result of the court's decision in *Matrix*, lenders who close a loan by unlawful means will be unable to successfully bring any action against any party to enforce the loan.

Importantly, the court's decision in *Matrix* did not create any new rights or causes of action, but rather, it characterized the unauthorized practice of law as so potentially harmful that lenders who engage in it shall not be entitled to equitable remedies. It is significant to note that the court did not create a new cause of action for potential borrowers, which limits the impact of *Matrix* to cases in which a lender seeks a remedy. Nevertheless, *Matrix* gives teeth to the court's line of decisions that require attorney supervision of real estate closings

209. Telephone Interview with Paul W. Dillingham, Shareholder, Spencer & Spencer (Jan. 6, 2012).

against lenders, whereas those cases previously only affected attorneys.[210] However, the court allows lenders a final opportunity to protect themselves in future closings, so long as *Matrix* applies only to mortgages filed after the issuance of the opinion, which is the most likely interpretation. Lenders that do not reform their closing processes after *Matrix* could potentially suffer substantial monetary losses.

While the South Carolina lower courts may have the discretion to deny a lender relief, it is not likely that the courts will stray from the ruling in *Matrix*, which was designed to eradicate the unauthorized practice of law in South Carolina. Lenders will continue to push for a change in closing requirements after *Matrix*, but for the time being, the South Carolina Supreme Court will look for reform from lenders. Lenders' failure to do so may result in requirements that are even more stringent.

Neil C. Robinson, III

210. *See supra* text accompanying notes 199–203.