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October 11, 2013

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Glaski v. Bank of America, National Association et al.
Supreme Court Case No. S213814;
Appellate Case No. F064556, Disposition Date 07/31/2013;
Trial Court Case No. 09CECG03601

CORRECTED RESPONSE AND OPPOSITION TO REQUEST FOR DEPUBLICATION

Dear Justices of the Supreme Court:

Pursuant to California Rules of Court ("CRC"), Rule 8.1125(b) *et seq.*, the undersigned writes to respectfully and timely oppose and object to the requests to depublish the published opinion of the appellate court for the above referenced case by providing the following corrected response.

STATEMENT OF INTEREST AND INTRODUCTION

The undersigned's interest in this response to the depublication request, relates to clients served in the undersigned's practice as a California Bus & Prof. Code qualified paralegal which consists of working on these types of cases with attorneys on a regular basis. We represent many clients who will be affected by this currently citable appellate court Opinion with some cases having already cited *Glaski* as applicable authority.

The clarity the appellate court provided in its well-reasoned Opinion was qualified for publication, certified for publication and accordingly, was rightfully published. The undersigned respectfully requests that the *Glaski* appellate court Opinion not be upset for the following additional reasons.

THE DEPUBLICATION REQUEST PROCESS IS NOT A FORUM TO RE-TRY THE CASE A DEPUBLICATION REQUEST SHOULD ONLY BE UTILIZED TO CONFIRM THAT THE APPELLATE COURT'S OPINION MET THE STANDARD FOR PUBLICATION[1]

The depublication process should not be used as a forum to re-try the case. Supreme Court review was an available option to the defendants but no petition was filed.

Justice Joseph R. Grodin wrote in 1984 confirming earlier explanations by the late Chief Justice Donald R. Wright[2] and then Chief Justice Rose Elizabeth Bird[3], that depublication is only ordered because the majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent[4]. Such is not the case here.

The appellate court had no choice but to assume the purported "Trust" was formed under New York Trust Laws because Plaintiff claimed it was and the defendants failed to refute or object to this stated fact in the instant case. The law under which the trust was purportedly formed does not change the general concept the appellate court established, that assets are prohibited from entering a trust after the trust closing-date. This is in order to mitigate tax liability and the potential of losing the trust's tax exempt status by utilizing the restrictive requirements required to maintain limited liability for the trust as a pass through entity.

Regardless of whether or not organized under New York Trust Laws, it was still a Real Estate Mortgage Investment Conduit ("REMIC") trust where I.R.S. Code § 860 *et seq.,* and Delaware Code, Title 12, Chapters 35 and 38 *et seq.*, each provides similar if not more comprehensive requirements related to the actual purpose of the trust; for instance:

> **"Every direct or indirect assignment, or act having the effect of an assignment, whether voluntary or involuntary, by a beneficiary of a trust of the beneficiary's interest in the trust or the trust property or the income or other**

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1 See Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514, 514 n.1 (1984).

2 See Julie H. Biggs, Note 8. at 1185 n.20, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. Cal. L. Rev. 1181, 1200 (1977) quoting Chief Justice Wright.

3 In Justice Bird's address at the State Bar Convention in San Francisco, CA Sept. 10, 1978, in Report, L.A. Daily J., Oct. 6, 1978, at 4, 8, speaking of depublished opinions as ones "with which the court does not agree" and as "erroneous ruling[s]".

4 *Grodin, supra*, note 7, at 514-15.

distribution therefrom that is unassignable by the terms of the instrument that creates or defines the trust is void.[5]"

Statements in the requests for depublication that Delaware Statutes provide no comparable provision that would render a belated assignment to a trust void is simply untrue.

The appellate justices' Opinion was sound, applicable and well-reasoned. Defendants' Petition for Rehearing was rightfully denied and the numerous requests for publication were properly considered and the case was certified for publication.

<u>THE APPELLATE COURT'S OPINION MET THE STANDARDS FOR CERTIFICATION AND PUBLICATION</u>

The appellate court's Opinion met the standard for certification and publication as authorized by Cal. Rules of Court, Rule 8.1105(c) which provides that an opinion of a court of appeal or a superior court appellate division - whether it affirms or reverses a trial court order or judgment - should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

[5] Delaware Decedents' Estates and Fiduciary Relations, Chapter 35, Trusts, Subchapter III. General Provisions § 3536.

The undersigned contends the appellate court's well-reasoned Opinion was published on the grounds of sub-sections 2, 3, 5, 6, and 8 referenced above and more specifically related to Sections III. sub-sections A-H and Section IV. sub-section B of the appellate court's Opinion[6].

Section III.A. The appellate court's Opinion clarifies securitization issues related to the lack of transfer of the deed of trust into securitized trusts after the closing date, which was deemed not acceptable due to the controlling "pooling and servicing agreement" and statutory requirements applicable to REMIC trusts, which is further clarified in FN 12 of the opinion[7]. This meets the standard for publication per CRC, Rules 8.1105(c)(3), (5), (6) and (8).

Section III.B. Clarifies previous issues and opinions related to wrongful foreclosure by a nonholder of the deed of trust; or when a party alleged not to be the true beneficiary, instructs the trustee to file a Notice of Default and initiate nonjudicial foreclosure which conflicts with other holdings; adopts more applicable holdings and further clarifies that a plaintiff must allege facts that show the defendant who invoked the power of sale was not the true beneficiary. This meets the standard for publication per CRC, Rules 8.1105(c) (3), (5), (6) and (8).

Section III. C. This is an important opinion not previously held by other courts clarifying the question of whether the purported assignment was void, not dependent on whether the borrower was a party to, or third party beneficiary of the assignment agreement. This meets the standard for publication per CRC, Rules 8.1105(c)(2), (3), (5), (6) and (8).

Section III.E. This section distinguishes the *Gomes*[8] case which seems to be universally utilized by other courts and defendant attorneys in California whether the application applies to the actual facts of the case at bar or not. Of particular note is the appellate court's interpretation allowing borrowers to pursue questions regarding the chain of ownership and

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[6] The "Sections" stated herein and below, relate to the applicable Sections of the appellate court's Opinion.

[7] "This allegation comports with the following view of pooling and servicing agreements and the federal tax code provisions applicable to REMIC trusts. "Once the bundled mortgages are given to a depositor, the [pooling and servicing agreement] and IRS tax code provisions require that the mortgages be transferred to the trust within a certain time frame, usually ninety dates from the date the trust is created. After such time, the trust closes and any subsequent transfers are invalid. The reason for this is purely economic for the trust. If the mortgages are properly transferred within the ninety-day open period, and then the trust properly closes, the trust is allowed to maintain REMIC tax status." (*Deconstructing Securitized Trusts, supra*, 41 Stetson L.Rev. at pp. 757-758.)" *Glaski, supra* fn 12.

[8] *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149.

consolidation with the *Herrera*[9] case as opposed to *Gomes* which applies to not only *Glaski* but many other cases. The Opinion of the appellate court clarifies important characteristics authorized by the standards for publication per CRC, Rules 8.1105(c)(3), (5), (6) and (8).

Section III.F. Banks raise failure to tender as a defense in virtually every case whether applicable or not. The *Glaski* opinion correctly holds that tender is not required where the foreclosure sale is void, rather than voidable which meets the standard for publication per CRC, Rules 8.1105(c)(3), (5), (6) and (8).

GLASKI WAS CORRECTLY DECIDED

Whether Glaski was a party or third-party beneficiary to the purported securitized trust agreement or Pooling and Servicing Agreement ("PSA") is irrelevant. The PSA *itself* did NOT allow transfer into the purported trust AFTER the closing-date whether the borrower invokes standing to challenge assignment into the trust or not. The same holds true whether or not the borrower was a party or third-party beneficiary of the PSA. The appellate court ruled that such a transfer after the closing-date was not allowed as it would violate the purpose of the securitized trust as a REMIC as further addressed herein.

Professor Adam Levitin[10] of Georgetown Law School states the following, regarding the view (as expressed in the requests for depublication) that a homeowner has no standing to challenge assignments into a trust because of not being a party to the PSA:

> **"I think that view is plain wrong. It fails to understand what PSA-based foreclosure defenses are about and to recognize a pair of real and cognizable Article III interests of homeowners: the right to be protected against duplicative claims and the right to litigate against the real party in interest because of settlement incentives and abilities.**
>
> **The homeowner is obviously not party to the securitization contracts like the PSA (query, though whether securitization gives rise to a tortious interference with the mortgage contract claim because of PSA modification limitations...). This means that the homeowner can't enforce the terms of the PSA. The homeowner can't prosecute putbacks and the like. But there's a major difference between claiming that sort of right under a PSA and pointing to noncompliance with the PSA as evidence that the foreclosing party doesn't have standing (and after *Ibanez*, it's just incomprehensible to me how this sort of decision could be coming out of the 1st Circuit BAP with a MA mortgage).**

[9] *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366.
[10] See: http://www.law.georgetown.edu/faculty/levitin-adam-j.cfm.

Let me put it another way. Homeowners are not complaining about breaches of the PSA for the purposes of enforcing the PSA contract. They are pointing to breaches of the PSA as evidence that the loan was not transferred to the securitization trust. The PSA is being invoked because it is the document that purports to transfer the mortgage to the trust. Adherence to the PSA determines whether there was a transfer effected or not because under NY trust law (which governs most PSAs), *a transfer not in compliance with a trust's documents is void*. And if there isn't a valid transfer, there's no standing. This is simply a factual question--does the trust own the loan or not? (Or in UCC terms, is the trust a "party entitled to enforce the note"--query whether enforcement rights in the note also mean enforcement rights in the mortgage...) If not, then it lacks standing to foreclosure.

It's important to understand that this is not an attempt to invoke investors' rights under a PSA. One can see this by considering the other PSA violations that homeowners are not invoking because they have no bearing whatsoever on the validity of the transfer, and thus on standing. For example, if a servicer has been violating servicing standards under the PSA, that's not a foreclosure defense, although it's a breach of contract with the trust (and thus the MBS investors). If the trust doesn't own the loan because the transfer was never properly done, however, that's a very different thing than trying to invoke rights under the PSA.

I would have thought it rather obvious that a homeowner could argue that the foreclosing party isn't the mortgagee and that the lack of a proper transfer of the mortgage to the foreclosing party would be evidence of that point. But some courts aren't understanding this critical distinction.

Even if courts don't buy this distinction, there are at least two good theories under which a homeowner should have the ability to challenge the foreclosing party's standing. Both of these theories point to a cognizable interest of the homeowner that is being harmed, and thus Article III standing.

First, there is the possibility of duplicative claims. This is unlikely, although with the presence of warehouse fraud (Taylor Bean and Colonial Bank, eg), it can hardly be discounted as an impossibility. The same mortgage loan might have been sold multiple times by the same lender as part of a warehouse fraud. That could conceivably result in multiple claimants. The homeowner should only have to pay once. Similarly, if the loan wasn't properly securitized, then the depositor or seller could claim the loan as its property. Again, potentially multiple claimants, but the homeowner should only have to pay one satisfaction.

Consider a case in which Bank A securitized a bunch of loans, but did not do the transfers properly. Bank A ends up in FDIC receivership. FDIC could claim those loans as property of Bank A, leaving the securitization trust with an unsecured claim for a refund of the money it paid Bank A. Indeed, I'd urge Harvey Miller to be looking at this as a way to claw back a lot of money into the Lehman estate.

Second, the homeowner had a real interest in dealing with the right plaintiff because different plaintiffs have different incentives and ability to settle. We'd rather see negotiated outcomes than foreclosures, but servicers and trustees have very different incentives and ability to settle than banks that hold loans in portfolio. PSA terms, liquidity, capital requirements, credit risk exposure, and compensation differ between services/trustees and portfolio lenders. If the loans weren't properly transferred via the securitization, then they are still held in portfolio by someone. This means homeowners have a strong interest in litigating against the real party in interest[11].

CONCLUSION

The arguments proffered supporting depublication are nothing more than meritless attempts to re-argue the *Glaski* case. The appellate court's Opinion was well-reasoned and correctly decided. The appellate court's opinion promotes the requirement that in order to foreclose on an owner's property, the foreclosing entity must have obtained standing to foreclose properly, not based on a void assignment in contravention of the foreclosing entity's controlling documents. In this case an assignment into a securitized trust after the closing-date of the trust has been properly deemed invalid and void by the appellate court.

For the foregoing reasons and on behalf of clients and persons this case affects, the undersigned respectfully request this Honorable Court NOT depublish the above referenced appellate court Opinion due to the importance that the continued ability to cite this well-reasoned Opinion has provided and will continue to provide in the future.

Sincerely,

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[11] http://www.creditslips.org/creditslips/2011/07/standing-to-challenge-standing.html.

PROOF OF SERVICE

Glaski v. Bank of America, National Association et al.
Supreme Court Case No. S213814
Appellate Case No. F064556

I, Charles W. Cox, am over the age of eighteen and not a party to this action. My business address is 322 West Center St., Yreka, CA 96097. On the date set forth below, I served the foregoing **RESPONSE AND OPPOSITION TO REQUEST FOR DEPUBLICATION** for the above referenced case, by placing a copy of the document in a sealed envelope with first-class postage fully prepaid and placing the envelope for collection and mailing with the United States Postal Service following our ordinary business practices, addressed to the following.

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I declare under penalty under the laws of the State of California that the information stated above is true and correct.

Dated: October 11, 2013

By: ____________
Charles W. Cox