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October 4, 2013

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

Re: **Request for Depublication**
Glaski v. Bank of America, N.A., et al.,
California Court of Appeal, Fifth Appellate District
Case No. F064556

To: The Honorable Chief Justice and Associate Justices of the California Supreme Court

JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC; JPMorgan Chase Bank, N.A.; and California Reconveyance Company, Defendants-Respondents in the above-mentioned appeal (together, "Respondents"), respectfully request that this Court depublish the opinion of the Fifth District Court of Appeal in *Glaski v. Bank of America, N.A., et al.*, No. F064556, issued July 31, 2013 and certified for publication on August 8, 2013 (the "Opinion"). This request is made pursuant to Rule 8.1125 of the California Rules of Court.

INTRODUCTION

Respondents' interest in this appeal derives not only from the present case, but also from the broad disruptive impact that the Court of Appeal's published ruling will have on nonjudicial foreclosures in this State. California Civil Code §§ 2924 *et seq.* furnishes an "exhaustive" and "comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust," such that courts should not "read any additional requirements into the nonjudicial foreclosure statute." *Gomes v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 3d 819, 823-824 (Ct. App. 2011). Nevertheless, the Court of Appeal has done just that, upending a previously consistent string of appellate decisions in the process. The Court of Appeal held for the first time that a plaintiff has standing to challenge the nonjudicial foreclosure on an undisputedly defaulted mortgage, based on an alleged breach of a loan securitization agreement to which a plaintiff was neither a party nor an intended third-party beneficiary—and which in no way relates to his payment obligations or to Respondents' authority to foreclose.

The Court's decision threatens to unsettle thousands of completed and ongoing foreclosures carried out lawfully under the State's statutory nonjudicial foreclosure regime. More to the point, the Court's ruling thwarts the California legislature's clear purpose in enacting California Civil Code §§ 2924 *et seq.* By conferring on defaulted borrowers a basis for challenging a nonjudicial foreclosure, the Court's opinion has the effect of converting a streamlined, efficient and comprehensive nonjudicial process into full-blown judicial foreclosure. Indeed, the effects of the decision already are being seen, in the short time since the opinion was published, in both newly filed complaints and existing cases in the California courts—where the Court of Appeal's published opinion is now precedent. The Court's unwarranted broadening of standing law may well have unfortunate repercussions in other contract cases as well.

THE COURT OF APPEAL'S DECISION

Ruling on grounds that were neither raised in the trial court (and which the trial court thus had no occasion to address), nor briefed by the parties on appeal, the Court of Appeal held that petitioner Thomas A. Glaski ("Glaski") had standing to maintain a wrongful-foreclosure action based on allegations related to a loan securitization agreement to which he is a complete stranger. Specifically, the Court of Appeal found standing based on Glaski's allegation that the assignment of his mortgage to a securitization trust allegedly occurred after the trust closing date set forth in the Pooling & Servicing Agreement ("PSA"). Relying on New York law, even though the PSA that Glaski invoked states that Delaware law governs, the Court found that a belated assignment to the trust would be void. The Court then held that California law recognizes a borrower's standing to challenge an assignment that is void rather than voidable. The Court appeared to believe that there was no California case law on point (Slip. Op. 17), and accordingly relied on four non-California cases, all of which held that the borrower had, on similar allegations, failed to state a claim for wrongful foreclosure (*id.*).

The Court of Appeal did not originally certify its opinion for publication. Glaski petitioned the Court to publish the opinion, arguing that the standing rule announced by the Court "is a first under California law." Antognini Aug. 2, 2013 Ltr. 2. The Court of Appeal then ordered the opinion published on August 8, 2013. Respondents petitioned for rehearing; the Court of Appeal denied that petition by order dated August 29, 2013.

REASONS FOR DEPUBLICATION

I. The Court of Appeal's Decision Threatens to Severely Disrupt California's Nonjudicial Foreclosure Regime, and to Generate a Flood of Meritless Litigation

Before the Court of Appeal, Glaski emphasized that "public policy" counseled in favor of publishing the opinion because of the high number of mortgages assigned to securitization trusts,

and the need for courts to ensure that lenders "do proper loan assignments." Antognini Aug. 2, 2013 Ltr. 4. In fact, the public policy concerns weigh in exactly the opposite direction, and warrant depublication of the Court's opinion.

California Civil Code section 2924 establishes a "comprehensive statutory framework ... to govern nonjudicial foreclosure sales [that] is intended to be exhaustive." *Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 785 (Ct. App. 1994). "The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." *Id.* at 782. Section 2924 permits "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents"—for example, the loan servicer—to foreclose. Cal. Civil Code § 2924(a)(1); *see also id.* § 2924b(b)(4) ("person authorized to record the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee"). The statute does not require a foreclosing party to "produce the promissory note or otherwise prove it holds the note" to nonjudicially foreclose. *Jenkins v. JP Morgan Chase Bank, N.A.*, 156 Cal. Rptr. 3d 912, 925 (Ct. App. 2013). Nor does it require a foreclosing party to establish a chain of ownership in order to nonjudicially foreclose. *Dennis v. Wachovia Bank, FSB*, 2011 WL 181373, *7-8 (N.D. Cal. Jan. 19, 2011). That is because requiring a foreclosing party to establish its interest in the note "would fundamentally undermine the nonjudicial nature of the process[.]" *Gomes*, 121 Cal. Rptr. 3d at 824. "Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the nonjudicial foreclosure statute." *Id.* at 823-824.

The Court of Appeal's published ruling threatens to upend the settled law and expectations in this area of California law. If followed by the lower courts, the now-published *Glaski* decision will allow borrowers—in circumstances where there is no dispute among any assignor or assignee of the note—to preclude mortgagees, trustees, or mortgage servicers who are statutorily authorized to nonjudicially foreclose from doing so, on mortgages that are indisputably in default (and which the mortgagor does not allege he can satisfy). That is plainly inconsistent with the California statutory provisions governing the nonjudicial foreclosure process, none of which "suggests that such a judicial proceeding is permitted or contemplated." *Gomes*, 121 Cal. Rptr. 3d at 824.

What is more, if followed by the lower courts, *Glaski* will permit borrowers to bring wrongful-foreclosure claims that do nothing to further the foreclosure statute's purpose of "protect[ing] the debtor/trustor from *wrongful* loss of the property," *Moeller*, 30 Cal. Rptr. 2d at 782 (emphasis added), because the allegedly late assignment of a borrower's mortgage to a trust has nothing to do with whether a borrower is in default or whether the foreclosing entity authorized by statute to

foreclose in fact has that authority. *See, e.g., Siliga v. Mortgage Elec. Registration Sys., Inc.*, 161 Cal. Rptr. 3d 500, 508 (Ct. App. 2013) ("The assignment of the deed of trust and the note did not change [plaintiffs'] obligations under the note, and there is no reason to believe that ... the original lender would have refrained from foreclosure in these circumstances."). Such a fact-finding detour is particularly unwarranted where the borrower knows from which entity he has been receiving monthly statements and notices. *See Jenkins*, 156 Cal. Rptr. 3d at 926-927 (servicer has standing to foreclose).

There are tens of thousands of California mortgages that have been lawfully assigned to securitization trusts, absent any objections by the actual parties to those agreements, and the California nonjudicial foreclosure statute expressly permits several entities involved with the mortgage to foreclose when a borrower defaults—as undisputedly occurred here. If the lower courts follow *Glaski*, borrowers will flood the State's trial courts (and, eventually, its courts of appeal) with wrongful-foreclosure lawsuits challenging their foreclosures based on allegations about the assignments of their mortgages to securitization trusts or any number of other alleged defects relating to an entity's authority to foreclose. They will do so regardless of whether they are in default (as Glaski undisputedly was), and regardless of whether they intend to, or are able to, make the required payments on their mortgage (as Glaski undisputedly was not). Indeed, the flood already has commenced, with increasing numbers of *Glaski*-like complaints being filed since the date the Court of Appeal's decision was published. The legislature enacted the nonjudicial foreclosure statute precisely to avoid this sort of burden on the state's court system and to avoid races to the courthouse in circumstances of foreclosure, especially where there was no legitimate cause to stop or unwind a proper foreclosure. Because the Court of Appeal's decision threatens to undermine the legislature's careful balancing of borrower and lender interests, and to deluge the courts with meritless wrongful-foreclosure actions, this Court should depublish the opinion.

II. The Court of Appeal's Unprecedented Application Of California Standing Law

As Glaski recognizes, the Court of Appeal's decision is the "first under California law" to hold that a borrower has standing to challenge an entity's authority to foreclose based on assignment of his mortgage into a securitization trust in alleged violation of the trust's PSA. Antognini Aug. 2, 2013 Ltr. 2. The Court's novel ruling as to California law departs from a "*judicial consensus* [that] has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement." *In re Walker*, 466 B.R. 271, 285 (E.D. Pa. 2012) (emphasis added). Thus, in an area where the decisional law has induced long settled expectations, *Glaski* (if it remains published) threatens to inject substantial uncertainty into the foreclosure arena.

There is no justification for allowing that uncertainty to be sowed, or to permit a proliferation of new, meritless challenges to foreclosure, as the *Glaski* Court's decision is contrary to foundational principles of California common law. California courts adhere to the well-established rule that "someone who is not a party to a contract has no standing to enforce the contract" except "where the contract is made expressly for that person's benefit." 14A Cal. Jur. 3d *Contracts* § 310; *see, e.g., Rodriguez v. Oto*, 151 Cal. Rptr. 3d 667, 673 (Ct. App. 2013). The Court of Appeal did not discuss this well-established rule of California common law, instead basing its holding on a negative inference in a California Jurisprudence citation stating only that, as to assignments, a borrower *cannot* challenge a voidable assignment. From this statement the Court of Appeal arrived at the conclusion that a borrower *could* challenge an allegedly void assignment. *See* Slip Op. 18 (citing 7 Cal. Jur. 3d *Assignments* § 43). Whatever California Jurisprudence says about standing to challenge a *voidable* assignment, it does not suggest that a borrower could challenge a *void* assignment, nor do any of the cases it cites.

Instead, California courts (both state and federal) have repeatedly invoked the principle that only intended third-party beneficiaries can sue to challenge a breach by a party to the contract, and therefore have repeatedly held that borrowers like Glaski may not pursue wrongful foreclosure claims premised on a breach of a PSA because borrowers are not parties to these agreements and the agreements are not made expressly for the borrowers' benefit. *See, e.g., Jenkins*, 156 Cal. Rptr. 3d at 927 ("As an unrelated third party to the alleged securitization ... Jenkins lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions."); *Sami v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 38466, at *15 (N.D. Cal. Mar, 21, 2012) ("[T]he court finds that she lacks standing to do so because she is neither a party to, nor a third party beneficiary of, [the PSA]."). These courts have done so notwithstanding the fact that a borrower alleged that the defect in the assignment rendered it "void," *see, e.g., Almutarreb v. Bank of N.Y. Trust Co.*, 2012 WL 4371410, at *2 n.1 (N.D. Cal. Sept. 24, 2012), and they have done so where the alleged voidness sprung from the fact that the mortgage was transferred to the trust after the closing date of the trust, *see, e.g., Jenkins*, 156 Cal. Rptr. 3d at 923-924; *Sabherwal v. Bank of N.Y. Mellon*, 2013 WL 101407, at *7 (S.D. Cal. Jan. 8, 2013).

The super-majority rule—that a borrower cannot base a challenge on an assignment contract if the borrower is not a third-party beneficiary of the assignment contract—is correct and conforms to the purposes of the nonjudicial foreclosure process. Because *Glaski* undermines that consensus, and threatens settled expectations, the decision ought to be depublished.

III. The Court Of Appeal's Unnecessary and Questionable Application of New York Trust Law

A final reason for depublication is that the Court of Appeal reached its holding only because of an unnecessary detour into and conclusion about New York trust law. The detour was unnecessary because the trust agreement in this case states that it is governed by Delaware law. Glaski's allegation that the Trust is governed by New York law contradicts the publicly filed document that he invoked in his complaint and that the Court of Appeal relied upon in its opinion. The PSA states explicitly that the Trust is a Delaware Statutory Trust, organized under the Delaware Statutory Trusts Statute, 12 Del. Code Ann. §§ 3801 *et seq.*, and governed by Delaware law. *See, e.g.*, PSA § 10.05 (governing law). There is no provision of the Delaware statute, however, that would render an allegedly belated assignment to a trust void. Indeed, more generally, Delaware courts reject the proposition that borrowers may challenge the allegedly improper assignment of their mortgage. *See, e.g.*, *Branch Banking & Trust Co. v. Eid*, 2013 WL 3353846, at *4 (Del. Super. Ct. June 13, 2013) ("[A] debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment.").

Accordingly, had the Court of Appeal limited its decision to only the law that actually governs the trust agreement in this case, there would have been no need for the Court ever to opine on the question whether California law ought to provide for a previously-unheard-of exception for void (as opposed to voidable) assignments. Moreover, trial courts following *Glaski* will be put in the awkward position of reaching disparate results in nonjudicial foreclosure cases based on their interpretation of the foreign law under which a given securitized loan trust was formed. That is hardly consistent with the purpose behind California Civil Code § 2924: to enact an exhaustive, streamlined, and efficient nonjudicial foreclosure regime.

Having determined to venture into inapplicable New York law, the Court of Appeal compounded the precedential problems with its now-published decision by declining to follow the majority of courts that have construed New York trust law. *See Bank of Am., Nat'l Assocs. v. Bassman FBT, L.L.C.*, 981 N.E.2d 1, 8-9 (Ill. App. Ct. 2012) (collecting and discussing New York appellate cases applying New York trust law and following cases that treat *ultra vires* acts as voidable rather than void); *see also Deutsche Bank Nat'l Trust Co. v. Stefiej*, 2013 WL 1103903, at *3-4 (N.D. Ill. Mar. 15, 2013) ("After reviewing the pertinent New York authority on section 7-2.4, this Court agrees with the analysis in *Bassman* and holds that section 7-2.4 only makes an act by the trustee in contravention to the trust instrument voidable, not void."). Depublication is thus also appropriate to avoid an unnecessary conflict with the New York appellate courts on an issue of New York law. *See Simmons v. Superior Ct. in & for L.A. County*, 214 P.2d 844, 852 (Cal.

Dist. Ct. App. 1950) ("unseemly controversy between courts of different states should be frowned upon and avoided if possible").

* * *

For the foregoing reasons, Respondents respectfully request that this Court depublish the decision of the California Court of Appeal.

Respectfully,

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