



California Court of Appeal Rules Borrower Can Challenge Validity of Loan Securitization

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On August 8, 2013, the California Court of Appeal ordered its decision in *Glaski v. Bank of America* (5th Dist. Ct. App. No. F064556) published. In reversing the trial court's sustaining of a demurrer to Glaski's complaint without leave to amend, the court held that "a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust... occurred after the trust's closing date." The Court explained that transfers that violate the terms of the trust instrument are void under applicable trust law, and borrowers have standing to challenge these "void" assignments of their loans.

By deciding that a borrower who is not a party to, or a third party beneficiary of, the assignment may nevertheless challenge the validity of that assignment, the court departs from well-settled California law that generally precludes a non-party to a contract from challenging its validity.

The court also discussed *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011), which just two years ago held that a borrower may not bring an action to challenge the authority of the defendant to foreclose. The court purported to distinguish *Gomes* because *Glaski* was not making a challenge regarding MERS's authority, as in *Gomes*, but rather was asserting that the party claiming to be the true noteholder was not in fact the true owner. Further, the court found that *Glaski*'s allegations that the foreclosure was not conducted at the direction of the correct party were sufficiently specific to survive a pleadings challenge.

The *Glaski* decision ignores the recent decision by the Fourth District Court of Appeal in *Jenkins v. JP Morgan Chase Bank*, 216 Cal.App.4th 497 (2013), which reached precisely the opposite result: "As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions."

This split in the California Courts of Appeal will leave trial courts free to follow either *Glaski* or the *Gomes* and *Jenkins* line of cases. In the coming months, it will be interesting to see which path the lower courts follow.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

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