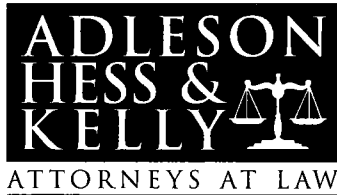


PHILLIP M. ADLESON
RANDY M. HESS
PATRIC J. KELLY
EDWARD C. McDONALD, JR.
PAMELA A. BOWER
JEFFREY A. BARUH
JOANNE M. WENDELL
LISA J. PARRELLA*
CLAY A. COELHO



A PROFESSIONAL CORPORATION

www.ahk-law.com

www.insurancecoveragelaw.com

MAIN OFFICE:
577 SALMAR AVENUE
SECOND FLOOR
CAMPBELL, CALIFORNIA 95008
TELEPHONE (408) 341-0234
FACSIMILE (408) 341-0250

SANTA ANA OFFICE:
1820 E. FIRST STREET, SUITE 410
SANTA ANA, CALIFORNIA 92705
TELEPHONE (714) 795-2360

*ALSO LICENSED IN NEVADA AND NEW YORK

PLEASE REPLY TO: CAMPBELL

December 30, 2011

VIA FEDERAL EXPRESS

Hon. Tani Cantil-Sakauye
And the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Biancalana v. T.D. Service Company, et al.*
Appellate Case No. H035400
Santa Cruz Superior Court Case No: CV162804
Our Client: United Trustees Association
Our File: 880284

SUPREME COURT CASE REFERENCE NO: S198562

Request for Depublication (California Rules of Court Rule 8.1125(a)) or for granting petition for hearing.

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

On behalf of United Trustee's Association, we hereby respectfully request depublication of *Biancalana v. T.D. Service Company*, Appellate Case No. H035400, published as 200 Cal.App.4th 527, or alternatively that the Court grant the petition of T.D. Service Company for a hearing before the Supreme Court.

I. The Interest of United Trustees Association.

This letter is written on behalf of the United Trustees Association ("UTA"), formerly known as the California Trustees Association ("CTA"), a nonprofit educational organization. The members of UTA are comprised of lenders and trustees under deeds of trust secured by real property in California, as well as members working for industries which provide support services in the nonjudicial foreclosure process, such as legal newspapers, title companies, posting and publishing services, and attorneys. UTA's

members provide reconveyance and nonjudicial foreclosure services for nearly all lenders in the California real estate market. UTA has also been actively involved in legislative changes in the nonjudicial foreclosure process in the California Legislature.

UTA and CTA have filed amicus briefs in the United States Supreme Court, the Federal Ninth Circuit Court of Appeals, the California Supreme Court, and the California Courts of Appeal, including such cases as: *BFP v. Resolution Trust Corporation*¹; *I. E. Associates v. Safeco*²; *Kachlon v. Markowitz*³, *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.*⁴; *Trustors Security Service v. Title Recon Tracking et al.*⁵; *In re Lindsay*⁶; *Prudential Home Mortgage Company, Inc. v. Superior Court*⁷; *Abdallah v. United States Bank*⁸; and, *Nguyen v. Calhoun*⁹.

UTA's goal is to provide a clear understanding of the legislation and case law that impacts the lending, loan servicing and default services industries, including important issues relating to lending, servicing and foreclosure of loans secured by deeds of trust. UTA members are vitally interested in the outcome of this case because they are regularly involved in the nonjudicial foreclosure of deeds of trust.

II. **Why *Biancalana v. T.D. Service Company* Should not be Published.**

UTA agrees with the position taken by *T.D. Service Company* in its request for depublication of the court of appeal's decision in *Biancalana v. T.D. Service Company*.

There is an extensive line of cases holding that even slight unfairness or irregularity in the processing of a nonjudicial foreclosure which results in a grossly inaccurate price is a sufficient basis for setting aside the sale and holding a new sale.

¹ *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531 (validity of regularly conducted nonjudicial foreclosure sale.)

² *I. E. Associates v. Safeco* (1985) 39 Cal.3d 281 (the extent and scope of a trustee's duties in connection with a nonjudicial foreclosure.)

³ *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316 (a trustee's conduct is privileged communication.)

⁴ *Banc of America Leasing & Capital, LLC, v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1104-1105, (refusing to extend duties of the trustee to subsequent purchasers who purchase property after a trustee's sale);

⁵ *Trustors Security Service v. Title Recon Tracking, et al.* (1996) 49 Cal.App.4th 592 (interpretation of Civil Code § 2941 and the legislative preference for reconveyances of deeds of trust by trustees.)

⁶ *In re Lindsay* (9th Cir. 1995) 59 F.3d 942 (validity of a regularly conducted nonjudicial foreclosure.)

⁷ *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236.

⁸ *Abdallah v. United States Bank* (1996) 43 Cal.App.4th 1101.

⁹ *Nguyen v. Calhoun* (2003) 105 Cal. App. 4th 428 (a loan secured by real property is paid off when the lender actually receives the payoff funds not when a purchase escrow by the seller/borrower closes.)

See, for example, *Sargent v. Schumaker* (1924)193 Cal.App.2d 129; *Winbigler v. Sherman* (1917) 175 Cal. 270, 275; *Whitman v. Transstate Title Company* (1985) 165 Cal.App.3d 312, 323; *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 701; *Millennium Rock Mortgage, Inc. v. T.D. Service Company* (2009) 179 Cal.App.4th 804, (“*Millennium Rock*”). These cases specify that where the error was made by the foreclosure trustee in processing the foreclosure (intrinsic to the process), and where that error directly resulted in a grossly inadequate price, particularly where the trustee’s deed upon sale has not yet been recorded, the trustee has the discretion to cancel the erroneous sale and hold a new sale whereby the effects of the error would be avoided.

This holding was applied in the *Millennium Rock* case in which the trustee, through its auctioneer agent, mixed up the credit bids from two files and, therefore, the actual credit bid duly submitted by the foreclosing beneficiary for the subject foreclosure was not the bid actually announced, and instead a significantly lower (mistaken) bid from another file was used. The court of appeal in its *Millennium Rock* decision confirmed that the processing of a credit by the trustee of the opening bids correctly submitted by the foreclosing beneficiary is an integral part of the foreclosure process, and that such an error by the trustee justified re-holding the sale. It distinguished this circumstance from the situation found in the case of *6 Angels, Inc. v. Stuart-Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 (“*6 Angels*”), which held that where the error was made by the beneficiary’s own outside servicing agent and, therefore, was extrinsic to the nonjudicial foreclosure process and the trustee’s duties, setting aside the trustee’s sale was not justified. As the *Millennium Rock* court held, “. . . if the sale is allowed to stand, it will deprive a blameless beneficiary of its entitlement to the full amount of its credit bid and result in a windfall to a purchaser” .

The court of appeal in *Biancalana v. T.D. Service Company* disregarded this longstanding distinction concerning the nature and source of the error. In *Biancalana*, the foreclosing beneficiary duly submitted its credit bid intended to open the bidding. T.D. Service Company as trustee in processing the foreclosure incorrectly took down the opening bid and, therefore, mistakenly instructed the auctioneer to open the bidding at a much lower sum than the actual credit bid submitted by the beneficiary. So, unlike

6 Angels, which the *Biancalana* court incorrectly relied upon, the error was made by the trustee directly in the course of processing the foreclosure (i.e., intrinsic to the process). In keeping with numerous other appellate court decisions cited above, T.D. Service Company, as trustee, should have been permitted to cancel and re-hold the sale using the correct credit bid submitted by the beneficiary rather than the bid actually used due to mistake of the trustee.

The *Biancalana* court failed to explain why it was departing from the pre-existing line of cases concerning the trustee's powers (i.e., distinguishing errors that are intrinsic vs. those that are extrinsic to the nonjudicial foreclosure process). Instead, it held that T.D. Service Company as trustee was merely acting as "agent" for the beneficiary and, therefore, had no right to re-hold the sale. The *Biancalana* court thereby confused the fiduciary role of the servicing agent in *6 Angels* with the neutral ministerial agency of the foreclosure trustee. (See *I.E. Associates v. Safeco Title Insurance Company* (1985) 39 Cal.3d 281, 288; *Hatch v. Collins* (1990) 225 Cal.App.3d 1104; *Heritage Oaks Partners v. First American Title Insurance Company* (2007) 155 Cal.App.4th 339, 345.)

Prior to the *Biancalana* decision, it was generally understood from the cases cited above that if an error were made by the trustee in processing the nonjudicial foreclosure pursuant to the statutory framework found at Civil Code § 2924 et seq., and if that error directly resulted in an inadequate price at the sale, the trustee was permitted, particularly if the trustee's deed had not yet been issued, to cancel the mistaken sale and hold a new, proper sale. It was further understood that the processing of the credit bid duly submitted by the foreclosing beneficiary fell within the duties of the trustee in processing the nonjudicial foreclosure. (See, *Millennium Rock Mortgage, Inc. v. T.D. Service Company, supra*, 179 Cal.App.4th 804, Footnote 4, and *Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1503.) The *Biancalana* decision confuses what was previously a rather clear distinction involving extrinsic errors of the beneficiary and intrinsic errors in the foreclosure process (e.g., by the trustee). The facts in the court of appeal's decision in *Biancalana* should have been distinguished from that found in *6 Angels, supra*, where the trustee had no involvement in the error, and the error was therefore outside the scope of the foreclosure

proceedings. The *Biancalana* decision directly conflicts with these other cases, and it now creates substantial confusion on the part of trustees and other participants in foreclosure sales in determining what constitutes an error in the course of processing the foreclosure and when such an error justifies the re-holding of the sale that resulted in a significantly inaccurate price. The *Biancalana* decision should therefore be depublished so as to confirm the prior line of cases and eliminate this source of confusion for foreclosure trustees and other foreclosure sale participants.

III. Conclusion.

To avoid the confusion created by the Court of Appeal's published decision in *Biancalana v. T.D. Service Company, et al.* (Appellate Case No. H035400), UTA respectfully requests that the Supreme Court consider either ordering depublishation of the Court of Appeals' published decision, or that it that grant the pending Petition for Hearing of T.D. Service Company.

Very truly yours,

ADLESON, HESS & KELLY, APC

By:



Phillip M. Adleson, Attorney
for United Trustee's Association

PMA:tlc

cc: See Attached Proof of Service List

PROOF OF SERVICE

1 I am over the age of eighteen years and not a party to the within-entitled action. I
2 am employed in Santa Clara County, California, with the law firm of ADLESON, HESS &
3 KELLY. My business address is 577 Salmar Avenue, Second Floor, Campbell, California
95008.

4 On December 30, 2011, I served upon the interested party(ies) in the action the
foregoing document described as:

5 **LETTER TO HON. TANI CANTIL-SAKAUYE – CA SUPREME COURT**
6 **REQUEST FOR DEPUBLICATION – *BIANCALANA V. T.D. SERVICE COMPANY***

7 X by placing ___ the original ___ X true copies thereof enclosed in sealed envelopes
addressed to:

8 **VIA FAX AND US MAIL**

9 Dawson, Passafuime, Bowden & Martinez
10 4665 Scotts Valley Drive
11 Scotts Valley, CA 95066
12 Fax: 831-438-2812
13 Attorneys for Plaintiff

John M. Sorich
Adorno Yoss Alvarado & Smith
1 MacArthur Place, Suite 200
Santa Ana, CA 92707
Attorneys for EMC Mortgage Corporation

12 Honorable Jeff Almquist
13 Santa Cruz Superior Court
14 701 Ocean Street
Santa Cruz, CA 95060

California Court of Appeals
Sixth Appellate District
333 W. Santa Clara Street, #1060
San Jose, CA 95113

15 Lawrence J. Dreyfuss, Esq.
16 The Dreyfuss Firm, PLC
17 7700 Irvine Center Drive, #710
Irvine, CA 92618

United Trustee's Association
Attn: Richard Meyers
2030 Main Street, #1300
Irvine, CA 92614

18 X **BY U.S. MAIL** I deposited such envelope(s), with said postage thereon fully prepaid
19 in the United States mail at a facility regularly maintained by the United States Postal
20 Service at Campbell, California. I am "readily familiar" with the firm's practice of
21 collecting and processing correspondence for mailing. Under the practice it would be
22 deposited with the U.S. Postal Service on that same day with postage thereon fully
23 prepaid at Campbell, California, in the ordinary course of business. I am aware that
24 on motion of the party served, service is presumed invalid if postal cancellation date
25 or postage meter date is more than one day after date of deposit for mailing,
26 pursuant to this affidavit.

27 **BY U.S. CERTIFIED MAIL** I deposited such envelope(s), with said postage thereon
fully prepaid in the United States mail, Certified Mail, at a facility regularly maintained
by the United States Postal Service at Campbell, California. I am "readily familiar"
with the firm's practice of collecting and processing correspondence for mailing.
Under the practice it would be deposited with the U.S. Postal Service on that same
day with postage thereon fully prepaid at Campbell, California, in the ordinary course
of business. I am aware that on motion of the party served, service is presumed
invalid if postal cancellation date or postage meter date is more than one day after
date of deposit for mailing, pursuant to this affidavit.

RETURN RECEIPT REQUESTED, U.S. MAIL

WITH CERTIFICATE OF MAILING A certificate of mailing was obtained from the
United States Post Office evidencing the mailing referenced above.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BY FEDERAL EXPRESS I caused such envelope(s) to be placed for FedEx collection and delivery at Campbell, California. I am "readily familiar" with the firm's practice of collecting and processing correspondence for FedEx mailing. Under the practice it would be deposited with the FedEx Office on that same day with instructions for overnight delivery, fully prepaid, at Campbell, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the FedEx delivery date is more than one day after date of deposit with the local FedEx Office, pursuant to this affidavit.

BY FACSIMILE I caused transmission of the foregoing document(s) by facsimile to the offices of the addressee(s), and such transmission was reported as complete and without error.

BY PERSONAL SERVICE I personally delivered by hand to the offices of the addressee(s) listed above, pursuant to CCP §1011.

X **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on December 30, 2011, at Campbell, California.


TAMMY CLARK