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April 3, 2006

Via Hand Delivery

Hon. Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4783

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APR 3 - 2006
CLERK SUPREME COURT

Re: *Smith v. Wells Fargo Bank, N.A., et al.* (2005) 135 Cal. App. 4th 1463
Supreme Court No. S141687
Court of Appeal No. D045487
San Diego County Superior Court No. GIC802664

Dear Chief Justice George and Associate Justices:

This letter in support of the request of Wells Fargo Bank, N.A. ("Wells Fargo") for an order de-publishing the Court of Appeal's decision in the above-captioned action is submitted pursuant to Rule 979(b) of the California Rules of Court by the American Bankers Association ("ABA") and the Consumer Bankers Association ("Consumer Bankers").

ABA and Consumer Bankers respectfully submit that the Court of Appeal's decision misapplied the both federal and state law in multiple respects. In a separate *amicus* letter submitted under Rule 28(g), we will address our support for the Petition for Review filed by Wells Fargo. However, should this Court deny review, we urge that the Court nonetheless order that the Court of Appeal's opinion not be published, given the lack of precedent or other support for that court's conclusions, and the wide confusion and interference with federal-state comity that its opinion is likely to engender.

I. The Interests of the American Bankers Association and Consumer Bankers Association

ABA is the principal national trade association of the financial services industry in the United States. Its members, located in each of the 50 states (including California) and the District of Columbia, include federally and state-chartered financial institutions of all sizes and types, including money center, regional, and community banks, independent and holding-company owned banks, and commercial and savings

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banks. ABA members hold a majority of the domestic assets of the banking industry in the United States. The ABA frequently appears and participates in an *amicus* capacity in litigation involving issues of widespread importance to the banking industry.

Consumer Bankers is a nonprofit national trade association founded in 1919 to provide a collective voice for the retail banking industry. Its members are leaders in consumer financial services throughout the country, including in California. Consumer Bankers represents over 750 federally insured financial institutions that collectively hold more than 70 percent of all consumer credit held by federally insured depository institutions in the United States. Consumer Bankers regularly monitors the impact that consumer issues have on retail banks and appears in litigation involving issues of widespread importance to the consumer banking industry.

Publication of the decision of the Court of Appeal in the above-captioned case will have a substantial and far-reaching impact on the operations of federally and state-chartered banking institutions in their efforts to harmonize their obligations under federal and state law. ABA and Consumer Bankers accordingly support the request that this Court order that the Court of Appeal's opinion not be published.

II. The Court Should Order that The Court Of Appeal's Decision Not Be Published.

"The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law" (*Schmier v. Supreme Court* (2000) 78 Cal. App.4th 703, 708.) Because the opinion of the Court of Appeal broadly interferes – both within California and beyond – with the "orderly development of decisional law" in the construction of both federal banking regulations and California law, this Court should order the lower court's opinion not be published.

This case involves causes of action asserted against a national bank under the Unfair Competition Law ("UCL"), the false advertising statute, and the Consumer Legal Remedies Act ("CLRA"). The decision of the Court of Appeal reversed a trial court grant of summary judgment finding all of these claims subject to federal preemption under regulations promulgated by the Office of the Comptroller of the Currency ("OCC"), the federal agency that regulates national banks. To achieve this reversal, the Court of Appeal had to adopt an interpretation that effectively rewrites all three of the asserted California statutes and ignores controlling decisions of this Court, the settled law of federal preemption, and express Congressional intent that private causes of action such as those asserted here should not be permitted.

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The substance and context of the Court of Appeal's ruling is set out in the petition for review and in Well Fargo's request for a de-publication order. In summary, the lower court was confronted with a situation in which indisputably valid OCC regulations precluded state regulation of the subject matter at issue. The Court of Appeal held nonetheless that federal preemption did not bar the plaintiff's claims because (a) the challenged conduct was subject to regulations promulgated under the federal Truth in Savings Act ("TISA"); (b) all three of the California statutes could be used as "borrowing" statutes to enforce those regulations; and (c) applied in this manner, the California statutes did not impose state-law regulation on the bank and did not otherwise offend federal law. This unprecedented chain of conclusions would interfere with the established balance of federal and state powers in the regulation of banks and, if permitted to remain published, would lead to confusion and disarray, for several reasons.

First, the Court of Appeal's opinion interferes with the system of federal banking regulation by impeding the federal banking agencies' promulgation and enforcement of federal rules governing the conduct of the banks they regulate. When promulgating (and amending) their rules, federal banking agencies necessarily take into account how such rules will be enforced. As a result, a published opinion permitting state-law causes of action to enforce federal banking regulations that have traditionally been understood to be enforceable only by the supervising federal agencies would permit liability that was not contemplated by the agencies when the regulations were promulgated, thereby creating confusion between the federal banking agencies and the state courts concerning the meaning and proper application of those regulations.

To govern their interstate operations, both federally and state-chartered ABA and Consumer Bankers members have designed compliance systems – often in consultation with the federal banking agencies that supervise them – to ensure that they are meeting their federal regulatory obligations. These uniform compliance systems would be significantly impaired by a legal regime – such as that imposed under the Court of Appeal's opinion – that adds the specter of state-law liability yielding additional, and often differing, federal regulatory requirements from those agreed to in consultation with the institutions' federal supervisors.

This concern is particularly acute where, as here, the regulations form part of a federal regulatory scheme in which it has been firmly established that private enforcement is *not* contemplated. Here, Congress enacted affirmative legislation to repeal TISA's private cause of action authorization. The legislative history shows that in doing so Congress meant to replace civil liability with exclusive federal administrative enforcement, given the highly technical nature of the federal TISA requirements. The Court of Appeal's decision, if allowed to remain published, would override Congressional intent that TISA regulations not be subject to private rights of action. This

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case is therefore particularly ill-suited as a vehicle for the lower court's broader conclusion that express federal preemption can be overridden by enforcing federal banking regulations through state-law causes of action.

Second, there are significant uniformity concerns raised by the Court of Appeal's decision. Although judges would undoubtedly do their best to apply federal banking regulations in a manner consistent with each other and with the federal banking agencies, it is inevitable that conflicts would arise. This is particularly likely in cases addressing regulations whose application is unclear – which are precisely those most likely to give rise to litigation. Indeed, permitting courts to interpret and apply via state-law causes of action complex federal banking regulations that were designed for enforcement only by expert federal agencies may result in a single bank having to comply with different interpretations of the same federal rule by different courts as well as its supervising agency. Such results will only exacerbate the challenges that federal bank regulators face in administering a consistent, coherent federal regulatory regime and that banks face in implementing such a regime.

Regulation of national banks, like Wells Fargo, is subject to exclusive and uniform supervision and enforcement of applicable laws by the Office of the Comptroller of the Currency ("OCC"). (*See Wells Fargo Bank, N.A. v. Boutris* (9th Cir. 2005) 419 F.3d 949, 963-64.) That is especially so when the applicable laws sought to be enforced are *federal banking regulations*. Longstanding interpretations of the National Bank Act confirm that Congress intended national banks to be subject to consistent and uniform regulation and supervision across the nation. (*See Easton v. Iowa* (1903) 188 U.S. 220, 231 ["It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the [National Bank Act]."]). As the United States Supreme Court has recently noted in another context, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" (*Beneficial National Bank v. Anderson* (2003) 539 U.S. 1, 10-11 [quoting *Tiffany v. National Bank of Mo.* (1874) 18 Wall. 409, 412]). Publication of this decision would interfere with this established federal system.

Third, if the California Court of Appeal's ruling were allowed to remain published, in-state and out-of-state banks could be exposed to a rash of litigation based on purported violations of federal regulatory requirements. It is not clear that the courts of this State are prepared for such an onslaught of cases dealing with the complex and specialized federal bank regulatory framework. This is particularly troubling in light of the lack of guidance offered by the Court of Appeal's decision in how such a dramatically altered state scheme should be implemented.

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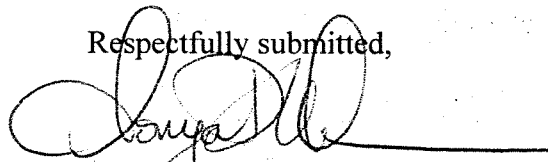
Finally, the Court of Appeal's decision injects great confusion into the proper interpretation of the three California statutes it addresses. Contrary to the Court of Appeal's holding, neither the CLRA nor the false advertising statute is a "borrowing" statute; rather, each is a stand-alone statute that establishes its own specific and unique standards for liability and remedies. Those standards and remedies differ in important respects from those established under the federal regulations from which the Court of Appeal's decision purported to borrow. The Court of Appeal does not explain how the trial courts are to resolve such conflicts. And although the "unlawful" prong of the UCL permits it to be used as a borrowing statute, the decisions of this Court have made clear that the UCL may *not* be used to create a private right of action where (as here) there is clear intent that the underlying substantive statute is not to be subject to private enforcement. (*See, e.g., Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal. 3d 287, 304 [(Insurance Code provisions not meant to create a private cause of action could not be enforced by private actions under UCL]).

The Court of Appeal's decision purports to work a dramatic substantive change in these three statutes in a manner unprecedented in, and unsupported by, any previous decision of this Court or the courts of appeal. Even if such major changes were within the Court of Appeal's authority (and they were not), this case provides a particularly awkward vehicle for effecting them. The lower court's brief discussions of the CLRA and false advertising claims, for example, offer no guidance to the trial courts in how the dramatic new interpretation of the scope of those statutes should be applied. The UCL claim in this case similarly provides a poor vehicle for announcing a shift in the way that much-litigated statute is to be applied, given the complex regulatory scheme at issue here.

III. Conclusion

For the foregoing reasons, as well as for those set forth by Wells Fargo, *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal. App.4th 1463, should be ordered not published.

Respectfully submitted,



Sonya D. Winner

DECLARATION OF SERVICE

I, Karla M. Quintanilla, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Covington & Burling in the City of San Francisco, California.
2. My business address is One Front Street, 35th Floor, San Francisco, CA 94111.
3. I am familiar with Covington & Burling's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.
4. On April 3, 2006, at One Front Street, 35th Floor, San Francisco, California, I served a true copy of the attached document by placing it in an addressed, sealed envelope clearly labeled to identify the person being served at the address shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on the date following ordinary business practices:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd
day of April, 2006, at San Francisco, California.


Karla M. Quintanilla