

California Supreme Court Finds Borrowers Have Standing To Challenge “Void” Assignment Of Loan After Foreclosure Sale

On February 18, 2016, the California Supreme Court issued its eagerly anticipated decision in *Yvanova v. New Century Mortgage Corporation, et al.*, Case No. S218973, finding that a borrower has standing to state a claim for wrongful foreclosure based on an allegedly “void” assignment of his/her loan after a foreclosure sale has taken place – notwithstanding the fact that the borrower is not a party to the challenged assignment. Although the Court tried to frame its ruling as a “narrow” one, the Court’s decision in *Yvanova* will undoubtedly have a sweeping effect on wrongful foreclosure cases in California – especially those involving securitization-based claims, which until now, have been almost universally rejected by state and federal courts alike.

In *Yvanova*, the California Supreme Court granted review as to the sole issue of whether, after a completed nonjudicial foreclosure sale, the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations that a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void. In finding that a borrower can state a claim for wrongful foreclosure based on a “void” assignment, the Court rejected the argument that a borrower lacks standing to challenge the assignment because he/she is not a party to the assignment. Instead, the Court found that because a “void” assignment has no legal effect at all, the borrower is not seeking to enforce the assignment, admittedly a contract to which he/she is not a party, but is rather alleging that the assignment was void from the beginning. Specifically, the Court found that “[i]n seeking a finding that an assignment agreement was void...a plaintiff in *Yvanova*’s position is not asserting the interest of parties to the assignment; she is asserting her own interest in limiting foreclosure on her property to those with legal authority to order a foreclosure sale.”

The California Supreme Court made clear that its ruling only applies to allegations of a “void” assignment and does not apply to allegations that an assignment is merely “voidable.” Interestingly, the Court declined to rule on whether the allegations pled by *Yvanova* would support a finding that the assignment was actually void and not merely voidable under New York law (as alleged by *Yvanova*) – despite the fact that New York courts (applying New York law) have found that the failure to comply with provisions of a pooling and servicing agreement (PSA) would make the resulting

assignment voidable, not void, and that any such assignment would only be voidable at the request of a true beneficiary to the securitized trust (*i.e.*, the certificateholders) – not the borrower.

The Court also rejected the argument that a borrower in default suffers no prejudice from foreclosure by a purported unauthorized party, as some California appellate courts have previously held. Citing to an amicus curiae brief submitted by the California Attorney General, the Court reasoned that a finding that “anyone may foreclose on a defaulting home loan borrower would multiply the risk for homeowners that they might face foreclosure at some point in the life of their loans.” The Court went on to state that “[w]hen a property has been sold at a trustee’s sale at the direction of an entity with no legal authority to do so, the borrower has suffered a cognizable injury.”

Although the California Supreme Court limited its holding in *Yvanova* to challenges of already-completed foreclosure sales and allegations of a void assignment, we anticipate that this ruling will increase the amount of post-foreclosure litigation, as well as cause an increase in the volume of preemptive wrongful foreclosure cases. Notably, while the Court stated that it does “not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party’s right to proceed,” the Court later clarified that it did not address “whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward.” We anticipate that the plaintiffs’ bar will latch onto this language as indicating such a claim is not necessarily prohibited under California law.

In the wake of the *Yvanova* decision, the mortgage servicing industry should be prepared for an increase in wrongful foreclosure cases in California and should further anticipate an increase in the number of cases that will survive the initial pleading stage. That said, the holding in *Yvanova* does not significantly impact the actual liability exposure in these borrower suits, as these securitization-based claims are typically without merit and can be defeated on summary judgment. **One possible way to combat the anticipated wave of litigation is to start advising plaintiffs at the outset of the litigation of the lender/servicer’s right to attorneys’ fees under the deed of trust, and if necessary, actually pursue such fees against the plaintiffs. Letting borrowers know at the outset that they are going to be**

on the hook for attorneys' fees may encourage quicker dismissals once the borrowers are faced with evidence of the propriety of the foreclosure.