

California Supreme Court Sides With Borrower Challenging Authority of Foreclosing Lender in Wrongful Foreclosure Case

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McGlinchey Consumer Finance Alert

The California Supreme Court issued a surprising decision last Thursday in *Yvanova v. New Century Mortgage Corp, et al.*, Docket No. S218973 (CA Supreme Court February 18, 2016), ruling unanimously to allow a borrower to challenge a foreclosure based on an allegedly void assignment of their loan, even where he or she is in default on the loan and was not a party to the challenged assignment. The decision means the mortgage industry will need to bolster its procedures for documenting assignments of mortgage loans to respond to newly expanded challenges.

The primary holding of the 33-page opinion is that only a lawful beneficiary of a deed of trust or its lawful assignee can direct a trustee to hold a foreclosure sale. This would not seem controversial. However, the Court went further in stating that, where a borrower alleges a foreclosure is unauthorized due to a void assignment, he or she has alleged prejudice sufficient to confer the right (standing) to make such a claim even though the borrower was not a party to the challenged wrongful agreements, and is in default on his or her loan.

The court essentially sided with a 2013 state appellate ruling in *Glaski v. Bank of America*, 218 Cal.App.4th 1079 (2013), which held that a borrower had standing to challenge a nonjudicial foreclosure sale based on alleged violations of the terms of a pooling and servicing agreement. *Glaski* had been roundly criticized and had not been followed by either other appellate courts or federal courts. Those courts instead held that borrowers were not victims of (and were not prejudiced by) alleged deficiencies in underlying foreclosure documents because their obligations under the loan remained unchanged.

But the *Yvanova* Court rejected the majority position, reasoning that a borrower owes money not to the world at large, but to a particular person or institution. Thus, if a purported assignment necessary to the chain is void,

a foreclosing entity has acted without legal authority by pursuing a trustee's sale, constituting prejudice to the borrower.

Did the California Supreme Court Just Open the Door For Defaulting Mortgage Borrowers to Halt Nonjudicial Foreclosures and Seek Damages Based on Missing or Inaccurate Documentation?

Maybe. The Court tried to limit the scope of its ruling by holding that: "We do 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." (*Id.* at page 2)

But despite repeatedly stating that its holding was only applicable to wrongful foreclosure claims brought *after* a foreclosure sale, the court's logic would seem to apply with equal force in the pre-foreclosure context. The opinion provides a new opening for those who claim that missing or inaccurate documents have been used to initiate or complete foreclosures, and has the potential to radically increase the number of lawsuits brought by borrowers, particularly on loans that were pooled into securitized trusts.

The Court left unaddressed several questions that will determine the ultimate expanse of its ruling. For example, crucial to the outcome in *Glaski* was the holding that not only did a borrower have standing to assert a void assignment, but that a transfer of a loan into a securitized trust after the PSA closing date was, in fact, void under New York law. 218 CalApp.4th at 1095-1098.

The *Yvanova* Court expressly declined to address this question, though subsequent rulings have cast doubt on the *Glaski* court's interpretation. In any event, much remains to be determined with respect to the type of alleged flaws in the chain of title or other documents that would actually render a specific transaction void, or merely voidable.

Moreover, the *Yvanova* decision left open the question of what remedies a plaintiff, who otherwise is in default on a loan, would be entitled to under such a theory. The opinion does suggest, however, that if a borrower can allege voidness of a necessary foreclosure document, even after the sale, he or she may be able to assert the right to statutory damages under the California Homeowner Bill of Rights or general and punitive damages under general tort claims, *i.e.*, wrongful foreclosure. This could lead to a spate of related title insurance claims.

Response to Thursday's Ruling

Mortgage servicers and lenders must continue to verify and attempt to fix any defects in title. In cases where issues are identified as to validity of assignments or other underlying documents, judicial foreclosure may provide an effective alternative to avoid post-sale challenges.

If you have further questions regarding the impact of the Supreme Court's decision, please contact a member of our [Consumer Financial Services Litigation team](#).