

MORTGAGEE BY MERGER MUST RECORD MORTGAGE ASSIGNMENT TO AVERT A VOIDABLE FORECLOSURE

In December of 2012, the Michigan Supreme Court^[1] addressed the provision of Michigan’s foreclosure by advertisement statute^[2] that requires a record chain of title evidencing the assignment of a mortgage to the party foreclosing the mortgage. In explaining its decision, the Supreme Court revisited long-standing Michigan common law^[3] that exempts mortgages transferred by “operation of law” from the statutory mandate for a recorded assignment. In holding that a mortgage transfer from the FDIC (as statutory receiver of a failed bank) to a “rescue” bank acquiring the failed bank’s assets was not a transfer by operation of law and a recorded assignment was therefore required, the Supreme Court’s opinion can be read to define, and limit, a transfer by “operation of law” to one “that occurs unintentionally, involuntarily, or through no affirmative act of the transferee.”

But the Supreme Court left unanswered the important question of whether a mortgage acquired in a merger fits within these new “operation of law” parameters. The Michigan Court of Appeals, in a published opinion issued June 24, 2014, provided the answer.

In *Federal Home Loan Mortgage Assn v Kelley, et al.* (Case No. 315082), the Michigan Court of Appeals applied the “operation of law” definition established by the Michigan Supreme Court in *Kim* to the situation where the mortgage holder acquired the mortgage as part of a merger transaction. Focusing on the fact that the merger survivor voluntarily signed the merger agreement, the Court of Appeals held that the mortgage therefore could not have passed “unintentionally, involuntarily, or through no affirmative act of the transferee.” In so holding, the Court danced (unconvincingly) around the fact that, under most statutory merger regimes, assets transfer automatically under the statute upon consummation of the merger.^[4]

The Court of Appeals’ holding in *Kelley* will require an additional step—recording evidence of the assignment—before a successor mortgagee by

merger can properly foreclose the mortgage by advertisement in Michigan. But it is not all bad news for mortgagees. Despite the mortgage holder's failure to record evidence of the assignment via merger, the Court of Appeals in *Kelley* also held that the failure did not render the foreclosure sale void, only voidable, and adopted the *Kim* requirement that, to overturn the foreclosure, the mortgagor must demonstrate prejudice by showing it would have been in a better position to preserve its interest in the property absent the foreclosing mortgagee's failure to record the assignment, a heavy burden to be sure.