

**CALIFORNIA SUPREME COURT OPENS DOOR FOR
WRONGFUL FORECLOSURE LAWSUITS AND CHALLENGES TO
TRANSFERS OF MORTGAGES: PRACTICAL IMPLICATIONS
AND OPTIONS MOVING FORWARD**

In *Yvanova v. New Century Mortgage Corporation et al*, the Supreme Court of California reversed the Court of Appeal's ruling, and held that a borrower plaintiff who has been subject to a nonjudicial foreclosure has standing to bring an action for wrongful foreclosure based on an allegedly void deed of trust assignment (without making any determination as to whether the alleged facts established a void assignment). In so doing, the Supreme Court came down solidly in favor of the "aggrieved" borrower thus settling, at least in California and likely other non-judicial foreclosure states, the issue regarding the standing of such a plaintiff to challenge the acts of a securitization trust. Since the financial crisis there have been several cases considering the standing issue, most notably the California Court of Appeal decisions in *Glaski v. Bank of America, N. A.* (2011) 198 Cal. App. 4th 256 (holding the plaintiff had standing to challenge the authority of the beneficiary to foreclose) and *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal. App. 4th 497 (holding the plaintiff had no standing to enforce the terms of the agreements allegedly violated). The Supreme Court stated "On the narrow question before us – whether a wrongful foreclosure plaintiff may challenge an assignment to the foreclosing entity as void- we conclude *Glaski* provides a more logical answer than *Jenkins*."

The *Yvanova* case has a particularly bad fact pattern where the deed of trust was executed in 2006 together with an assignment of mortgage or deed of trust "in blank", or without filling in the name of the assignee of the deed of trust and recording the assignment. New Century, the lender and beneficiary on the deed of trust, filed for bankruptcy on April 2, 2007 and on August 1, 2008 was liquidated and its assets were transferred to a liquidation trust. Prior to that time, the mortgage was sold to a securitization trust – MSAC-2007 Trust-HE-1 Pass Thru Certificates. Ocwen Loan Servicing LLC, as attorney in fact for New Century, completed the assignment of mortgage on December 19, 2011, and the assignment was recorded on December 30, 2011. Although not deciding on the issue of whether the assignment was "void" and not merely "voidable", the Court noted that New Century no longer existed when the assignment of mortgage was "completed". The foreclosure occurred in September 2012.

Practical Implications for Securitization Trusts

Securitization trusts have typically provided for assignments of deeds of trust or mortgages to be completed in blank. There are practical reasons for such a delay in recording the assignments:

- Holding the assignment in blank (rather than the recorded assignment) cuts down on the paperwork and expense relating to reconveyance of a mortgage loan to the Seller if the Seller was required to buy back a mortgage due to breach of representations given by the Seller at the time the loan was sold to securitization trust.
- Assignments in blank provide flexibility for the trust to deal with the deeds of trust in the future. The assignment in blank was considered a low-risk manner of conveying a mortgage loan while maintaining maximum flexibility, at least until the financial crisis. It was during the financial crisis that we began to see a line of cases chipping away at the established legal principle (codified in the uniform commercial code) that the mortgage (or deed of trust in the case of California) follows the note.

Regardless of whether the court got the issue of the legal/beneficial ownership of the loan and the deed of trust right, the decision regarding the standing of the plaintiff to challenge the foreclosure is problematic.

The Use of Titling Trusts

The Court of Appeal will now decide whether the bankruptcy of New Century and the fact that the securitization trust was closed to new loans at the time of completion of the assignment, constitutes the assignment of the deed of trust “void” and not merely “voidable”. While we await the decision, the time may be right to rethink the manner in which deeds of trust are assigned to securitization trusts. Particularly since the timing issues relating to conveyance of the loans to the trust remain with us today. One alternative to consider is the use of a “titling trust”. In a titling trust, the deed of trust would be assigned to the trustee of the titling trust and recorded in the trustee’s name. The mortgage loans to be securitized would then be allocated to, and held in, a special unit of the titling trust, or “SUBI”. A securitization trust would acquire the SUBI and would issue securities secured by the SUBI interest in the titling trust. There would be no need for assignments in blank because the deed of trust would not have to be

transferred outside of the titling trust until such time as the property was to be reconveyed to the original borrower.

Conclusion

It is now settled law in California that a plaintiff in a wrongful foreclosure may challenge an assignment to the foreclosing entity as void. Although it is too late to rectify the manner in which the assignments securitization trusts were done in the past, we can change how we structure these transactions going forward. The private securitization market is poised to make a comeback. We should seize the opportunity to rectify the chain of assignment problem.