

**CALIFORNIA SUPREME COURT: BORROWERS HAVE  
STANDING TO ALLEGE WRONGFUL FORECLOSURE BASED ON  
VOID ASSIGNMENT OF NOTE**

For the past few years, California appellate courts have been split on the question of whether a borrower has standing to challenge a foreclosure based on allegations that a purported assignment of the note and deed of trust to the foreclosing party was defective and void.

In a decision published February 18 — [\*Yvanova v. New Century Mortgage Corporation\*](#) — the California Supreme Court resolved the split of authority, and confirmed that a borrower has standing to allege wrongful foreclosure based on a *void* (but not merely *voidable*) assignment of the note or deed of trust.

**Facts**

Based on the complaint:

The borrower signed a note in 2006 in the amount of \$483,000 for residential property in Woodland Hills, California. The lender was New Century Mortgage Corporation. New Century filed for bankruptcy in 2007, and was liquidated in 2008, with its assets transferred to a liquidation trust controlled by a bankruptcy trustee.

In 2011, New Century (despite its earlier dissolution) executed a purported assignment of the deed of trust to Deutsche Bank National Trust, as trustee of a Morgan Stanley investment trust. However, that investment trust had a “closing date” (after which no new assignments could be accepted by the trust) of January 27, 2007.

In 2012, Western Progressive, LLC substituted itself for Deutsche Bank as trustee, recorded a notice of trustee’s sale of the property, and completed the trustee’s sale.

The borrower sued several defendants, claiming the assignment of the deed of trust from New Century to the Morgan Stanley investment trust was void for two reasons: (1) New Century’s assets has previously (in 2008) been transferred to a bankruptcy liquidation trust; and (2) the Morgan Stanley investment trust had closed to new loans in 2007.

## **Rulings by the trial court and court of appeal**

The trial court sustained defendants' demurrer to the borrower's complaint and dismissed the action.

The court of appeal affirmed the dismissal, holding that the borrower failed to tender payment of the debt, and that the borrower was a third party to the alleged assignment, and therefore lacked standing to challenge its validity.

The California Supreme Court granted review, limiting the issue to whether, in a wrongful foreclosure action, the borrower has standing to challenge an assignment of the note or deed of trust on the basis of defects allegedly rendering the assignment void.

## **Supreme Court's Opinion**

### **Holding**

The Supreme Court held:

We conclude a home loan borrower has standing to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust was not merely voidable but void, depriving the foreclosing party of any legitimate authority to order a trustee's sale.

The Court distinguished between "void" and merely "voidable" assignments, and also limited the reach of its ruling in important respects.

### **Void vs. voidable**

The Court started by acknowledging that normally a borrower cannot object to assignment of the note and deed of trust because a note is a negotiable instrument that can be sold without notice, and the deed of trust is inseparable from the note and follows it even without a separate assignment.

But, the Court observed, if the borrower defaults on the loan, only the *current beneficiary* (the original beneficiary or its valid assignee or agent) may direct the trustee to undertake the nonjudicial foreclosure process under California law. A foreclosure initiated by one with no authority to do so is "wrongful."

As to “whether and when” a wrongful foreclosure plaintiff may challenge an assignment, the Court turned to the distinction between void and voidable transactions.

A **void** transaction has no legal effect, and “has no existence whatsoever.” It cannot be ratified or validated even by the parties to the transaction.

A **voidable** transaction, on the other hand, is one where either party to the transaction (but usually *not an outsider*) may elect to avoid, or to ratify, the legal relations created. The transaction can be declared void, but is not void in itself.

The Court sided with a prior line of cases holding that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment, not merely render it *voidable*.

The Court rejected the defendants’ arguments that the borrower suffered “no prejudice” from foreclosure by an unauthorized party because she was in default, and the actual beneficiary could just as well have foreclosed. The Court held that the borrower suffered sufficient prejudice through the lost ownership of her property in an allegedly illegal sale.

The Court further held that the borrower had a legitimate interest in identifying the true beneficiary: “The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security.”

Driving home this point, the Court quoted a Texas district court opinion:

Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank’s deed of trust.

### **Limitations on the holding**

The Court made clear that it was not reaching several issues.

First, the Court limited its opinion to wrongful foreclosure claims — i.e., those challenging *completed* foreclosure sales. The Court declined to extend its holding to actions for injunctive relief seeking to stop an *impending*

foreclosure sale. As to the latter, the Court acknowledged other cases holding that pre-foreclosure lawsuits challenging the foreclosing beneficiary's authority would delay valid foreclosures and re-route the nonjudicial foreclosure process into the court system. (On the other hand, it would seem odd to force borrowers with a legitimate gripe about a void note assignment to suffer the loss of their property before asserting a claim.)

Second, the Court declined to decide the factual issue of whether the assignment of the note to the securitized trust made after the trust's closing date was void or instead, merely voidable. As such, that question will have to be resolved in future proceedings.

Third, the Court declined to address whether the borrower's lawsuit was fatally flawed by a lack of "tender" of the debt owed. The Court noted that the tender requirement has been excused in circumstances where the borrower alleges the trustee's deed is facially void, "as arguably is the case when the entity that initiated the sale lacked authority to do so." But the Court expressed no opinion as to whether tender was excused in this case.

Finally, the Court declined to address the recently enacted Homeowner Bill of Rights, since that legislation post-dated the foreclosure sale at issue. (Certain provisions of the Homeowner Bill of Rights prohibit any entity from foreclosing unless it is the beneficiary under the note and deed of trust — see Civil Code section 2924(a)(6).)

## **Lesson**

A borrower has standing to claim a nonjudicial foreclosure sale was wrongful on the grounds that an assignment of the note or deed of trust to the purported foreclosing beneficiary was "not merely voidable, but void." Lenders must carefully plan and meticulously document such assignments.