

DECISION LIMITING THE REACH OF YVANOVA

On March 16, 2016, California's Fourth Appellate District issued its opinion in *Saterbak v. JPMorgan Chase Bank, N.A.*, Case No. D066636, finding that a borrower does not have standing to challenge an assignment of her Deed of Trust before a foreclosure sale takes place. While the California Supreme Court's recent ruling in *Yvanova v. New Century Mortgage Corp.* found that borrowers may have standing, *after* the foreclosure sale has occurred, to pursue wrongful foreclosure claims based on a void assignment of the loan, *Saterbak* provides a strong basis for preventing *pre-foreclosure sale* actions based on securitization or fraudulent assignment theories.

The borrower in *Saterbak* sought to cancel the assignment of her Deed of Trust based on two familiar theories. She argued that the Assignment was executed and recorded after the closing date of the Pooling and Servicing Agreement (PSA) of the trust. She also argued that the Assignment should be cancelled because the signature was either forged or "robo-signed."

At the trial court, JPMorgan demurred to the borrower's complaint on the basis that, as a third party to the PSA and the Assignment, she lacked standing to challenge the Assignment. The trial court agreed and dismissed the complaint. The central issue on appeal was whether the borrower had "standing to challenge the assignment of the DOT on the grounds that it does not comply with the PSA for the securitized instrument."

The Court first addressed the burden of establishing standing. The borrower argued that the securitized trust should bear the burden of establishing the validity of the Assignment. The Court rejected the argument and explained that as the party seeking to cancel the Assignment, the borrower must demonstrate "some such beneficial interest that is concrete and action, and not conjectural or hypothetical." The Court also distinguished cases in which an assignee filed a suit to enforce its assigned rights, explaining that those cases are inapplicable when a borrower files suit to challenge an assignment.

After determining that the borrower had the burden to establish standing, the Court concluded that she failed to meet that burden. Relying on *Jenkins v. JPMorgan Chase Bank, N.A.* and *Gomes v. Countrywide Home Loans, Inc.*, the Court explained that it is inconsistent with the legislature's comprehensive non-judicial foreclosure scheme to require a foreclosing entity to prove its authority to foreclose in court *prior* to conducting a sale.

The Court then addressed *Yvanova* and distinguished it on two grounds. First, the Supreme Court expressly limited its holding to the post-foreclosure sale context. Second, *Yvanova* expressly declined to rule on the issue of whether an assignment after the PSA's closing date would render the assignment *void* or *voidable* under the applicable New York law. Because *Yvanova* found that a borrower has standing for a post-foreclosure wrongful foreclosure action only where the assignment is *void*, and not just *voidable*, *Yvanova*'s standing analysis was inapplicable where the assignment would be simply voidable. The Court went on to conclude that an assignment that failed to comply with the terms of the PSA would be "merely voidable," adopting a Second Circuit Court of Appeals decision and rejecting the contrary holding in *Glaski v. Bank of America*. In sum, the *Saterbak* Court concluded that the borrower lacked standing because her lawsuit was brought before the foreclosure sale occurred and because the basis of her challenge was not a *void* assignment.

Saterbak is an important decision that should help prevent *Yvanova*'s analysis from expanding to pre-foreclosure cases. It also provides support for the argument that, even in a post-*Yvanova* world, an assignment that does not comply with a PSA is simply voidable, rather than void. Despite the *Saterbak* decision, however, the California Supreme Court has granted review in *Keshtgar v. U.S. Bank, N.A.*, Case No. S220012. That decision will eventually address standing in the pre-foreclosure context.