

WHAT THE DECISION IN YVANOVA MEANS

The California Supreme Court leaves much unresolved in case

The California Supreme Court has just issued its much anticipated decision in the case of *Yvanova v. New Century Mortgage Corporation*. As stated by the Supreme Court in its order granting review, the sole issue up for review in *Yvanova* was: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?" Unfortunately, despite extensive briefing on both sides concerning the necessary and possible consequences of that determination, the Court's opinion explicitly stated:

Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a non-judicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. **We do not hold or suggest that a borrower may attempt to preempt a threatened non-judicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements. [Opinion at p. 2]**

Essentially, despite expounding on the issues for 30 pages, the opinion just stands for the unremarkable (and, largely, undisputed) proposition that a borrower has standing to sue for wrongful foreclosure where the transaction by which the beneficiary acquired the loan was void at its inception. That

point was even conceded, to some degree, by respondents in their brief.

What the Supreme Court specifically *avoided* doing, however, was to provide any clarity or even guidance as to what constitutes a void versus merely voidable transaction¹, with what level of specificity a borrower must plead to establish a claim that the transaction was void (so as to be able to survive a demurrer or motion to dismiss), whether tender is required as a precondition of the borrower's suit (as it otherwise typically is in wrongful foreclosure actions), or, most importantly, whether the borrower can bring a pre-emptive (pre-foreclosure) challenge on the basis of a claim that the transaction was void ["This aspect of Jenkins, disallowing the use of a lawsuit to preempt a non-judicial foreclosure, is not within the scope of our review, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for wrongful foreclosure."** Opinion at pp.16-17].²**

The Court declined to consider any of the factual arguments made by Respondent to show that, in this particular case, at least, the transaction was, at worst, voidable. Oddly, the Court also did not address the purely legal issue (although argued in the briefs) of whether an assignment needed to be recorded at all to effect the transfer of the loan. These issues were all left to the lower courts to determine in the individual cases.³

What the Court did do, though, that might prove troublesome in cases still pending or yet to be filed, is reject the defense arguments that other, lower court cases had sometimes relied upon to the effect that:

- 1. It is irrelevant to the borrower who is enforcing the debt,**
- 2. There is no harm/prejudice to the borrower from the "wrong party" foreclosing if the loan is in default**

- 3. The borrower must show that the “true” owner would have refrained from foreclosing**
- 4. Borrowers lack standing to challenge an assignment *as void* because they are not parties to the assignment.⁴**

The focus of defense will thus need to shift away from those arguments to issues which might pose more factual questions that are not usually suitable for resolution on demurrer or motion to dismiss.

Of course, given the recent change in the law concerning demurrers in California, there is already reason for beneficiaries/servicers to consider deferring their challenges to the borrower’s claims of void transactions to a summary judgment motion, where the “facts” alleged by the borrower can more fully be refuted. However, **motions to dismiss in federal court remain potentially fruitful options given the stricter pleading standards imposed by the federal system.**

The impact of the Supreme Court’s ruling on the lending and foreclosure industries – and the courts – in California will likely be significant. The uncertainty on the unresolved issues will undoubtedly lead to more litigation and confusion and create far greater expense for borrowers, lenders, servicers and foreclosure trustees.

It will also, inevitably, further inundate an already overburdened court system. As noted in our Amicus Brief in support of the respondents’ position⁵, among the likely detrimental effects of an adverse ruling here would be: an increased cost to obtain loans in California; tighter underwriting standards to reduce the risk of default; fewer investors willing to take the risk of secondary market loans (further drying up funding sources); an increased risk and rate of borrower defaults as borrowers find it harder to obtain new credit (and/or as a result of some less scrupulous borrowers’ “gaming the system” to continue to live in properties without having to make any payments to anyone);

a decrease of available housing in the market since there will be fewer foreclosed properties for sale; and those properties on which borrowers are already not making their loan payments are also less likely to be properly insured or maintained, resulting in increased blight and property hazards.

The opinion the Court ultimately issued here does nothing to assuage those concerns.

[1] The Court did concede, though, that defects which merely rendered a transaction voidable would not suffice for the borrower to bring suit. [Opinion at p.20]

[2] Although the Court briefly discussed the holding in *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, **rejecting borrower standing to sue for a supposedly void transaction prior to a foreclosure sale taking place, the Court expressed no opinion as to whether *Kan* was correctly decided. [Opinion at p.27] While *Yvanova* is now likely to be invoked there as well, ***Kan* remains a published opinion, which can and should still be cited in pre-foreclosure cases.****

[3] The Court also declined, as unnecessary to its opinion, to determine whether the California Homeowners Bill of Rights supported a borrower's standing to sue. Thus leaving that issue open for argument as well. [Opinion at p.28]

[4] The Court expressly disapproved *Jenkins v. JPMorgan Chase Bank, N.A.*; *Siliga v. Mortgage Electronic Registration Systems, Inc.*; *Fontenot v. Wells Fargo Bank, N.A.*; and *Herrera v. Federal National Mortgage Assn.*, "to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void." [Opinion at p.25, fn.13].

[5] Wright, Finlay & Zak, LLP filed an Amicus Curie brief on behalf of industry groups, the United Trustees Association and American Legal and Financial Network.