

MICHIGAN SUPREME COURT ISSUES OPINION ON STATE'S FORECLOSURE STATUTE

Shortly before the end of 2012, the Michigan Supreme Court issued its first opinion in a calendar case on Michigan's foreclosure statute in nearly 20 years. In **Kim v JPMorgan Chase Bank, N.A.**, --- Mich ----; --- NW2d ---- (Mich Dec 21, 2012) (No 144690), the Court was unanimous in upholding long-standing Michigan case law stating that deficiencies in the foreclosure process make a foreclosure sale voidable, not void *ab initio*.

The difference is subtle, but significant. Voidable sales may be set aside, but only if the mortgagor can show it was prejudiced by any alleged deficiencies. Sales that are void *ab initio* are simply invalid, whether the mortgagor was harmed or not – and even if the foreclosed property has since been sold to one or more innocent purchasers. The *Kim* decision comes in response to a growing number of Michigan Court of Appeals decisions following the Court of Appeals' 2007 ruling in *Davenport v HSBC Bank USA*, which held that at least certain types of deficiencies made a foreclosure sale void *ab initio*. 275 Mich App 344; 739 NW2d 383 (2007). By rejecting *Davenport* and its progeny, *Kim* gives a great deal more certainty to foreclosing mortgagees, purchasers of foreclosed property and the title companies insuring those sales alike.

Despite the full Michigan Supreme Court agreeing on this point, the Court split 4-3 on the actual merits of the *Kim* case. At issue was whether a transfer by the FDIC of a closed bank's assets was a transfer by operation of law, or a more typical asset sale. Justice Marilyn Kelly, writing for the majority, explained that this transfer was a sale of assets and not a transfer by operation of law. Because it was not a transfer by operation of law, the majority held that the mortgagee of the *Kim*'s property was unquestionably required to record an assignment before the sheriff's sale under MCL 600.3204(3). Since the mortgagee failed to do so, the sheriff's sale is voidable. **The Court remanded for determination of whether the mortgagor was prejudiced.**

In his concurring opinion, Justice Markman offered additional guidance concerning the nature of the "prejudice" that a plaintiff must demonstrate in order to set aside a foreclosure. *Id.* at 121. He suggested that courts consider the following factors: 1) whether the plaintiff was misled into believing that

no sale had been had; 2) whether the plaintiff acted promptly after becoming aware of the facts on which his or her complaint is based; 3) whether the plaintiff made an effort to redeem the property during the redemption period; 4) whether the plaintiff was represented by counsel throughout the foreclosure process; and 5) whether the defendant relied on the apparent validity of the sale by taking steps to protect its interest in the subject property. *Id.*

In other words, Plaintiffs would have to show that they would have been able to redeem the property, make their monthly payments, or prevent foreclosure but for the assignment.