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Yvanova: Borrowers Achieve Limited Victory in the California Supreme Court

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After two years of waiting, on February 18, 2016, the California Supreme Court issued its decision in *Yvanova v. New Century Mortgage Co.,* No. S218972. A dud on arrival, the decision resolves only one exceedingly narrow issue—that a foreclosed California borrower now has standing to sue for wrongful foreclosure based on a claim that an assignment of the loan and beneficial interest in the deed of trust was absolutely void, not merely voidable. A void assignment, the Court reasoned, deprives a foreclosing party of any legitimate authority to complete a nonjudicial foreclosure sale.

At first glance, this holding may appear formidable and disheartening to servicers. To be sure, *Yvanova* will no doubt invite more borrower lawsuits attacking the validity of nonjudicial foreclosure sales on the ground that earlier assignments were void. However, *Yvanova* is no insurmountable obstacle. A few considerations for servicers:

Yvanova Is A Narrow Holding That Leaves Many Defenses Intact. The Supreme Court's opinion is far narrower than its holding suggests. Indeed, the Supreme Court emphasized the opinion's limited scope no less than nine times throughout the opinion.

For example, although the opinion holds that borrowers have standing to challenge nonjudicial foreclosure sales where the assignments were supposedly void, the Supreme Court stopped short of explaining *what* facts might render an assignment void. The vast majority of wrongful securitization lawsuits assert that an assignment was defective because it was accomplished after a trust closing date—an event that does *not* render an assignment void, at least as to trusts governed by New York law. So, in many cases, although borrowers will now have standing to attack nonjudicial foreclosure sales on the basis that an assignment was *void*, their suit may still be subject to dismissal if the allegations or evidence prove that the assignment was merely *voidable*. *Yvanova* carefully avoided answering whether a post-closing date transfer into a New York securitized trust is void or merely voidable.

Similarly, *Yvanova* deliberately avoided addressing one of the most common grounds servicers use to defeat meritless borrower lawsuits in California where the foreclosure sale has not yet occurred. As the Court put it, “[w]e do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed.” So, where a nonjudicial foreclosure sale has not yet been completed, servicers may continue citing California authorities disapproving of speculative, pre-foreclosure attacks on a party's authority to foreclose.

Yvanova also avoided addressing California's tender rule—an equitable rule that, with a few narrow exceptions, requires borrowers to tender the loan balance as a prerequisite to setting aside a completed nonjudicial foreclosure sale. So, servicers may continue using that rule as a tool in defending borrower lawsuits predicated on defective assignments.

Prepare for New Arguments That Assignments Are Void. Since *Yvanova* does confer standing to borrowers who allege that assignments are *void*, borrowers now have a greater incentive to fashion their complaints to portray the assignments as the product of a forgery, or alternatively, a fraud in the execution or inception of the assignment. Either of those scenarios could render the assignment void. So, prudent servicers will prepare themselves to disprove those sorts of allegations, and to explain how a recorded assignment differs from earlier unrecorded assignments that may have occurred—another issue *Yvanova* expressly dodged.

Evidence Is Now More Important. Since borrowers now have standing to assert causes of action arising from void assignments, more lawsuits will undoubtedly survive pleadings challenges. So, more cases will need to be disposed of through motions for summary judgment or trial, thereby making evidence far more important than it was before *Yvanova* was decided. Servicers that have grown accustomed to prevailing on demurrer should prepare for a shift in how wrongful securitization lawsuits are defended. People who signed assignments many years ago may now become important witnesses. What may have previously been an objectionable discovery request, may now be fair game.

Yvanova undoubtedly affords borrowers a new right, but the opinion should not be viewed with derision, fright, or dismay. Standing is merely a threshold question, and borrowers' newly created right of standing says nothing of their lawsuits' substantive merit. However, in light of *Yvanova*, counsel should immediately review any pending securitization-related matters to determine what alternative grounds might exist to defeat the suits, whether supplemental briefs need to be filed in any trial or appellate courts, and whether settlement negotiations should be reconsidered.

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