

# 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.<sup>1</sup>

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 and their outside counsel:

***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.<sup>2</sup>

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.

Importantly, 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.<sup>3</sup> 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.<sup>4</sup> *Yvanova* carefully avoided answering whether a post-closing date transfer into a New York securitized trust is void or merely voidable.<sup>5</sup>

Similarly, *Yvanova* deliberately avoided addressing one of the most common grounds ser-

vicers 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."<sup>6</sup> 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.<sup>7</sup>

*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.<sup>8</sup> So, servicers may continue using that rule as a tool in defending borrower lawsuits predicated on defective assignments.

***Prepare for 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.<sup>9</sup> 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.<sup>10</sup>

***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.

<sup>1</sup>*Yvanova v. New Century Mortgage Corp.* (February 18, 2016; S218972) \_\_ Cal.4th \_\_ Slip Opn. at p. 2 ("Yvanova").

<sup>2</sup>*Id.* at pp. 2, 12, 13, 16, 17, 18, 27, and 29 (i.e., "Our ruling is a narrow one." "On the narrow question before us..." "We do not address the distinct question of...").

<sup>3</sup>*Rajamin v. Deutsche Bank Nat. Trust Co.* (2nd Cir. 2014) 757 F.3d 79, 88-89.

<sup>4</sup>A void contract is one without any legal effect, whereas a voidable contract is one that a party may subsequently ratify. (*Yvanova*, at p. 10.)

<sup>5</sup>*Yvanova*, at p. 13 ("We did not include in our order the question of whether a postclosing date transfer into a New York securitized trust is void or merely voidable, and though the parties' briefs address it, we express no opinion on the question here.")

<sup>6</sup>*Yvanova*, at p. 2.

<sup>7</sup>See e.g., *Kan v. Guild Mortgage* (2014) 230 Cal.App.4th 736, 743-744.

<sup>8</sup>*Yvanova*, at p. 9, fn. 4.

<sup>9</sup>*Village Northridge Homeowners Ass'n v. State Farm Fire and Cas. Co.* (2010) 50 Cal.4th 913, 921; *Schiavon v. Arnaut Bros.* (2000) 84 Cal.App.4th 374, 378.

<sup>10</sup>*Yvanova*, at p. 29.

## KNOW THIS

Utah tied with 7 other states (North Dakota, Michigan, California, Arizona, Colorado, Nebraska, and Montana) for the second-lowest foreclosure inventory rate in the nation as December 2015 with 0.4 percent. Alaska and Minnesota tied for the lowest rate with 0.3 percent, according to CoreLogic.