THE CALIFORNIA SUPREME COURT'S DECISION PERMITTING BORROWERS TO CHALLENGE ASSIGNMENTS OF MORTGAGE SHOULD NOT HAVE AN IMPACT UPON FLORIDA

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The California Supreme Court has weighed in on the thorny issue of whether and when a borrower should be permitted to challenge an assignment of mortgage in a recent decision, Yvanova v. New Century Mortgage Corp. In doing so, it has become one of few state supreme courts to address this issue, which has become a centerpiece in foreclosure defense and claims by consumers nationwide against lenders, their servicers, agents and vendors. Most courts that have addressed this issue have held that a borrower cannot contest the validity of an assignment of mortgage because the borrower is not a party to that contract.

California is a non-judicial foreclosure state that permits the lender to foreclose without judicial proceedings as a beneficiary of a deed of trust that, like a mortgage, is a considered a lien upon real property in many jurisdictions including Florida. In California, a borrower is generally limited to a post-foreclosure action for wrongful foreclosure seeking damages, the reconveyance of title, or both. Many California courts have limited such an action to circumstances where the borrower alleges he or she is not in default. The overwhelming majority of California opinions on the issue have also held that a borrower lacks standing to contest an assignment of mortgage. On February 18, 2016, the legal landscape in California changed.

Yvanova brought a wrongful foreclosure action alleging that her loan and deed of trust had been conveyed to the securitized residential mortgage trust after the “closing date” or deadline to convey mortgages to the trust. She alleged that the conveyance, in violation of the trust’s pooling and servicing agreement, was void. As a result, plaintiff contended that the foreclosing party, the assignee, lacked authority to foreclose.

The California Supreme Court first rejected lack of a default as a pre-condition to a wrongful foreclosure action. The Court then held that a borrower possesses standing to challenge an assignment if the plaintiff alleges sufficient facts to establish that the assignment is void, not merely voidable. When an assignment is void, the lender lacks authority to foreclose. An assignment is merely voidable, and cannot be challenged, if it could be ratified or the parties to the assignment could otherwise elect to avoid the legal consequences of the contract. However, the Court declined to rule on what circumstances would render an assignment void as opposed to voidable, or even whether Yvanova’s “failed securitization” theory is viable. The Yvanova decision threatens to spawn a significant quantity of litigation in the nature of wrongful foreclosure or deceptive trade practices claims. Fortunately, other jurisdictions that have adopted the void versus voidable distinction have found a number of circumstances where an assignment is merely voidable and not subject to challenge.

While Yvanova will, no doubt, be cited in Florida and other jurisdictions, it should have minimal impact in our State. Florida decisions on standing in the foreclosure context have generally been limited to whether the foreclosing party held the note at the time that the foreclosure was commenced. This is because Florida has adopted the rule that the transfer of the note automatically transfers the mortgage, whether or not an

assignment has been recorded. An assignment is not essential to a foreclosure in Florida. This principle, which is grounded upon Article 3 of the Uniform Commercial Code, is known as “the mortgage follows the note.” An assignment is merely evidence that a loan has been transferred and, if recorded, provides record notice to subsequent lienholders and bona fide purchasers. Yvanova should have no impact in Florida.

For more information on this topic, please contact the author, Fred Goldberg, on the firm’s Dispute Resolution Team.

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