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Real Property Law Section
Presents

35TH ANNUAL REAL PROPERTY LAW SECTION RETREAT
Recent Developments in California Mortgage Law

Saturday, May 21, 2016
3:45 PM – 5:15 PM

Panelist(s):
- Harold Justman, Justman & Associates, Palo Alto
- Sanford Shatz, McGlinchey Stafford, Irvine
- Michael Simkin, Simkin & Associates, Los Angeles

California Real Property Law Section Retreat

Recent Developments in Mortgage Law

Sanford Shatz

May 11, 2016

Financial Services Regulation

- Long History
- Federal Statutes
- Federal Regulations
- State Statutes
- State Regulations
- Local Regulations
- Litigation

Dodd-Frank Act

- House: The Wall Street Reform and Consumer Protection Act of 2009
- Senate: Restoring American Financial Stability Act of 2010
- Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010)

Enumerated Consumer Laws

- The Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.) (1982); Reg. D
- The Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.); Reg. M
- The Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except section 920 (1968); Reg. E
- **The Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) (1968); Reg. B**
- The Fair Credit Billing Act (15 U.S.C. 1666 et seq.) (1975);
- The Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) (1970), except sections 615(e) and 628 (15 U.S.C. 1681m(e), 1681w) [amended by Fair and Accurate Credit Transactions Act of 2003]; Reg. V

Enumerated Consumer Laws

- The Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.) (1998);
- The Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.) (1978); Reg. F
- The Federal Deposit Insurance Act (12 U.S.C. 1831t(c)–(f)) (1950), section 43, subsections (b) through (f); Reg. I
- The Gramm-Leach- Bliley Act (15 U.S.C. 6802–6809) (1999), sections 502 through 509, except for section 505 as it applies to section 501(b);
- **The Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.) (1975); Reg. C**
- The Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note) (1994);

Enumerated Consumer Laws

- **The Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.) (1974); Reg. X**
- The Secure And Fair Enforcement (S.A.F.E.) Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.) (2008); Regs. G & H
- **The Truth in Lending Act (15 U.S.C. 1601 et seq.)(1968); Reg. Z**
- The Truth in Savings Act (12 U.S.C. 4301 et seq.) (1991); Reg. DD
- The Omnibus Appropriations Act, 2009 (Public Law 111–8), section 626 (2009);
- The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701) (1968); Regs. J & K

New Mortgage Rules

- Ability To Repay – Qualified Mortgages
- Appraisals – High Cost
- Appraisals – Disclosure and Delivery
- High Cost Mortgages and Counseling
- Escrows
- Loan Originator Compensation
- Mortgage Servicing
- TILA-RESPA Integrated Disclosure Rule
- Home Mortgage Disclosure Act Rule

Laws and Regulations

- The Truth in Lending Act (15 U.S.C. 1601 et seq.) (1968); Reg. Z
- The Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.) (1974); Reg. X
- California Homeowner Bill of Rights; Civil Code sections 2920, et seq.

Truth in Lending Act

- 15 U.S.C. 1601
  - Disclosure of costs of loans
  - Preliminary TIL and Final TIL
  - Rescission rights and damages
  - Now LE and CD
- 15 U.S.C. 1641(g)

15 U.S.C. 1641(g) (2009)

(g) Notice of new creditor

- (1) In general In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—
  - (A) the identity, address, telephone number of the new creditor;
  - (B) the date of transfer;
  - (C) how to reach an agent or party having authority to act on behalf of the new creditor;
  - (D) the location of the place where transfer of ownership of the debt is recorded; and
  - (E) any other relevant information regarding the new creditor.
- (2) Definition
  - As used in this subsection, the term “mortgage loan” means any consumer credit transaction that is secured by the principal dwelling of a consumer.

Real Estate Settlement Procedures Act

- **12 U.S.C. 2601**
  - **Good faith estimate**
  - **HUD-1 Closing Statement**
  - **LE and CD**
- 12 U.S.C. 2605 (b) & (c)

Notice of Transfer of Servicing

- 2605 (b)
- (1) Notice requirement - Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.
- Goodbye letter at least 15 days before transfer – provide information

Notice of Transfer of Servicing

- 2605 (c)
- (1) Notice requirement - Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.
- Welcome/Hello letter not more than 15 days before transfer – provide information

Background – California

Peralta Mortgage Relief Act

- Operative September 6, 2008
- "ASSESS the borrower's financial situation"
- "EXPLORE options for the borrower to avoid foreclosure"
- *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208
- "Time, time and more time"
  - Debt collection
  - Mortgage servicing

Mabry v. Superior Court

- State – regulates debt collection
- Federal – regulates business of financial services
- Preemption issues – NBA and HOLA
  - National Banks
  - National Associations

Homeowner Bill of Rights

- Process of reaching out to borrowers
  - Pre-foreclosure – no timing
  - Assess and explore
  - Solicit application
  - Evaluation application – no limit
  - Appeal rights – once appealed, no limit
  - Timing issues

Homeowner Bill of Rights

- Civil Code section 2924.17
- (a) A declaration recorded pursuant to Section 2923.5 or, until January 1, 2018, pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence.
- (b) Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower‘ s default and the right to foreclose, including the borrower's loan status and loan information.

Reg. X – 1024.41

- Process of reaching out to borrowers
  - Pre-foreclosure – **120 days**; 36/45
  - Assess and explore
  - Solicit application
  - Evaluation application – 90/45/37
  - Appeal rights - 30
  - Timing issues
- No federal preemption

Modification Consideration

- Complete (actual or facially) application
  - Borrower delays
  - Lender delays
- Evaluation
- Court ordered conferences
  - Orange County
  - Nevada
  - New York

Loan Transfers

- Transfer the Note
  - Mortgage or deed of trust follows the note.
    - "Under long-standing California and New York law, a deed of trust (or mortgage) "is a mere incident to the debt which it secures, and follows the transfer of a note with the full effect of a regular assignment." *Ord v. McKee,* 5 Cal. 515, 516 (1855). As codified in Cal. Civ. Code § 2936, "the assignment of the note carrie[s] with it the security of the deed of trust." *Seidell v. Tuxedo Land Co.,* 216 Cal. 165, 170 (1932)."
  - Notes may be transferred and endorsed to a specific person or in blank
  - Possession of note
  - To a Pooling and Servicing Agreement

Pooling and Servicing Agreements

- Loan is made, sold and pooled
  - All transfers documented
  - Loan schedule
- What does the borrower know?
  - Servicer
  - Loan owner
- REMIC Issues

Who can foreclose?

- The trustee, mortgagee, or beneficiary, or any of their authorized agents. Civil Code section 2924(a)(1)
- Process – record NOD
  - Trustee
  - Substitution of trustee
  - Substitution by code
  - Agent
- Directed by loan owner/servicer

Recorded Documents

- Deed of Trust
- Substitution of Trustee
- Notice of Default
- Notice of Sale
- Assignments (Timing)
- Trustee's Deed Upon Sale

Other States Different

- Florida
  - Need to establish standing at start of process
  - Complaint for judicial foreclosure
    - Need original endorsed note
    - Need original mortgage
    - Assignment helpful

New Challenges

- Timing of the execution and recording of the Assignment of Deed of Trust
- Assignments
  - Not always prepared
  - Trustee conducts foreclosure
  - Agent directs action
  - Needed for chain of title

What Happens If Late Assignment?

- *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079
  - Held that a borrower has standing to challenge the assignment of a loan to a securitized trust in violation of a PSA to which the borrower is neither a party nor a beneficiary because, under governing New York law, an assignment after the closing date of the trust is void. (*Glaski, id.* at 1094–1096.)
- *Glaski's* holding followed *Wells Fargo Bank, N.A. v. Erobobo* (2013) 39 Misc.3d 1220(A) (*Erobobo I*) which stated: " 'Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL § 7–2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void. [Citations.]' " (*Glaski,* at 1097.)
- *Glaski* also relied on an unpublished Texas bankruptcy case, *In re Saldivar* (Bankr. S.D. Tex., Jun. 5, 2013, 2013 WL 2452699, at *4).

Erobobo Reversed

- (*Wells Fargo Bank, N.A. v. Erobobo* (2015) 127 A.D.3d 1176 (Erobobo II).)
- In reversing *Erobobo* I, the Appellate Division of the Supreme Court of New York held - a borrower whose loan was assigned to a securitized trust has no standing to challenge the assignee's status "based on purported noncompliance with certain provisions of the PSA." (*Erobobo II*, at 1178, citing *Rajamin v. Deutsche Bank Nat' l. Trust Co*. (2d Cir. 2014) 757 F.3d 79, 90 (*Rajamin*) [holding that, under weight of New York authority, assignments in contravention of PSA are voidable at the trust beneficiary's election, not void *ab initio*].)
- See also *Bank of America Nat. Assn. v. Bassman FBT, L.L.C.* (Ill.App. 2012) 981 N.E.2d 1, 13 ["New York legislature could [not] have intended to allow a debtor in a commercial transaction to invoke the provisions of a trust to which it is a stranger in order to frustrate the collection of the debt"].)

Erobobo – cont.

- Furthermore, whether or not improper securitization invalidates the trust's tax-free status, federal district courts have concluded that it does not give rise to a private right of action by the borrower under the Internal Revenue Code. (See, e.g., *Martin v. Litton Loan Servicing LP* (E.D. Cal., Mar. 12, 2014, No. 2:12–cv–970–MCE–EFB PS), 2014 WL 977507, at *11; *Kloss v. RBS Citizens, N.A*. (E.D. Mich., 2014), 996 F.Supp.2d 574; *Oliver v. Delta Fin. Liquidating Trust* (D. Or., Aug. 27, 2012, No. 6:12–cv–00869–AA), 2012 WL 3704954, at *2, fn. 8; *Obal v. Deutsche Bank Nat'l. Trust Co*. (S.D.N.Y., Feb. 13, 2015, No. 14 Civ. 2463), 2015 WL 631404, at *4, reconsideration denied sub nom., *Obal v. Deutsche Bank Nat'l. Trust Co*.(S.D.N.Y. June 25, 2015, No. 14 Civ. 2463), 2015 WL 3999455.)

Saldivar is questioned

- *Saldivar* is inconsistent with a district court decision from that district issued just days earlier. (Compare *In re Saldivar* (Bankr. S.D. Tex., June 5, 2013, No. 11–10689) 2013 WL 2452699, 4 [transfer was void] with *Sigaran v. U.S. Bank Nat. Ass'n* (S.D. Tex., May 29, 2013, No. H–12–3588) 2013 WL 2368336, 3) [holding that "assignments made after the Trust's closing date are voidable, rather than void"].)
- The bankruptcy court decision in *In re Saldivar* has subsequently been found to be "the clear minority [view] on the matter and runs counter to the majority of decisions that have expressly rejected such assignment challenges." (*U.S. Bank Nat. Ass'n v. Salvacion* (Hawaii Ct. App. 2014) 134 Haw. 170, 175, 338 P.3d 1185, 1191.)
- The federal fifth circuit agreed. (*Ferguson v. Bank of New York Mellon* (5th Cir. 2015) 802 F.3d 777, 782 ("home-loan borrowers – such as the Fergusons – had no standing under Texas law to enforce a PSA because they were neither parties to the PSA nor intended third-party beneficiaries under it.")

Glaski - Jenkins

- Glaski
  - Not followed
  - Questioned
  - May challenge late assignment
- Jenkins
  - Universally followed
  - May not challenge late assignment

Yvanova v. New Century

- Yvanova v. New Century Mortgage Corporation (2016) 62 Cal.4th 919
  - Discussed next
  - “We granted review in this case to decide one aspect of that question: whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void.”

Yvanova v. New Century

- "We hold only that a borrower who has suffered a nonjudicial 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." (*Id*. at 924.)

Saterbak v. JP Morgan Chase Bank

- Saterbak v. JP Morgan Chase Bank (4th Dist. 3-16-16) 245 Cal.App.4th 808
- 2007 Trust
- 2011 Assignment dated
- 2012 Assignment recorded
- Claims: Late assignment is invalid, assignment was robo-signed, and assignment a cloud on title

Saterbak v. JP Morgan Chase Bank

- Pre-foreclosure
- Saterbak lacks standing to challenge late assignment to trust, citing *Jenkins* and *Gomes*
- Late assignment may be voidable not void
- Note and deed of trust may be assigned
- However, 2924.17 and 2924.12
- Assignment not issue – terms of Note unchanged

Brown v. Deutsche Bank

- Brown v. Deutsche Bank National Trust Company (1st Dist. 5-09-16) 2016 WL 2726229
- Pre-foreclosure challenge to Washington Mutual to Chase
- Although *Yvanova* limited its holding to the post-sale context, its determination that borrowers have standing *after* a foreclosure sale to allege that the assignment of a deed of trust was void raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations *before* the sale. (Cf. *Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 815, 199 Cal.Rptr.3d 790 [borrower lacked standing to bring preemptive suit where alleged defect in assignment rendered it only voidable, not void].)

Sciarratta v. U.S. Bank, N.A.

- Sciarratta v. U.S. Bank National Association (4th Dist. 5-18-18) D069439
- Post-foreclosure, late assignment case
- Prejudice:
- ”Where a homeowner alleges foreclosure by one with no right to do so, do such allegations alone establish the requisite prejudice or harm necessary to state a cause of action for wrongful foreclosure? Or instead, to adequately plead prejudice, does the plaintiff-homeowner have to allege the wrongful foreclosure interfered with his or her ability to pay on the debt, or lead to a foreclosure that would not have otherwise occurred?”

Sciarratta v. U.S. Bank, N.A.

- 2005 TD to Washington Mutual Bank
- 2008 SOT to Quality Loan Service Corporation
- 4-27-09 Assignment from JP Morgan Chase to Deutsche Bank, as trustee
- 4-27-09 Deutsche recorded SOT naming California Reconveyance Company
- 4-27-09 CRC records NOD
- July 2009 NOS
- 11-09-09 Assignment from Chase to BANA, as trustee
- 11-09-09 TDUS to BANA – credit bid
- 12-28-09 Corrective assignment

Sciarratta v. U.S. Bank, N.A.

- "Accordingly, we conclude that a homeowner who has been foreclosed on by one with no right to do so—by those facts alone—sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure. When a non-debtholder forecloses, a homeowner is harmed by losing her home to an entity with no legal right to take it. Therefore under those circumstances, the void assignment is the proximate cause of actual injury and all that is required to be alleged to satisfy the element of prejudice or harm in a wrongful foreclosure cause of action."

Orcilla v. Big Sur, Inc.

- Orcilla v. Big Sur, Inc. (6th Dist. Mod. 3-11-16) 244 Cal.App.4th 982
- May 2010 Foreclosure sale
- 2006 loan. Payment exceeded income
- 2008 modification. Capitalized arrearage and payment still exceeded income
- HAMP application submitted, and told sale on hold
- Property sold to a third party and family evicted

Orcilla v. Big Sur, Inc.

- Unconscionable loan and modification
  - Default cured by modification
- Harm – loss of home of 18 years
- Tender not required
- Bona fide purchaser – not notice provisions

Proposed Mortgage Servicing Rule Changes

- Successors in Interest
- Definition of Delinquency
- Requests for Information
- Force-Placed Insurance
- Early Intervention
- Loss Mitigation
- Prompt Payment Crediting
- Bankruptcy Periodic Statements
- Small Servicer

Where do we go from here?

- Borrower has standing to challenge the foreclosing party
- Need facts
- A late deed of trust should not be sufficient
- Other claimants or parties
- Missing title records

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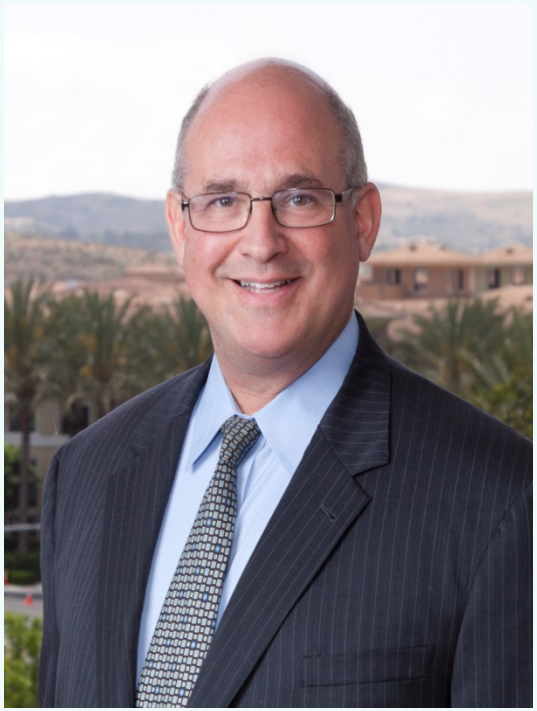

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Sanford Shatz (sshatz@mcglinchey.com) is Of Counsel to McGlinchey Stafford in Irvine, CA, and is a member of the firm's Commercial Litigation and Consumer Financial Services sections. He has been a licensed attorney in California for more than 28 years, during which time he has actively litigated cases in the areas of commercial law, real estate, and consumer financial services, specializing in mortgage-related issues. In 1998, he joined Countrywide Home Loans where he organized and established that company's California In-House Litigation Group. Mr. Shatz focused on all aspects of mortgage-related litigation, including originations, servicing, trustee, escrow, title and modification issues. In 2008, after Bank of America acquired Countrywide, he managed outside counsel on a pool of several hundred litigation cases, and helped to develop case-resolution strategies. In 2010, he returned to private practice, and currently practices at McGlinchey, where he works on litigation and regulatory issues, and appeals. Mr. Shatz is active in the American Bar Association's Consumer Financial Services Committee where he organizes and moderates a monthly call-in program on current issues in consumer financial services. He has published journal articles and papers, and organized and presented seminars on various aspects of current events in the mortgage world.

Recent Developments in California Mortgage Law

Yvanova v. New Century Mortgage Corp. (2016)
62 Cal. 4th 919
in Mortgage Litigation

By Michael J. Simkin, Esq.

MORTGAGE LITIGATION REQUIRES KNOWING WHERE YOU ARE GOING

Loan Modification

Short Sale

Injunction

Wrongful Foreclosure Damages
TILA

RESPA

FCRA

Eviction Defense

FIRST QUESTION: WHAT DO I DO, WHICH CAUSES OF ACTION?

LOOK TO YOUR CALIFORNIA STATUTORY REMEDIES FOR HELP

California Homeowner Bill of Rights of 2013 Civil Code § 2920-2944.10

PRINCIPAL FORGIVENESS OR LOAN MODIFICATION

- Federal programs such as HAMP, "2MP" for Home Equity Loans or second mortgages, HAFA (if return to the lender)
- Consider the "UP" program if unemployed, the lender assigns a case manager to help including with loan modification.

INJUNCTIVE RELIEF – LOOK TO THE CALIFORNIA HOMEOWNER BILL OF RIGHTS OF 2013

Civil Code § 2920-2944.10

TO ENJOIN THE TRUSTEE'S SALE, YOU NEED SPECIFIC FACTS THAT THE ENTITY DOES NOT HAVE AUTHORITY TO INITIATE THE FORECLOSURE

PLEADING FORECLOSURE COMPLAINTS

Need “specific facts” similar to fraud pleading requirements

POST FORECLOSURE SET ASIDE OF FORECLOSURE SALE

Equitable Action, show unconscionable

DOES YVANOVA HELP STOP EVICTION AFTER FORECLOSURE?

Code of Civil Procedure § 1161b

Fixed term lease? Former owner in possession? 90 Day Notice?

MORTGAGE LITIGATION REQUIRES GREAT FACTS TO SURIVIVE DEMURRER AND SUMMARY JUDGMENT

Need “specific facts”, prejudice,
“Tender of debt” satisfied by “void” transfer

YVANOVA IS AN INCOMPLETE DECISION. THE SUPREME COURT LOWERED THE BAR, THEN PUSHED IT OUT

Many unanswered questions

RECAP OF YVANOVA: LIMITED RULING AND ONLY ALLOWS A POST FORECLOSURE ACTION FOR WRONGFUL FORECLOSURE.

The Supreme Court expressly limited Yvanova's ruling

PRE-FORECLOSURE ACTIONS ARE STILL GOING TO BE EXTREMELY DIFFICULT

Saterbak v. JPMorgan Chase (2016)– No pre-foreclosure challenge

YVANOVA SHOWS COURTS WANT FOCUS ON WRONGFUL FORECLOSURE

(WHICH EFFECTIVELY HELPS BANKS)

Glaski v. Bank of America followed, Jenkins v. JPMorgan Chase rejected

Glaski (forged signatures) vs. Jenkins (pre-foreclosure, pooling agreement challenge)

YVANOVA HAD GREAT FACTS

The Court was upset at the Robo-signing, egregious break in chain of title.

Filed 5/18/16

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MONICA SCIARRATTA, Plaintiff and Appellant, v. U.S. BANK NATIONAL ASSOCIATION, as trustee, etc., et al., Defendants and Respondents.	D069439 (Super. Ct. No. RIC1301485)

APPEAL from a judgment of the Superior Court of Riverside County, John Vineyard, Judge. Reversed and remanded.

Stephen F. Lopez Esq. and Stephen F. Lopez for Plaintiff and Appellant.

Keesal, Young & Logan, David D. Piper, Michael T. West and Joshua B. Norton for Defendants and Respondents.

This is an action for wrongful foreclosure. The homeowner, Monica Sciarratta, alleges that as a result of a void assignment of her promissory note and deed of trust, the entity that conducted a nonjudicial foreclosure sale on her home had no interest in either the underlying debt or the subject property. In *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), the California Supreme Court held that in a case such

as this—where a homeowner alleges a nonjudicial foreclosure sale was wrongful because of a void assignment—the homeowner has standing to sue for wrongful foreclosure. (*Id.* at pp. 942–943.) However, *Yvanova* did not address "any of the substantive elements of the wrongful foreclosure tort" (*id.* at p. 924), and in particular did not address "prejudice . . . as an element of wrongful foreclosure." (*Id.* at p. 929, fn. 4.)

This case presents the question of "prejudice" left open in *Yvanova*: Where a homeowner alleges foreclosure by one with no right to do so, do such allegations alone establish the requisite prejudice or harm necessary to state a cause of action for wrongful foreclosure? Or instead, to adequately plead prejudice, does the plaintiff-homeowner have to allege the wrongful foreclosure interfered with his or her ability to pay on the debt, or lead to a foreclosure that would not have otherwise occurred?

Although *Yvanova* did not address this precise issue, the policy considerations that drove the standing analysis in *Yvanova* compel a similar result here. As the Supreme Court stated in *Yvanova*, it would be an "'odd result' indeed" were a court to conclude a homeowner had no recourse where anyone, even a stranger to the debt, had declared a default and ordered a trustee's sale. (*Yvanova*, *supra*, 62 Cal.4th at p. 938.)

Accordingly, we conclude that a homeowner who has been foreclosed on by one with no right to do so—by those facts alone—sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure. When a non-debtholder forecloses, a homeowner is harmed by losing her home to an entity with no legal right to take it.

Therefore under those circumstances, the void assignment is the proximate cause of actual injury and all that is required to be alleged to satisfy the element of prejudice or harm in a wrongful foreclosure cause of action.

The opposite rule, urged by defendants in this case, would allow an entity to foreclose with impunity on homes that were worth less than the amount of the debt, even if there were no legal justification whatsoever for the foreclosure. The potential consequences of wrongfully evicting homeowners are too severe to allow such a result. (See *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 410 (*Miles*).)

On the issue of standing, the Supreme Court stated, "'Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust.'" (*Yvanova, supra,* 62 Cal.4th at p. 938.) *Yvanova's* holding on standing would be undermined unless the same considerations applied in determining what prejudice must be alleged to constitute a wrongful foreclosure cause of action. (*Ibid*.) Therefore, we reverse the judgment of dismissal entered after the trial court erroneously sustained a demurrer to Sciarratta's first amended complaint without leave to amend, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In reciting the facts on review of a demurrer, "'we accept as true the well-pleaded facts in [Sciarratta's first amended] complaint.'" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 571.) "We may also consider

matters that have been judicially noticed." (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

Because the facts in this case are convoluted, it is helpful to know before one starts where one will end. As explained in detail *post*, Deutsche Bank was the owner of Sciarratta's loan and beneficiary of the deed of trust according to the public record at the time of this foreclosure. But Deutsche Bank did not foreclose. Bank of America did.[1]

A. *Washington Mutual Loan and Deed of Trust*

In June 2005 Sciarratta obtained a $620,000 loan secured by real property in Riverside County, California (the property). She executed a promissory note secured by a deed of trust identifying the lender as Washington Mutual Bank, F.A. (WaMu) and the trustee as California Reconveyance Company (CRC).[2] In January 2008 WaMu substituted Quality Loan Service Corporation as successor trustee.

B. *The Assignment to Deutsche Bank*

On April 24, 2009, JPMorgan Chase Bank, N.A. (Chase), as successor in interest to WaMu, assigned the Sciarratta deed of trust and promissory notes to Deutsche Bank

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1 The rules of court require litigants to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) "We may decline to consider passages of a brief that do not comply with this rule." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 60.) The statement of facts in Sciarratta's opening brief contains no record citations. Therefore, we base our understanding of the parties' dispute on the portions of the record cited by defendants' brief.

2 Apparently as part of the same transaction, Sciarratta also borrowed an additional $77,500, which was secured by a second deed of trust naming WaMu as beneficiary.

National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2006-6 (Deutsche Bank). This assignment was recorded on April 27, 2009, as document No. 2009-0205476.[3] Chase, acting on behalf of Deutsche Bank, also substituted CRC as trustee.

C. *Sciarratta's Default and Notice of Sale*

By April 24, 2009, Sciarratta's loan was $15,362.99 in arrears. On April 27, 2009, CRC recorded a "Notice of Default and Election to Sell Under Deed of Trust" (Notice of Default). The Notice of Default stated in part: "To find out the amount you must pay, or to arrange for payment to stop the foreclosure . . . contact: JPMorgan Chase Bank . . . at [address], [telephone number]."

In July 2009 CRC recorded a "Notice of Trustee's Sale," stating the property would be sold at auction on August 18, 2009 and that the estimated unpaid balance and other charges was $729,234.93.

D. *Purported Assignment to Bank of America*

On November 9, 2009, Chase, as successor in interest to WaMu, recorded a document entitled "Assignment of Deed of Trust," purporting to assign the Sciarratta deed of trust and promissory notes to Bank of America, National Association, as

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[3] This date and document number become relevant in December 2009 when Chase recorded a "[c]orrective [a]ssignment," purporting to retroactively correct document number 2009-0205476 to reflect an assignment of Sciarratta's loan to Bank of America rather than to Deutsche Bank.

successor by merger to LaSalle Bank NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR19 (Bank of America).[4]

E. *Trustee's Sale to Bank of America*

On the same day, November 9, 2009, CRC recorded a "Trustee's Deed upon Sale" on behalf of Bank of America as "the foreclosing beneficiary" of the deed of trust. Bank of America acquired the property in exchange for a credit bid.

F. "*Corrective*" *Assignment to Bank of America*

On December 28, 2009, Chase, as successor in interest to WaMu, recorded a document entitled "Assignment of Deed of Trust" which states: "This assignment is being recorded to correct the assignee reflected on the assignment recorded April 27, 2009 as instrument No. 2009-0205476. [¶] For value received, the undersigned hereby grants, assigns, and transfers to Bank of America . . . all beneficial interest under that certain Deed of Trust dated 06/17/2005, executed by Monica Sciarratta . . . ."

G. *Sciarratta's District Court Action*

On November 2, 2009—the day before the scheduled trustee's sale—Sciarratta filed a 16-count complaint against Chase, Deutsche Bank, and CRC in United States District Court. The complaint states in part, "This is an action to quiet title against parties who have wrongfully foreclosed upon residential real property of the Plaintiff, but who in reality have no standing whatsoever to exercise any rights under the subject deed of trust that encumbers Plaintiff's realty."

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4 Sciarratta alleges this purported assignment was void because Chase had previously assigned the trust deed and promissory notes to Deutsche Bank.

The record provided by the parties does not inform us about any other aspects of this litigation except that in May 2012 the district court entered a judgment of dismissal with prejudice in favor of the defendants.

H. *Sciarratta's State Court Action*

In February 2013 Sciarratta filed a state court complaint for (1) wrongful foreclosure, (2) quiet title, and (3) cancellation of instruments against U.S. Bank National Association as trustee successor in interest to Bank of America, Deutsche Bank, and CRC (collectively, Defendants).

Sciarratta's complaint alleges the foreclosure "is wrongful in that the trustee that held the sale was not the proper trustee at the time of the sale and therefore the sale of the Subject Property is void as a matter of law . . . or in the alternative the party that held the sale and acquired the Subject Property by way of a supposed credit bid was not the holder of the Subject Note and was not the beneficiary of the Subject Deed of Trust and could not have submitted a credit bid." Sciarratta's original complaint did not allege particularized prejudice from the fact that Bank of America rather than Deutsche Bank foreclosed.

Defendants demurred to the complaint on the grounds (1) the action was barred by the res judicata effect of the district court judgment of dismissal in Sciarratta's previous action, and (2) Sciarratta had not alleged the essential element of prejudice. The court overruled this demurrer.

After certain defaults were set aside that are not relevant to any issues in this appeal, Defendants answered the complaint, and later Sciarratta dismissed Deutsche Bank without prejudice.

I. *Motion for Judgment on the Pleadings*

In May 2014 Defendants filed a motion for judgment on the pleadings, primarily asserting that Sciarratta's wrongful foreclosure claim fails as a matter of law because she did not and cannot allege prejudice. Defendants asserted, "Plaintiff alleges that the foreclosure sale was invalid because CRC foreclosed on behalf of Bank of America instead of Deutsche Bank, who Plaintiff argues was the correct beneficiary. Prejudice is an essential element of a wrongful foreclosure claim . . . ."

Sciarratta opposed the motion for judgment on the pleadings on both procedural and substantive grounds. Procedurally, she argued the motion was barred by Code of Civil Procedure section 438, subdivision (g)(1), which provides that a motion for judgment on the pleadings may be made after a demurrer has previously been overruled, "provided that there has been a material change in applicable case law or statute since the ruling on the demurrer." Sciarratta asserted there had been no such material change in law, and therefore the judgment on the pleadings was improper because the court had previously overruled a demurrer brought on the same grounds. Substantively, Sciarratta

argued prejudice is not an element of wrongful foreclosure where, as she had alleged, the foreclosure sale is void.[5]

The court granted the motion for judgment on the pleadings, with leave to amend, on the grounds that "[p]laintiff must adequately allege the element of 'prejudice.'"

J. *First Amended Complaint*

In August 2014 Sciarratta filed a first amended complaint for (1) wrongful foreclosure, (2) quiet title, and (3) cancellation of instruments. In addition to facts alleged in the original complaint, Sciarratta attempted to allege prejudice; i.e., that she had suffered damages from the wrongful foreclosure, stating:

> "Plaintiff need not allege prejudice in this case . . . because the claims made by Plaintiff . . . show that the parties that held the sale, [Bank of America] and CRC had no right to do so. Regardless, as a result of the foreclosure sale of the Subject Property by [Bank of America] and CRC, Plaintiff has suffered prejudice. . . . Plaintiff has been prejudiced by the sale of the Subject Property by [Bank of America], an entity that has no right to hold a sale, because she was deprived of any right to prevent foreclosure, in that [Bank of America] has no reason to work with Plaintiff as mandated by California law before holding a foreclosure sale and no interest in providing Plaintiff with information mandated by [the California Homeowners Bill of Rights] before a foreclosure. As a result, Plaintiff has been deprived of her substantial rights related to the prevention of a foreclosure to her prejudice."[6]

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[5] On appeal, Sciarratta again argues the motion for judgment on the pleadings was barred by Code of Civil Procedure section 438, subdivision (g)(1). However, because we reverse on the merits, it is unnecessary to consider this contention.

[6] By amending her complaint to allege prejudice after the court sustained the motion for judgment on the pleadings with leave to amend, Sciarratta in effect conceded the complaint was inadequate and she waived any error in the trial court's determination that prejudice beyond the fact of foreclosure itself is an essential element of her wrongful foreclosure cause of action. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962,

K. *Demurrer to the First Amended Complaint*

Defendants demurred to the first amended complaint on the grounds, among others, that Sciarratta had failed to adequately allege the essential element of prejudice. Unlike their demurrer to Sciarratta's original complaint, in this demurrer defendants did not argue the action was barred by res judicata.[7]

At the hearing, Sciarratta's counsel stated, "The facts are very clear and very simple. Deutsche Bank was the owner of this loan according to the public record at the time of this sale. And Deutsche Bank did not hold this sale. There was no dispute about that. Bank of America did." Citing *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*), Sciarratta's lawyer stated, "Prejudice is not an element in this particular

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966, fn. 2; *Sheehy v. Roman Catholic Archbishop of San Francisco* (1942) 49 Cal.App.2d 537, 540-541 ["When he amended his complaint after the general demurrer was sustained he in effect admitted that the demurrer was good and that his complaint was insufficient to state a cause of action."]; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1698-1699, abrogated on other grounds by *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, as stated in *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832-833.)

However, defendants did not raise this waiver issue in their respondent's brief, and after considering the parties' supplemental briefs on this issue, we conclude defendants have forfeited the waiver issue by failing to assert it and no good cause to relieve defendants of that forfeiture has been shown. (See *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

7 Despite not raising res judicata in their demurrer to Sciarratta's first amended complaint, on appeal defendants contend we should affirm on res judicata grounds. However, because the district court judgment became final before defendants demurred to Sciarratta's first amended complaint, we will not consider the res judicata issue for the first time on appeal. (See *First N.B.S. Corp. v. Gabrielsen* (1986) 179 Cal.App.3d 1189, 1195 [res judicata effect of a prior judgment must be raised in the trial court, except when the judgment becomes final during the pendency of an appeal in another action].)

circumstance. The reason that is the case is because we have a sale by someone, without question, [*sic*] had no right to hold a sale."

The court asked Sciarratta's attorney, "[A]re there facts that can be pled that have not been pled now that would make me reconsider the no leave to amend?" After Sciarratta's attorney stated, "I don't think there are any new facts," the court sustained the demurrer without leave to amend and subsequently entered a judgment dismissing her first amended complaint with prejudice.

DISCUSSION

I. *THE STANDARD OF REVIEW*

"On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 989.) "'We may also consider matters that have been judicially noticed. [Citations.]' [Citation.] '[W]hen the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former.'" (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 210.)

II. *A HOMEOWNER WHO HAS BEEN FORECLOSED ON BY ONE PURPORTING TO EXERCISE RIGHTS UNDER A VOID ASSIGNMENT SUFFERS SUFFICIENT PREJUDICE TO STATE A CAUSE OF ACTION FOR WRONGFUL FORECLOSURE*

A. *Wrongful Foreclosure*

A wrongful foreclosure is a common law tort claim. It is an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that

the foreclosure was improper. (See *Miles, supra,* 236 Cal.App.4th at pp. 408-409.) The elements of a wrongful foreclosure cause of action are: "'(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.'" (*Id*. at p. 408.) "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Id.* at p. 409.) "[A]ll proximately caused damages may be recovered." (*Id.* at p. 410.)

"[O]nly the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt . . . ." (*Yvanova, supra,* 62 Cal.4th at p. 928.) "It is no mere 'procedural nicety,' from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so." (*Id.* at p. 938.)

Here, implicitly invoking these principles, Sciarratta alleges that the entity entitled to enforce the debt was Deutsche Bank, but the entity that foreclosed was Bank of America. Specifically, she alleges that in April 2009 Deutsche Bank became the owner of her promissory note and trust deed by assignment from Chase. Sciarratta alleges that the subsequent purported assignments of the note and trust deed by Chase to Bank of America in November 2009 and again in December 2009 were *void* because Chase had previously assigned the note and trust deed to Deutsche Bank. Thus, Sciarratta alleges Bank of America had no right to foreclose because it never became a beneficiary of her deed of trust.

Based on these allegations, which are supported by the judicially noticeable recorded documents, Sciarratta alleges the November 2009 nonjudicial foreclosure "was held by an entity [other] than the owner of the Subject Note and holder of the Subject Deed of [T]rust, [Bank of America], whom [*sic*] had no right to hold said sale or submit a credit bid thereon and as a result the sale is void and of no effect." In more colloquial terms, Sciarratta's appellate brief asserts, "There is no question that as of the date of the sale Bank of America had no right to hold a foreclosure sale of the Subject Property as the owner of the note and deed of trust was Deutsche [Bank] as of April 24, 2009."[8]

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[8] As an alternative and inconsistent theory of liability, Sciarratta's first amended complaint also alleges that Deutsche Bank was *not* assigned the note and deed of trust, and therefore its purported substitution of trustee (substituting CRC for Quality Loan Service) was ineffective. On this alternative theory, foreclosure is alleged to be wrongful because the trustee initiating the foreclosure, CRC, allegedly lacked authority to do so.

However, in her brief, Sciarratta has elected to not address this alternative theory in any meaningful way, limiting her discussion of this point to a single paragraph containing no citation to the record and scant analysis. Instead, she focuses on the theory, discussed in the text *ante*, that WaMu assigned her promissory note and trust deed to Deutsche Bank, but Bank of America foreclosed.

For example, Sciarratta's briefs state: (1) "The public record *leaves no doubt* that the entity that held the sale was not the holder of the note or beneficiary of the deed of trust" (italics added); (2) "This is a case where the public *record leaves no doubt* that the foreclosure sale was held by an entity that was not the holder of the note or beneficiary of the deed of trust at issue" (italics added); (3) "There is *no question* that as of the date of the sale Bank of America had no right to hold a foreclosure sale of the Subject Property as the owner of the note and deed of trust was Deutsche [Bank] as of April 24, 2009" (italics added); (4) "[T]here is *no question* that as of the date of the sale the true holder of the note was Deutsche [Bank]" (italics added); (5) "[A]t the time of the sale the holder of the note and beneficiary of the deed of trust was Deutsche [Bank]."

Similarly, in the trial court Sciarratta's lawyer stated, "The facts are very clear and very simple. Deutsche Bank was the owner of this loan according to the public record at the time of this sale. And Deutsche Bank did not hold this sale. There was no dispute about that. Bank of America did."

Given these unequivocal assertions and Sciarratta's failure to develop the inconsistent alternative theory in her brief, we do not address whether the first amended complaints states a viable cause of action on an alternative theory that the "wrong" trustee

B. *Sciarratta Alleges a Void Assignment*

"A void contract is without legal effect." (*Yvanova, supra,* 62 Cal.4th at p. 929.) "A voidable transaction, in contrast, 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.'" (*Id.* at p. 930.)

Yvanova holds that a borrower has legal authority—standing—"to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust was not merely voidable but void, depriving the foreclosing party of any legitimate authority to order a trustee's sale." (*Yvanova, supra,* 62 Cal.4th at pp. 942-943.)

Here, Sciarratta's first amended complaint alleges that in November 2009, when Chase purported to assign Sciarratta's promissory note and deed of trust to Bank of America, Chase had nothing to assign, having previously (in April 2009) assigned the promissory notes and deed of trust to Deutsche Bank. The documents properly subject to judicial notice are consistent with these allegations. On April 27, 2009, Chase executed a document entitled "Assignment of Deed of Trust" where it "hereby grants assigns and transfers to Deutsche Bank . . . all beneficial interest under that certain Deed of Trust . . . executed by Monica Sciarratta . . . [¶] [t]ogether with the note or notes therein described . . . ." Approximately six months later, on November 3, 2009, Chase purported to assign the same trust deed and promissory notes to Bank of America.

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initiated foreclosure. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [declining to address an alternative theory not developed in the party's appellate brief].)

Chase, having assigned "all beneficial interest" in Sciarratta's notes and deed of trust to Deutsche Bank in April 2009, could not assign again the same interests to Bank of America in November 2009. (See *California Bank & Trust v. Piedmont Operating Partnership* (2013) 218 Cal.App.4th 1322, 1347 [once a claim has been assigned, unless a contrary intention is shown, the assignment """vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto"""].)

Thus, assuming Sciarratta's allegations are true, as we must on review of the demurrer, the assignment to Bank of America is void, and not merely voidable. (*Yvanova, supra,* 62 Cal.4th at p. 935; *Glaski, supra,* 218 Cal.App.4th at p. 1097 [assignment void, not voidable, where entity invoking the power of sale was not the holder of the deed of trust]; see *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291 (*Culhane*) [a mortgage assignment is void, not merely voidable, where the assignor "had nothing to assign" or "no interest to assign"]; *Wilson v. HSBC Mortgage Services, Inc.* (1st Cir. 2014) 744 F.3d 1, 9 (*Wilson*).)[9] As the Supreme Court in *Yvanova* explained: "'A homeowner . . . has standing to challenge that assignment as void because success on the merits would prove the purported assignee is not, in fact, the mortgagee and therefore lacks any right to foreclose on the mortgage." (*Yvanova, supra,* 62 Cal.4th at pp. 935-936.)

Defendants' arguments to the contrary are not persuasive. Citing *U.S. Hertz Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, defendants contend the recording of an assignment to Deutsche Bank "does not actually transfer an interest in property; it merely

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9 In *Yvanova*, the Supreme Court cited *Culhane* and *Wilson* with approval. (*Yvanova, supra,* 62 Cal.4th at pp. 935, 940.)

serves as notice that a transfer has occurred." However, *U.S. Hertz* is materially distinguishable because it involves a notice of substitution of trustee, not an assignment of the deed of trust and promissory notes. It is in the context of a notice substituting a trustee that the court states "such documents . . . grant no interest in real property. Their main objective is notice . . . ." (*Id*. at p. 85.)

Defendants also contend the "[c]orrective [a]ssignment" recorded in December 2009 "demonstrated that beneficial interest had been assigned to Bank of America, not Deutsche Bank." However, defendants cite no authority suggesting that as a matter of law, the "[c]orrective [a]ssignment" recorded in December 2009 has any relevant legal effect on the nonjudicial foreclosure occurring one month *prior*, in November 2009.

Defendants also argue that the "[c]orrective [a]ssignment" shows that "[a]t most" Chase "made procedural errors on the documents regarding the identity of the beneficiary, and that Chase later corrected these errors." However, this is an appeal from a judgment of dismissal after a demurrer was sustained, where we are required to assume the truth of the facts plaintiff has alleged. Defendants cannot hijack Sciarratta's first amended complaint, delete allegations not to their liking, insert other contrary allegations such as this one about a mere "procedural error[]", and contend the resulting pleading they have cobbled together fails to state a cause of action. Sciarratta alleges that at the time of the nonjudicial foreclosure sale, Deutsche Bank was the assignee and Bank of America was not. The judicially noticeable documents do not contradict these allegations.

Defendants also contend that Sciarratta's complaint admits that Deutsche Bank was not the assignee and never held a beneficial interest in the deed of trust. However,

the allegation defendants highlight is not contained in Sciarratta's cause of action for wrongful foreclosure, but rather in her cause of action to quiet title. In any event, an allegation that Deutsche Bank never held a legal or equitable interest in the property is not necessarily inconsistent with an allegation that Bank of America also did not.

In sum, we hold that Sciarratta has alleged the nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party, Bank of America, purportedly took a beneficial interest in the deed of trust was void. Therefore, under *Yvanova*, Sciarratta has standing to assert such a claim.[10]

C. *Sciarratta Has Adequately Alleged Prejudice for Wrongful Foreclosure*

Sciarratta contends prejudice or harm, beyond the allegedly wrongful foreclosure itself, should not be required to be alleged in order to state a cause of action for wrongful foreclosure where, as here, it is alleged the foreclosing beneficiary's interest is void. We agree.

A homeowner experiences prejudice or harm when an entity with no interest in the debt forecloses. When a non-debtholder forecloses, a homeowner is harmed because he or she has lost her home to an entity with no legal right to take it. If not for the void assignment, the incorrect entity would not have pursued a wrongful foreclosure. Therefore, the void assignment is the cause-in-fact of the homeowner's injury and all he or she is required to allege on the element of prejudice. The critical issue is not the

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10 Because Sciarratta alleges a void as distinguished from a voidable assignment, she is excused from having to allege tender as an element of her wrongful foreclosure cause of action. (*Yvanova, supra,* 62 Cal.4th at p. 929, fn. 4 ["Tender has been excused when . . . the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so."].)

plaintiff's ability to pay, but rather whether the defendant's conduct resulted in the plaintiff's harm; i.e., a foreclosure that was wrongful because it was initiated by a person or entity having no legal right to do so; i.e. holding void title. As the Supreme Court stated in *Yvanova,* "the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus, '[t]he identified harm—the foreclosure—can be traced directly to [the foreclosing entity's] exercise of the authority purportedly delegated by the assignment.'" (*Yvanova, supra,* 62 Cal.4th at p. 937.)

There are also strong policy reasons favoring this approach. A contrary rule would lead to a legally untenable situation—i.e., that anyone can foreclose on a homeowner because someone has the right to foreclose. "And since lenders can avoid the court system entirely through nonjudicial foreclosures, there would be no court oversight whatsoever." (*Miles, supra,* 236 Cal.App.4th at p. 410.) Moreover, giving homeowners—who have the most at stake and the most to lose—the ability to challenge improper loan assignments as being absolutely void will provide a proper incentive to lending institutions to employ due diligence to properly document assignments and confirm who currently holds a loan. "The consequences of wrongfully evicting someone from their home are too severe to be left unchecked." (*Ibid*.)

Cases cited by defendants that reach a contrary result did not have the benefit of the Supreme Court's decision in *Yvanova* and as a result incorrectly and exclusively focus on the plaintiff's ability to have avoided *any* foreclosure. For example, in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*) disapproved on other grounds (standing) in *Yvanova, supra,* 62 Cal.4th at page 939, footnote 13, the court found that plaintiff had failed to demonstrate prejudice resulting from an allegedly

improper transfer of her debt because the plaintiff conceded she was in default, did not allege the transfer interfered with her ability to pay her debt, and did not allege the original lender would have refrained from foreclosure. (*Fontenot, supra,* at p. 272.)

Similarly, in *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495 (*Herrera*), disapproved on other grounds (standing) in *Yvanova, supra,* 62 Cal.4th at page 939, footnote 13, the court found that the plaintiffs could not demonstrate prejudice where they had defaulted on their loan and could not cure the default. (*Herrera, supra,* 205 Cal.App.4th at p. 1508.)

Thus, *Fontenot* and *Herrera* interpret prejudice narrowly to mean the plaintiff must demonstrate that she could have avoided foreclosure. These cases are inconsistent with the policies underlying the standing rule in *Yvanova*: "The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security." (*Yvanova, supra,* 62 Cal.4th at p. 938.) *Fontenot* and *Herrera* also ignore the fact that the wrongful nature of the foreclosure alleged here would require the sale to be unwound, at least where there are no intervening third-parties. (See *Miles, supra,* 236 Cal.App.4th at p. 408 ["The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale."]) In her wrongful foreclosure cause of action, Sciarratta seeks such a remedy, alleging an entitlement not only to money damages, but also "a declaration that the sale of the Subject Property by . . . [Bank of America] . . . was a void act of no legal effect."

Fontenot and *Herrera* also fail to recognize that the measure of damages for wrongful foreclosure is the familiar measure of tort damages: all proximately caused

damages. "Wrongfully foreclosing on someone's home is likely to cause other sorts of damages, such as moving expenses, lost rental income . . . and damage to credit. It may also result in emotional distress . . . ." (*Miles, supra,* 236 Cal.App.4th at p. 409.) We are not suggesting that any of these damages will be actually recoverable here. It may be that Sciarratta has no such damages. It may be that any such damages are entirely offset by the benefit of being free from a loan with unfavorable terms, the benefits of apparently living rent-free during this litigation, or some other reason(s).[11] These issues are not before us and we express no opinion one way or the other. However, Sciarratta has alleged she sustained compensatory damages in excess of $25,000 as a result of the wrongful foreclosure. For purposes of overcoming a demurrer in this case on the issue of prejudice, that allegation is sufficient. Therefore, the court erred in sustaining the demurrer to Sciarratta's first cause of action for wrongful foreclosure.

III. *QUIET TITLE AND CANCELLATION OF INSTRUMENTS*

The trial court sustained defendants' demurrer to Sciarratta's cause of action for quiet title on the grounds that "payment of the debt owed (tender) is a necessary element for a quiet title cause of action." The court sustained the demurrer to Sciarratta's cause of action for cancellation of instruments on the grounds that action "is dependent on the [first] and [second] causes of action."

The court erred in sustaining the demurrer to Sciarratta's causes of action for quiet title and cancellation of instruments. Because Sciarratta properly alleged the foreclosure was void and not merely voidable, tender was not required to state a cause of action for

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11 In response to a question at oral argument, Sciarratta's lawyer stated Sciarratta still resides in the home.

quiet title or for cancellation of instruments. (*Glaski, supra*, 218 Cal.App.4th at p. 1100 [homeowner not required to allege tender in causes of action for wrongful foreclosure, cancellation of instruments, and quiet title where the foreclosure sale is void rather than voidable].)

In her opening brief, Sciarratta addresses the issues in this case only as they relate to her cause of action for wrongful foreclosure, not quiet title or cancellation of instruments. There is no separate heading in her brief asserting the court erred in sustaining the demurrer to her causes of action for quiet title or cancellation of instruments.

Ordinarily, therefore, any contentions regarding the correctness of the trial court's ruling sustaining the demurrer to these two other causes of action would be abandoned. (*Ram v. OneWest Bank FSB* (2015) 234 Cal.App.4th 1, p. 21, fn. 2 [where demurrer sustained without leave to amend, appellant's failure to raise arguments in connection with one of several causes of action is deemed abandonment of that cause of action].)

However, in addressing the tender issue in the context of wrongful foreclosure, Sciarratta argued tender is not required because Bank of America's purported assignment is void and not merely voidable. In her opening brief, Sciarratta cited, among other authorities, *Glaski*, *supra*, 218 Cal.App.4th at page 1100, which, as noted *ante*, also applies the rule excusing tender in void transactions to causes of action for quiet title and cancellation of instruments.

Therefore, Sciarratta addressed the determinative legal issue, and cited authority for its application to quiet title and cancellation of instruments, albeit in the context of wrongful foreclosure. As a result, Defendants were on notice that Sciarratta was arguing

she was excused from alleging tender, and that she was relying on *Glaski, supra*, 218 Cal.App.4th 1079 for that proposition. Indeed, Defendants argued the tender issue in their respondents' brief.

Because the issue of tender was fully examined by both Sciarratta and Defendants, there is no sound reason to apply the ordinary rule of forfeiture for Sciarratta's failure to separately address the trial court's rulings on these two causes of action. Accordingly, the judgment of dismissal of those two causes of action must also be reversed.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings. Monica Sciarratta shall recover her costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

RECENT DEVELOPMENTS IN CALIFORNIA MORTGAGE LAW

Presented at the
2016 REAL PROPERTY LAW SECTION RETREAT – MAY 21 – MONTEREY

Harold A. Justman
Sanford Shatz
Michael Simkin

I. MORTGAGE LAW LITIGATION

The litigation attendant upon the foreclosure crisis arising from the Great Recession was composed of preforeclosure actions and post-foreclosure actions. The preforeclosure litigation was composed of preemptive actions seeking to delay nonjudicial foreclosures.

The post-foreclosure actions were composed of actions seeking to rescind the nonjudicial foreclosure sale. Also, there were eviction actions following the foreclosure sale.

Finally, there were actions seeking monetary damages based upon tortious conduct in the context of the foreclosure process.

A. Preemptive Judicial Actions.

The foreclosure litigation gave rise to a number of creative legal theories designed to delay a nonjudicial foreclosure. For example, the case of *Kan v. Guild Mortgage Co.* dealt with the securitization process. In July 2007, Lindsay Kan ("Borrower") borrowed $516,000 and executed a first note and deed of trust ("First Loan") against real property in Stevenson Ranch ("Property"). The First Loan was securitized and assigned to the Bank of New York Mellon ("Assignee") as trustee for a mortgage-backed investment trust. A notice of default was recorded against the Property in December 2010 and a notice of trustee's sale was recorded in March 2012. In October 2012, the Borrower filed a preforeclosure quiet title action claiming that the securitization process was deficient. The trial court sustained the assignee's demurrer to

the Borrower's complaint without leave to amend. A judgment of dismissal was entered.

The Court of Appeal **affirmed** the judgment dismissing the Borrower's complaint, holding that the Borrower could not pursue a preemptive judicial action to delay a nonjudicial foreclosure. The Court of Appeal reaffirmed that a nonjudicial foreclosure should be a quick, inexpensive and efficient remedy for a lender. Many courts did not want to turn a nonjudicial foreclosure into a quasi-judicial foreclosure.

B. <u>Post-Foreclosure Actions</u>

As stated earlier, post-foreclosure actions generally consisted of actions to set aside the foreclosure. Actions to set aside the foreclosure could be based upon technical deficiencies in the foreclosure process.

The case of *Ram v. One West Bank, FSB*, addressed the issue of post-foreclosure actions to set aside the foreclosure on the ground that there were technical deficiencies in the foreclosure process.

In 2005, Bhika Ram and Asharfun Hafitz ("Homeowner") purchased a home in Pleasant Hill ("Property"). On September 7, 2010, One West Bank, FSB ("Lender") was the holder of the first loan on the Property. On that date, the Lender caused Aztec Foreclosure Corporation, the Trustee, to record a notice of default ("NOD") against the Property. On September 24, 2010, the Lender executed a substitution of trustee, formally authorizing the new Trustee to conduct the nonjudicial foreclosure. Then the new Trustee recorded a notice of trustee's sale and conducted a trustee's sale of the Property. The Lender purchased the Property at the foreclosure sale.

The Homeowner then sued the Lender seeking, amongst other things, to set aside the foreclosure sale due to the fact that the new Trustee was not the original Trustee that recorded the NOD. The trial judge ordered the dismissal of the Homeowner's complaint on the ground

that it failed to allege facts sufficient to constitute a cause of action.

The Court of Appeal **affirmed** the judgment dismissing the Homeowner's complaint, holding that any procedural irregularity in the foreclosure process, at worst, rendered the trustee's sale voidable. But because the Homeowner could not allege that she had tendered the amount due and that the procedural irregularity prejudiced her by impairing her ability to either prevent or to contest the foreclosure, the Homeowner was not entitled to judicial relief from the foreclosure sale.

The majority opinion addressed the complex issue of void and voidable nonjudicial foreclosure sales and concluded that the nonjudicial sale was voidable, at worst. Accordingly, a voidable sale will only be set aside if the homeowner can allege and prove that she could have paid the amount due and was prevented from curing the default by an irregular trustee's sale. Absent a showing of tender and prejudice, there is no judicial relief from a voidable nonjudicial trustee's sale.

C. Torts in the Mortgage Context.

The most significant evolution of laws concerning the mortgage market has taken place in the tort law applicable to the mortgage context. In the case of *Fleet v. Bank of America, N.A.* the Court of Appeal was confronted with plaintiffs who were in propria personae and a complaint that was not in the form to which courts are accustomed. Nonetheless, the Court of Appeal through the exercise of dogged analysis found allegations constituting viable tort causes of action and available tort damages.

In 2009, Robert Fleet and Alina Szpak-Fleet ("Homeowners") applied with Bank of America ("Lender") to have their home loan modified under the Making Homes Affordable Act. In November 2011, the Lender informed the Homeowners that they had been approved for a trial

period plan under a Fannie Mae loan modification program. Under the plan, the Homeowners had to make three monthly trial payments. If the Homeowners made the required payments and passed a subsequent test of financial hardship, their loan was to be permanently modified. After the Homeowners made payments for the first two months of the trial period, the Lender's representative told the Homeowners that foreclosure proceedings had been suspended. However, before the end of the second month, the Homeowners' property was sold at a trustee's sale.

In June 2012, the Homeowners sued the Lender, several officers and employees of the Lender, the trustee, and the buyer of the property and its representative. The trial judge entered a judgment in favor of the Lender defendants and against the Homeowners, holding that the complaint failed to state facts necessary to support causes of action for promissory estoppel, breach of contract, fraud, and accounting.

The Court of Appeal **reversed** the judgment on the fraud cause of action as to the Lender and three of the Lender's employees, **reversed** the judgment on the breach of contract and promissory estoppel causes of action against the Lender, and remanded the case back to the trial judge for further proceedings, including a possible jury trial.

The Court of Appeal held that the Homeowners had stated a cause of action for fraud against the Lender and three of the Lender's employees based on allegations that, despite assurances made to the Homeowners regarding the trial period agreement and loan modification, these defendants had no intention of honoring the agreement but rather intended to foreclose. The Court of Appeal declared that the Homeowners' damages would include the loss of their property, the loss of money expended in their efforts to obtain the promised loan modification, and, possibly, money spent on repairs to the property made by Homeowners after they learned of the sale.

Claims for tort damages in actions involving allegations of tortious conduct in the loan modification process created clear battle lines between the Courts of Appeal. The case of *Miles v. Deutsche Bank National Trust Co.* established one battle line on this issue. On July 1, 2005, John Miles ("Homeowner") refinanced his home in Riverside ("Property") obtaining a new loan of $815,000 ("Loan"). The Loan was ultimately assigned to defendant Deutsche Bank National Trust ("Lender"). In 2005 and 2006, the Homeowner failed to pay the property taxes on the Property. The Lender and Homeowner engaged in protracted loan modification negotiations. In July 2008, the Lender recorded a notice of default and election to sell. On October 29, 2008, the Lender sent notice of the trustee's sale set for November 20, 2008. The Homeowner brought suit and obtained a temporary restraining order on March 19, 2009, blocking the trustee's sale.

It was disputed whether or not the Lender received notice of the temporary restraining order. On March 23, 2008, the Lender bought the Property at a nonjudicial foreclosure sale and subsequently evicted the Homeowner. The Homeowner continued to pursue a cause of action, amongst others, for wrongful foreclosure. The Lender moved for summary judgment on the wrongful foreclosure action. The Lender provided evidence that the amount owed at the foreclosure sale was $891,375.18 and that the Property was worth $815,000 when it sold. The trial judge granted summary judgment in favor of the Lender and against the Homeowner. The trial judge ruled that the only permissible damages in a wrongful foreclosure action is the lost equity in the Property. Where there is no equity, no wrongful foreclosure action will lie.

The Court of Appeal **reversed** the trial judge and remanded the case to the trial court for further proceedings, including a possible jury trial. The Court of Appeal held that a tort action lies for wrongful foreclosure even in the absence of a lost equity. Moreover, the Court of Appeal held that the Homeowner can recover all proximately caused damages. The Court of Appeal

gave as examples of possible damages moving expenses, lost rental income, damage to credit, emotional distress and punitive damages.

The case of *Granadino v. Wells Fargo Bank, N.A.* drew the other battle line on the issue of tort damages in actions alleging tortious conduct in the loan modification process. On May 24, 2010, Wells Fargo Bank, N.A. ("Lender") recorded a notice of default against the Pasadena home ("Property") of Robert Granadino and Gloria Legaspi ("Homeowner"). In August 2011, the Lender recorded a notice of trustee sale setting September 24, 2011, as the trustee sale date. The Homeowner retained a law firm that engaged in loan modification negotiations with the Lender. During the loan modification negotiations and on December 16, 2011, the Lender sold the Property at a trustee sale. At the time of the foreclosure sale the Homeowner owed a total amount of $1,004,631.75 and the Property's fair market value was $875,000.

The Homeowner sued the Lender for promissory estoppel. The trial judge summarily granted a judgment in favor of the Lender and against the Homeowner ruling, in part, that because there was no equity in the Property, the Homeowner had failed to demonstrate legal damages.

The Court of Appeal **affirmed** the summary judgment in favor of the Lender and against the Homeowner. Of most importance to the evolving issue of torts in the mortgage context, is the Court of Appeal holding that because the Homeowner had no equity in the Property, there were no damages.

II. QUESTIONS POSED BY THE MORTGAGE LAW LITIGATION

1) Whether and how homeowners could challenge the validity of the chain of assignments involved in securitization of their loans.

2) Whether and how is an assignment to a securitized trust made after the trust's closing date void or voidable.

3) Whether and how lenders could challenge a homeowner's complaint for failure to allege a tender of the amount due.

4) Whether and how lenders could challenge a homeowner's complaint for failure to allege prejudice.

5) Whether and how should the answer to questions 1-4 affect a preforeclosure, preemptive action.

6) Whether and how should the answers to questions 1-4 affect a post-foreclosure wrongful foreclosure action or a cancellation of trustee's deed action.

7) Whether and how a homeowner could challenge the title of a bona fide purchaser of a foreclosed property.

8) Which appellate cases should be disapproved and how.

9) Whether and how common law court decisions regarding California Mortgage law are preempted by California statutes regarding a nonjudicial foreclosure.

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Mabry v. Superior Court, 185 Cal.App.4th 208 (2010)

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RECENT DEVELOPMENTS IN CALIFORNIA MORTGAGE LAW

Presented at the
2016 REAL PROPERTY LAW SECTION RETREAT – MAY 21 – MONTEREY

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Yvanova v. New Century Mortgage Corp. (2016) 62 Cal. 4th 919

in Mortgage Litigation

1. **MORTGAGE LITIGATION REQUIRES KNOWING WHERE YOU ARE GOING. E.G. Loan Modification, Short Sale, Injunction, Wrongful Foreclosure Damages, TILA, RESPA, FCRA, Eviction Defense.**
2. **FIRST QUESTION: WHAT DO I DO, WHICH CAUSES OF ACTION?**
    a. Is foreclosure good for borrower? The deficiency-precluding effect of the sale under CCP §580d may be much better than getting the property back? Are there second or third deeds of trusts? Can I afford the loan?
    b. The basic causes of action are Quiet Title, Cancel a Void Instrument, Declaratory Relief and Wrongful Foreclosure, Fraud, Unfair Business Practices and the Homeowner's Bill of Rights, Violation of Statutory Duty (negligence per se).
        i. Trial courts do not want to reward a defaulted borrower by allowing them to continue to live rent free so facts essentially showing the lender is wrongly causing the foreclosure are critical.

c. **Yvanova only helps common law remedies (wrongful foreclosure)** by providing standing to survive a demurrer/summary judgment/motion to dismiss. Essentially, lenders' defense that the borrower is a non-party and not a third party beneficiary of their inter-bank assignments is void.

d. Lenders can continue to assign notes and deeds of trust ad nauseum without objection or notice to the borrower. (Civil Code §§ 955, 1458, 1459, Commercial Code §§3102, 9101) However, the Yvanova Court found that if the chain of title is broken by lack of (or a void) assignment, then the trustee lacked standing to sell the property and a wrongful foreclosure may have occurred.

3. Look to your California Statutory Remedies for help.

a. **California Homeowner Bill of Rights of 2013** Civil Code § 2920-2944.10 is your friend.

b. **Pre-Foreclosure**: Loan modification, reinstatement of loan, short sale are the common goals.

c. **Consider if a short sale or anti-deficiency protection is better?** If house is upside down in value, consider Code of Civil Procedure § 580d, 580e (includes short sales after 9/2011) and Coker v. JP Morgan Chase (2016) 62 Cal.4th 667 —short sales include anti-deficiency relief if was a purchase money loan) may be the better way to go.

i. **Don't' forget about taxes after short sales** (Calif. and Federal tax laws differ. See also https://www.ftb.ca.gov/aboutFTB/newsroom/Mortgage_Debt_R

elief_Law.shtml

d. **Principal forgiveness or loan modification:**

i. There are many programs to look into. Common requirements of Federal programs include limits on amount of the mortgage ($729,000), loan before January 1, 2009, etc. Most have similar and confusing names, e.g. HAMP, (the primary program), "2MP" for Home Equity Loans or second mortgages, HAFA (if return to the lender, can forgive mortgage, and give $10,000 relocation assistance).

ii. Consider the "UP" program if unemployed, the lender assigns a case manager to help including with loan modification. See also https://www.hmpadmin.com/portal/resources/docs/counselor/factsheets/mha_factsheets_eng_multiprogram_060515.pdf

4. Injunctive Relief Look to the California Homeowner Bill of Rights of 2013

See Civil Code § 2920-2944.10. (They may be repealed 2/2018)

a. **The Calif. Homeowner Bill of Rights Is Your Big Gun**

These laws were enacted as part of the National Mortgage Settlement to encourage lenders to act in good faith with loan modifications (e.g. no dual track modifications while still foreclosing (Civil Code §§ 2923.6, 2924.11, 2924.18), single point of contact with lender (Civil Code § 2923.7), document verification, e.g. show *is the holder of the beneficial interest* under the deed of trust (Civil Code § 2924(a)(6), no "Robo-signing" (Civil Code § 2925.17), 90 day notice to tenants (Civil Code § 1161b(a).)

b. The California law is intended for first mortgages, owner occupied dwellings 1-4 units.

c. Mortgage Broker is a fiduciary! (Civil Code § 2923.1)

d. **Injunctive Relief** as well as well as post foreclosure damages may be awarded. (Civil Code 2924.12)

e. Civil penalty of up to $7,500 for robo-signing (Civil Code §2924.17(c))

f. Remedy for violations is injunctive relief to halt a foreclosure or actual economic damages If intentional/reckless/willful misconduct by lender or servicer, then court can award treble actual damages or statutory damages of $50,000 (Civil Code §2924(b))

5. **To enjoin the trustee's sale, you need specific facts that the entity does not have authority to initiate the foreclosure**. Facts that may work include that the defendant is not the true beneficiary, extreme irregularities in the conducting of the sale, such as collusion in the sale price. (Lo v. Jensen (2001) 88 Cal.App. 4th 1093—HOA conspiracy to foreclose and own Malibu condo citing Civil Code § 2824h(g))

   a. A case to watch after Yvanova is Keshtgar v. U.S. Bank, N.A. Case No. S220012 330 P. 3rd 686, in which the California Supreme Court granted review. This is a pre-foreclosure action based on a void assignment. (The Keshtgar lower courts sustained a demurrer due to no prejudice from a void assignment.)

6. PLEADING FORECLOSURE COMPLAINTS

While ultimate facts are a rule of pleading, in foreclosure actions the

courts require want much more, referred to as “special facts” or basically, evidentiary facts. (See Jenkins v. JPMorgan Chase Bank, N.A (2013) 216 Cal.Ap.4th 497) Special facts are akin to the heighted pleading requirement in a fraud action.

Every court focuses upon the facts and you must get the correct facts pled. “…properly alleging a cause of action under this theory requires more than simply stating that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, a plaintiff asserting this theory must allege facts that show the defendant who invoked the power of sale was not the true beneficiary.” (Glaski v. Bank of America (2013) 218 Cal. App. 4th 1079, 1094.

If this is your first mortgage case figuring out the story of MERS, the trusts, PSA’s, etc. it will drive you nuts. Investigate your case thoroughly and plead the correct facts. In Robinson v. Countrywide Home Loans, Inc., 199 Cal. App. 4th 42 the plaintiff did not name the correct actors in the convoluted mortgage foreclosure process and lost. Also avoid pleading matters on information and belief. You cannot challenge the foreclosure process unless you have hard evidence of fraud and non-compliance with Civil Code 2924 et seq.

7. **Post Foreclosure Set Aside of Foreclosure Sale**. Orcilla v. Big Sur, Inc. (2016) 244 Cal.App. 4th 982 discusses equitable cause of action to set aside an unconscionable sale. Orcilla had great facts, limited education, limited English and a prior loan modification so was unconscionable. Court mentioned that the mortgage exceeded income by $1,000 month was “substantively

unconscionable" and the BFP of the ultimate purchaser did not matter and Unfair Competition Law violation (§17200).

a. **Injunctive Relief may also allow for an interim attorney fee award even though the matter is still pending**. (See Civil Code § 2924.12(i); Lac v. Nationstar Mortg. LLC (2016) No. 2:15-cv-0523 KJM AC 2016 U.S. Dist. Lexis 40633, citing Monterossa v. Superior Court (2015) 237 Cal. App. 4th 747—fees awarded for nonjudicial foreclosure sale being enjoined)

8. **DOES YVANOVA HELP A FORMER OWNER OR HIS TENANT AFTER A FORECLOSURE TO DEFEND AN UNLAWFUL DETAINER ACTION**?

a. If representing a tenant, look to the Homeowner Bill of Rights as to 90 day notice for month to month tenants. (Code of Civil Procedure § 1161b(a)(f)). This is an offshoot of the Federal Protecting Tenants at Foreclosure Act of 2009, Public Law 111-12.

i. Other issues/requirements include if fixed term lease, must wait till expiration, UNLESS purchaser will occupy as primary residence, tenant is child/spouse/parent of former owner, lease is phony, former owner remains on the property. (Code of Civil Procedure § 1161b(d))

ii. The burden of proof is on the new owner/successor in interest. (Code of Civil Procedure § 1161b(c)

b. A limited challenge to title is proper in an unlawful detainer action. These cases may also be consolidated, but the court has great discretion. (See

Martin-Bragg v. Moore (2013) 219 Cal. App. 4th 367)

c. CCP § 1161a(b) sale-eviction grounds requires the purchaser to have perfected title so lack of title is an affirmative defense. (Evans v. Super.Ct. (Robbins) (1977) 67 CA3d 162, 169) This includes if the defendant was fraudulently induced to relinquish title (Asuncion v. Super.Ct. (W.C. Fin'l, Inc.) (1980) 108 CA3d 141, 145-146)

d. As to the Yvanova case, in Boyce v. TD Serv. Co. (2015) 352 P.3d. 390. The issue in Boyce was res judicata or claim preclusion. The borrower's Glaski based claims were denied alleging title not perfected by lender as in Yvanova. The appellate court stated "basta" or enough, stating that borrower had lost five times before, and now he lost again. The "Yvanova" Supreme Court may reverse because it may take offense with the Court of Appeal's statement that since the note could be sold borrower cannot complain that someone else "owns it" even if outside of the chain of title transfer. This is an example of an unsympathetic borrower so the courts are not going to help.

9. <u>MORTGAGE LITIGATION REQUIRES GREAT FACTS TO SURVIVE DEMURRER AND SUMMARY JUDGMENT.</u>

a. Pleading requirements require e.g. "specific facts" e.g. evidentiary, not only ultimate facts. "Specific facts" derived fraud pleading requirements, also from RESPA litigation 12 USC § 2605; Glaski v. Bank of America (2013) 218 Cal. App. 4th 1079, 1094; Rossberg v. Bank of America, N.A., (2013) 219 Cal. App. 4th 1481, 1483—fraud to enjoin trustee sale)

Unclear as to statutes of limitations (3 or 4 years?) When is accrual? Trustee's sale or when the error with title transfer occurred?

b. Need to show general prejudice against defaulted borrowers.

c. Yvanova Footnote #4, The Tender (of debt) Rule. The Yvanova Court said that all conditions for wrongful foreclosure still apply, including the tender rule (of past due money). It also cited with approval cases allowing for excuse of tender rule. "Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so." This is a huge potential win for current/former homeowners.

10. **YVANOVA IS AN INCOMPLETE DECISION. THE SUPREME COURT LOWERED THE BAR, THEN PUSHED IT OUT.**

a. The Supreme Court only has made a ruling that if a void assignment is alleged with sufficient facts, then plaintiff can defeat a demurrer.

b. Yvanova is frustrating as it is a partial decision. The Supreme Court did not hold that the assignment was void, or determine legal issues such does an assignment need to be recorded to be valid, does New York trust law make this assignment void or voidable.

c. What about the Homeowners Bill of Rights as to standing? Yvanova mentions this law, but fails to discuss it but it also refers to the foreclosing party must own the loan.

d. How about Internal Revenue Code's REMIC (Real Estate Mortgage Investment Conduit) e.g. Freddie Mac/Fannie Mae and rules on tax

bypass entities (IRS Code 860D; 860F(a), 860G(d) for interest on pooled mortgages. Do these entities break the chain of title? As in Yvanova, REMIC have fixed dates to add assets. This is another "factual question".

e. Pooling & Servicing Agreements (PSA) What happens if no assignment occurs within the given time frame of the PSA? Also void?

f. Effect of New York State, Delaware or other jurisdictions trust law. New York's trust law makes late transfers void, not voidable, (N.Y. Estates, Trusts and Powers Law §§ 7-1.18, 7-2.4) but only certain trusts may make late transfer void. Delaware's trust law may make them voidable. Also late transfers impose tax penalties (e.g. lose tax exempt status).

    i. Firato v. Tuttle (1957) 48 Cal.2d 136 ("In 1859 it was held by a divided court in Briggs v. Davis, 20 N.Y. 15 [75 Am.Dec. 363], that this statute made a wrongful reconveyance under a deed of trust absolutely <u>void</u> even as to an innocent purchaser.").

g. The Uniform Commercial Code (Article 3 Commercial Paper and Article 9 Secured Transactions) e.g. different statutes of limitations (6 years in Commercial Code § 3118(a)), requirements as to the original promissory note.

h. Is the anti-SLAPP statute, CCP §425.16 a defense to the lender? This should not be a defense. (See Garretson v. Post (2007), 156 Cal. App. 4th 1508; Crossroads Investors, LP v. Federal National Mortgage Association, (2016) 246 Cal. App. 4th 529 –deny anti-SLAPP.)

11. RECAP OF YVANOVA: LIMITED RULING AND ONLY ALLOWS A POST FORECLOSURE ACTION FOR WRONGFUL FORECLOSURE.

a. Yvanova clarified that the principle of "chain of title" remains applicable to assignments of deeds of trusts and promissory notes even though the borrower is not a party to the assignments between beneficiaries and/or trustees.

b. Yvanova only allows you to state a cause of action for post foreclosure damages due to a void assignment of the note to the party conducting the trustee's sale. The Court stated if facts showing a void assignment, e.g. break in the chain of title, then the borrower has standing to assert a cause of action for wrongful foreclosure.

c. Yvanova does not hold that a void assignment is evidence of prejudice or provides the "prejudice" required to prove damages in wrongful foreclosure. (See Fontenot v. Wells Fargo, N.A. (2011) 198 Cal.App. 4th 256, 272 as to the "prejudice rule".) So look to the California Homeowner Bill of Rights for help.

d. The California Homeowner Bill of Rights is where you want to explore.

Intengan v. BAC Home Loan Servicing LP (2013) 214 CA4th 1047
Borrower stated cause of action for wrongful foreclosure based on bank's alleged noncompliance with statutory duty to explore options to avoid foreclosure.

Lueras v. BAC Loan Servicing, LP (2013) 221 CA4th 49
Borrower allowed to amend complaint against lender for negligence and

breach of contract when lender foreclosed 13 days after telling borrower it would not do so.

Rossberg v. Bank of America (2013) 219 CA4th 1481 (Review denied 11/26/2013) Borrowers failed to adequately allege an enforceable modification agreement or that lender violated statutory requirements for conducting a nonjudicial foreclosure.

e. Cases under the Federal HAMP law include:

West v. JP Morgan Chase Bank (2013) 214 CA4th 780

When borrower timely made all payments under HAMP trial period plan and borrowers representation regarding her financial hardship remained true, bank should have offered the borrower a permanent loan modification.

Chavez v. Indymac Mortgage Servs. (2013) 219 CA4th 1052

Lender was equitably estopped from relying on statute of frauds defense when it failed to execute and deliver a copy of the loan modification agreement to borrower who has complied with terms of modification plan and meet the eligibility requirements under HAMP.

12. <u>PRE-FORECLOSURE ACTIONS ARE STILL GOING TO BE EXTREMELY DIFFICULT AND YVANOVA DOES NOT HELP</u>.

a. Pre-foreclosure challenges are still extremely difficult and a "void" assignment will not allow a pre-foreclosure challenge. A month after Yvanova, the Fourth Appellate District[1] in Saterbak v. JPMorgan Chase

[1] San Diego, Imperial, Orange, San Bernardino, Riverside and Inyo Counties, and probably where more foreclosures occur than any other area in California.

Bank, N.A. (2016) 245 Cal.App. 4th 808 re-iterated cases cited by Yvanova holding that a borrower does not have standing to challenge a void assignment of a deed of trust before the foreclosure sale because it is not a party to those assignments.

b. Yvanova stated "it does not address" the nonjudicial foreclosure statutes (Civ. Code, §§ 2924–2924k) providing a comprehensive framework for the regulation of nonjudicial foreclosures. Favorably citing Gomes v. Countrywide Home Loans, Inc., supra, 192 Cal.App.4th at p. 1154.

13. YVANOVA RESTORES A FORMER OWNER'S RIGHT TO SUE FOR WRONGFUL FORECLOSURE IF THE FORECLOSING ENTITY LACKED TITLE OR AUTHORITY TO CONDUCT THE SALE

The seminal issue in foreclosure litigation is if a borrower should file a lawsuit before or after the foreclosure occurs. The basic choices are declaratory relief and injunction or to sue for damages (wrongful foreclosure) after the trustee's sale and loss of possession of the owner of the property. Yvanova only assists with the wrongful foreclosure cause of action after the foreclosure sale.

The problems include that a "nonjudicial foreclosure" and Civil Code 2924, et seq., do not allow for a pre-emptory challenge to title. (Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149) This is because the "judicial process" is not intended require a person to prove they have standing before using the nonjudicial foreclosure process. The way to do this was to show the beneficiary foreclosing is not the actual beneficiary. This may be by fraud, or a forged deed of trust so that title was void ab initio.

Declaratory relief also requires an actual controversy which will lead to damages and as to the improper transfer the borrower still owes money no matter who holds the paper and the borrower is not a party to the assignment agreement.[2]

The trial court sustained the demurrer against Yvanova in part because in of Jenkins v. JPMorgan Chase Bank, N.A (2013) 216 Cal.Ap.4th 497 holding that she lacked standing as an unrelated third party to the assignment even if the assignment was defective. The Supreme Court in Yvanova twisted its ruling to disagree with parts of Jenkins v. JPMorgan Chase Bank, N.A (2013) 216 Cal.Ap.4th 497, but to focus on the "void vs. voidable" issue to allow Yvanova to have standing to challenge the lack of title by improper assignment as a basis for a wrongful foreclosure action for damages. The Supreme Court in Yvanova sided with the reasoning in a case decided about the same time as Jenkins, Glaski v. Bank of America (2013) 218 Cal.App.4th 1079 (which alleged forged signatures and a void transfer into a Wall Street securities trust), which also held that a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust.

14. **YVANOVA IS ABOUT STANDING, OR A RIGHT TO SUE ON VOID ASSIGNMENTS**.

The Supreme Court was troubled by the egregious break in the chain of title, almost akin to a fraud by the lenders and the way the note was assigned. Void versus voidable was the issue. The Supreme Court went back to basics finding

[2] See of Jenkins v. JPMorgan Chase Bank, N.A (2013) 216 Cal.Ap.4th 497; Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal. App. 4th 75. Debrunner v. Deutsche Bank National Trust Co. (2012) 204 Cal.App. 4th 433 (possession of the note is not necessary) and Gomes v. Countrywide Home Loans (2011) 192. Cal. App. 4th 1149 (non-judicial scheme for foreclosures upheld).

that Yvanova's rights to challenge the wrongful foreclosure we due to the void transfer from a defunct lender to a successor who essentially forged an assignment by the lender who no longer existed and "Robo-signed" the asset into an investment trust that it was not supposed to receive the asset.

a. **YVANOVA HAD STRONG FACTS AS TO A "TIME WARP" AND ROBO SIGNED DOCUMENTS THAT WERE ESSENTIALLY FORGERIES/NULLITIES**

The Supreme Court was troubled that a bankrupt entity signed the assignment years after its dissolution and its assets were transferred to the bankruptcy trustee. Yvanova obtained the loan in 2006 loan, 2007 lender New Century filed bankruptcy, August 1, 2008 New Century's assets transferred to a liquidation ("investment") trust. Then December 19, 2011 Yvanova's loan was assigned to a successor, Deutsche Bank National Trust Company who placed the asset into a Morgan Stanley investment pool. However, at the time of transfer into this Morgan Stanley investment pool, New Century had no authority for the transfer as it was dissolved. Further, in 2011 the Morgan Stanley Trust by the terms of the Morgan Stanley Trust instrument, was limited to only contain assets assigned to it to before January 27, 2007.[3] The Supreme Court did not like that "robo-signing"[4] had a dissolved entity signing an assignment, but the asset was assigned to an investment trust that was not supposed to contain Yvanova's asset. If you have facts of another Yvanova then you should be able to work out a loan modification or settlement.

[3] The Supreme Court in Yvanova declined to opine as to the postclosing date transfer if that was void or voidable.
[4] Yvanova v. New Century Mortgage Corp. at 62 Cal. 4th 919, 928, cites articles discussing uncertainty of mortgage title and the foreclosure crises and problems with the Mortgage Electronic Registration System (MERS).

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