

11-2014

Borrower's Wrongful Foreclosure Claims Based on an Alleged Failed Attempt to Securitize the Loan

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Bernhardt, Roger, "Borrower's Wrongful Foreclosure Claims Based on an Alleged Failed Attempt to Securitize the Loan" (2014).
Publications. Paper 659.
<http://digitalcommons.law.ggu.edu/pubs/659>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

Category: [Articles & Columns](#)

November 2014

Borrower's wrongful foreclosure claims based on an alleged failed attempt to securitize the loan, as well as impermissible robo-signing, failed.

Mendoza v JPMorgan Chase Bank, N.A. (2014) 228 CA4th 1020

*** **THE EDITOR'S TAKE:** This opinion was initially unpublished, but the court of appeal apparently had second thoughts and later certified it for publication. I too had initial doubts about a comment or its public significance, but I also have since come around to thinking that it is worth paying attention to—for three reasons.

1. *It cites almost everything.* In many respects, *Mendoza* looks like just another, almost humdrum decision rejecting a homeowner's postforeclosure attack on the trustee sale that was conducted after she stopped paying her mortgage and rejecting her contention that the foreclosure was bad because her loan had been improperly securitized—a claim frequently made by the foreclosure defense bar and almost as frequently vetoed by the judiciary. But on that point, the opinion is worth saving because of its citation-laden summary of the many decisions that have pronounced a foreclosure sale not wrongful simply because the underlying loan might not have been properly securitized.

Glitches in the trustee sale process (e.g., relating to substitution of trustee, notice of default, notice of sale, and conduct of the sale) can matter and, when they occur, may give a borrower—even one in default—a plausible defense or basis for vacating the sale. On the other hand, glitches in a loan's earlier securitization (e.g., regarding compliance with applicable pooling and servicing agreements, or federal REMIC rules, or the state's trust laws) are not likely to eliminate her obligation to pay her mortgage, notwithstanding the possibility that someone other than her foreclosing lender or servicer might be better entitled to collect that debt.

This opinion's defense of a lender against this sort of "securitization attack" can save similarly situated ones a good

deal of library time by serving as their research engine—and at the same time provide borrowers with a ready list of the hurdles they will have to overcome to even get close to a jury. On the other hand, I expect that both crowds have those lists already (including similar pre-*Glaski* rulings, such as in *Wise v WFB* (CD Cal 2012) 850 F Supp 2d 1047, and last-minute refusing-to-take-a-stand holdings, as in *Kan v Guild Mortgage Co.*, ordered published on October 15 of this year and reported in this issue on p 147).

2. *Foreclosure audits.* Many of the securitization attacks have suffered from being overspeculative, unpersuasively arguing that *perhaps* something had been done wrong when the individual loan was being transferred into the pool, but not demonstrating that it had actually occurred. Mendoza's attack, however, did attempt to overcome that difficulty. She argued that "unlike Gomes, whose allegations were based on sheer speculation, she has identified the true beneficiary and has provided the factual basis lacking in *Gomes*—an audit report."

These "foreclosure audits" or "forensic loan audits" have become increasingly popular for borrowers in default looking for better weapons to stop or undo foreclosures that threaten to wipe them out. The complicated federal and state securitization rules, and the thousands of pages in the transactional documents designed to bring their securitized pools into compliance with those rules, include enough fussy and complicated requirements and deadlines as to make them often easier to be missed than to be met. Especially during the boom years, when the activity was so frantic, undoubtedly many loans—perhaps entire pools—were not in perfect compliance with all those mandates.

But although speculating that *perhaps* a loan's securitization was wrongly done might not suffice as a defense, a borrower who could actually show that her particular loan was truly mishandled may have a stronger case. A loan that had not been deposited into the trust pool within the window of time set by its PSA has arguably never gotten into the hands of the pool trustee if applicable state trust law says so; thus, it may be held by someone else, which could mean that the wrong party might be trying to enforce it—if *all of that could actually be proven*.

Those hopes and prospects have brought foreclosure auditors into the picture, with their promises of documenting for borrowers just how their loans were—in the auditor's opinion—defectively securitized (as well as also, according to them, probably defectively made). These audits might constitute a useful service, if they were well done, but the data seems to indicate that this is not quite the case. The Federal Trade Commission has said "there is no evidence that forensic loan audits will help you get a loan modification or any other foreclosure relief, even if they're conducted by a licensed, legitimate and trained auditor, mortgage professional or lawyer." (FTC, *Consumer Information, Forensic Loan Audits*.) Too many foreclosure audits are just phony rescue scams. (The latest one I read about cost the borrowers \$3600 and got their attorney in trouble. *Matter of Smithwick, State Bar Court Case No. 11-O-11334, Review Department, May 16, 2014*, available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Smithwick.pdf>.)

Audit reports often sound as speculative as information and belief pleadings on this issue sound. A truly thorough audit of a loan's securitization would review all of the requirements in the prospectuses, the loan purchase agreements, and the pooling and servicing agreements (and in all of the amendments, supplements, and schedules to those documents). It would then compare those requirements with the terms of the borrower's note (and its

endorsements and allonges and delivery mechanisms), and the terms of her deed of trust (and its assignments and recordations), to see whether all requirements and deadlines in those documents were met. We'll never know what the audit in *Mendoza* actually reviewed or concluded because it was not included in the appellate record. But since Mendoza claimed that she had "identified the true beneficiary" of her loan, I suspect that her auditor had concluded that her loan had not been properly transferred into the trust and was therefore still held by the original beneficiary and trustee, which made them, according to the auditor, the only ones entitled to enforce it.

Counsel for a borrower contemplating paying for such an audit should admonish her client that for even a competent one to do any good, the audit will have to be admitted into evidence and its authoring auditor permitted to testify on it—which will entail his being deposed and then subject to cross-examination by the offended lender regarding the basis for his adverse conclusions. Even if all of those obstacles can be overcome, the judge could decide that the audit report is immaterial because it does not impact the borrower's obligation to pay her loan notwithstanding those defects. That is the issue that may well be decided next.

3. *Yvanova*, *Keshtgar*, and *Glaski*. The *Mendoza* court is not the first one to grapple with this issue, nor the first to rule that a bad securitization does not entitle a borrower to stop paying her mortgage or challenge her foreclosure sale. In fact, its lengthy review of federal and state opinions shows that only one state appellate court—the Fifth District, in [Glaski v Bank of America \(2013\) 218 CA4th 1079](#)—had publicly declared its belief that a borrower can get much profit from a bad securitization, while every other court after *Glaski* appears to have rejected that conclusion. (Westlaw told me that it knew of 64 opinions declining to follow that decision.)

But 64–1 may not count for much if the minority has the support of the California Supreme Court. Right now, our high court has that issue squarely before it. Earlier this year, the Second District in [Yvanova v New Century Mortgage Corp. \(2014\) 226 CA4th 495](#), like the Third District in *Mendoza* and earlier in [Keshtgar v US Bank \(2014\) 226 CA4th 1201](#), rejected the *Glaski* position. The Reporter reported on those earlier decisions, but all that was before our supreme court granted review in *Yvanova* (on Aug. 27, 2014, S218973) and *Keshtgar* (on Oct. 1, 2014, S220012). *Keshtgar* involves a preforeclosure challenge and *Yvanova* a postforeclosure one, but both hold that improper securitization does not make a foreclosure wrongful. Whether or not *Mendoza* also goes up, the high court can give us a much more definitive understanding of where California stands on this contentious issue. 64–1 sounds compelling, and a better tally might include non-California forums, although some notable tribunals have surprised lenders by demanding they adhere to the rules requiring the proper transfer of notes, even when others would argue that it does not matter. See, e.g., [Ibanez v US Bank Nat'l Ass'n \(2012\) 856 F Supp 2d 273](#) (Massachusetts).

If the California Supreme Court sides with the "majority" view and rejects bad securitization as a defense, then defaulting borrowers will have to find defects outside that process if they hope to stop or avoid their foreclosures. Improper securitization may be relevant to other parties in the secondary market, and the lending industry may have a lot of cleaning up to do for, e.g., pool investors, but not for prepool borrowers who received their loan funds before any securitization of their documents even started.

On the other hand, if the court endorses the *Glaski* position (which its proponents predict may happen because of

the court's earlier refusal to review *Glaski* itself or to depublish it) and holds that securitization mistakes may invalidate foreclosures, there is going to be a lot of follow-up litigation. Do all securitization mistakes have the same effect, or do some hurt borrowers more than others? Must an individual borrower show how she was actually hurt or prejudiced by what went on? Does the blunder justify her in demanding more proof of entitlement to collect from her adversary? Even if no one else is also demanding payment? Or does the mistake—as some claim—completely excuse her from having to pay anybody or having her property remain encumbered by the original mortgage? A pro-*Glaski* result will keep us all quite busy for a long time.—*Roger Bernhardt*