

Appellate court ruling may cost lenders more time, money on foreclosed FDIC acquired mortgages

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Given the growing number of failed lending institutions and the subsequent acquisition of their loans, especially in Michigan, a recent holding by the Michigan Court of Appeals could require that mortgage loans be foreclosed judicially, thereby resulting in extended time-lines and increased costs.

The Michigan Court of Appeals recently held that a foreclosing mortgagee is required to record evidence of assignment of the mortgage prior to the non-judicial foreclosure sale, even in instances where the mortgage loan is acquired through a Federal Deposit Insurance Corporation (FDIC) receivership.

In *Kim v JP Morgan Chase Bank*, ___ Mich. App. ___ (2012); Mich. Ct. App. Docket 302528 (Jan. 12, 2012), JP Morgan Chase Bank (JPM) foreclosed by advertisement a mortgage loan that it acquired from Washington Mutual Bank (WAMU) pursuant to a Purchase and Assumption Agreement between the FDIC, as receiver, and JPM. Following notice and publication, JPM purchased the property at the sheriff's sale.

The mortgagors filed suit to, among other things, set aside the foreclosure sale, arguing that JPM failed to satisfy the statutory requirements to foreclose by advertisement because it failed to record evidence of its mortgage interest prior to the sale. The trial court disagreed and, relying on a Michigan Attorney General Opinion, determined that JPM was not required to record its interest before the sale because JPM acquired its interest by operation of law through the FDIC receivership.

The Michigan Court of Appeals reversed the trial court's ruling and held that there is no exception, for a mortgage interest, which is acquired by operation of law, to the requirements of M.C.L. 600.3204 that states in part:

- If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the

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mortgage to the party foreclosing the mortgage.

The appellate court further rejected JPM's argument that it acquired the mortgage loan "by operation of law" under 12 U.S.C. 1821. While the court found that the FDIC succeeded the interests of the failed institution and acquired WAMU's mortgage loans *by operation of law*, JPM simply purchased these mortgage loans after they were transferred to the FDIC by operation of law. Because JPM failed to record evidence of the assignment of the mortgage loan and simply relied upon WAMU's place in the chain of title, the appellate court found that JPM failed to comply with the statute's requirements and that the foreclosure sale was void.

In a similar case, while ruling on JPM's motion to dismiss filed in response to the complaint, the U.S. District Court for the Eastern District of Michigan for the Southern Division addressed the same argument in *Dungan v Chase Home Finance*, Case No. 10-cv-14549, Doc. No. 14.

While addressing whether the Dungans had standing to challenge the foreclosure sale after the expiration of the redemption period, the district court found that the Dungans did have standing and suggested that the foreclosure sale may be invalid for lack of record evidence in the chain of title. Following the denial of JPM's motion for reconsideration, JPM filed its motion to certify order for interlocutory appeal and for stay of proceedings, which remained pending as of the date of this Rapid Report.

The *Kim* and *Dungan* cases demonstrate the latest strategy by mortgagors seeking to derail the foreclosure process. While many flavor-of-the-month challenges fail before any significant momentum can build, the impact of these cases could be far reaching. It is expected that leave to appeal to the Michigan Supreme Court will be sought by JPM in *Kim*. However, as it stands, *Kim* will certainly prompt suits by many mortgagors similarly situated.

Further, a practical problem exists in that, even in instances of pending and future foreclosure sales, the recording of evidence of mortgage assignment from a failed institution is likely impossible because the institution is no longer around to execute these documents. Given the traction of this argument, it should also be expected that similar challenges will be raised in instances where the foreclosing mortgagee is a product of a *merger* of lending institutions.

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